

UNIVERSITY OF HULL

**THE INTERNATIONAL LEGAL PROTECTION OF
PERSONS INTERNALLY DISPLACED BY
INTERNAL ARMED CONFLICT**

being a Thesis submitted for the Degree of Doctor of Philosophy in Law

in the University of Hull

by

Niranjini Vivekananthan, LL.B (Hons), MPhil (Colombo)

March 2006

Contents

Acknowledgements	v
Table of Cases	vi
Table of Treaties and Other International Instruments	xiv
Abbreviations	xvii
Introduction	1
Part I	
Preliminary Issues	
Introduction	9
1. Conceptualizing the Protection of IDPs	10
A. Definition of IDPs	10
2. Normative Frameworks	23
A. International Human Rights and Humanitarian Law: Their Relationship and the Protection of IDPs	23
Conclusion to Part I	48
Part II	
Protection from the Causes of Displacement	
Introduction	49
3. Protection Against Arbitrary Displacement	51
A. Forced Displacement <i>Per se</i> as a Violation of Human Rights	52
B. Commentary on the Right to Remain	63
C. Derogations	73
1. Legality of Displacement	74
a. Protection Under International Criminal law	80
b. Legality of Displacement in Human Rights Law	91
D. Protection of Minorities Against Arbitrary Displacement	98
E. Protection Against Forced displacement in International Humanitarian Law	103
4. Protection Against Displacement As a By-Product of Armed Conflict	
A. Spreading Terror Among IDPS	111
B. Indiscriminate Attacks	114
Conclusion to Part II	118

Part III
Protection from the Consequences of Displacement

Introduction	119
5. Protection During Displacement	120
A. Protection Against Discriminatory Treatment	120
B. Movement Related Needs	
1. Right to Move to a Safe Part of the Country	123
2. Right to Leave One's Own State and the Right to seek Asylum.	126
3. Right to be Protected Against Forcible Return or Resettlement	130
C. Need for Documentation	136
D. Need for Family Reunification	138
E. Subsistence and Other Basic Needs and the Humanitarian Assistance	142
1. Human Rights Law	142
2. Humanitarian Law	
a. Medical Assistance	157
b. Other Needs of Subsistence	160
c. Starvation of IDPs	162
d. External Assistance	166
i. Access to Rebel Held Areas	171
ii. Protection of Humanitarian Personnel	174
3. The Right to Humanitarian Assistance	179
F. Direct and Indiscriminate Attacks on IDPs and Their Camps or Settlements or Objects Used by Them	181
1. Protection Under Human Rights Law	181
2. Protection Under International Humanitarian Law	187
a. Protection Against Indiscriminate Attack	197
b. Proportionality and Precautions	205
c. Prohibition of Land Mines	210
G. Reprisals Against IDPs	212
H. Protection of IDPs from Being Used as Human Shields	217
6. Protection Relating to Return or Resettlement	220
A. The Necessity of Return or Resettlement and its Impact on the Protection of IDPs	220
B. Right to return	223
C. Protection of Property	227
D. Restitution or Compensation to Returned or Resettled IDPs	231
Conclusion to Part III	239

Part IV
Implementation and Enforcement of Human Rights Law and
Humanitarian Law Pertaining to the Protection of IDPs

Introduction	241
7. Implementation and Enforcement of International Humanitarian Law	242
A. International Criminal Tribunals	242
1. Sanctions	242
a. Individual Criminal Responsibility	246
i. Joint Criminal Enterprise	249
ii Command Responsibility	251
b. Limitations With Regard to War Crimes	256
2. Reparations	263
B. Prosecution in the National Courts of Third States on the Basis of Universal Jurisdiction	266
C. The International Committee of the Red Cross	275
8. Implementation and Enforcement of International Human Rights law	
A. The United Nations	283
1. Charter Based Mechanisms	283
2. Treaty Based Mechanisms	292
B. Regional Human Rights Bodies	309
1. The European System	309
2. The inter-American System	321
3. The African System	330
Conclusion to Part IV	338

Part V

The Future of IDP Protection

9. Adopting an International Treaty Relating to the Protection of IDPs	340
General Conclusions	345
Bibliography	353

Acknowledgements

I received the assistance and support of many individuals in the completion of this study. Among them, my deep gratitude is first and foremost due to my supervisor, Professor Lindsay Moir, at the Law school, University of Hull for his invaluable guidance, support and encouragement throughout this study.

I am thankful to the assistance of the library staff at the Institute of Advanced Legal Studies of the University of London, the Refugee Studies Centre of the University of Oxford, the British library at Boston Spa, the International Committee of the Red Cross library in Geneva and the United Nations Library in Geneva.

My thanks are due to the University of Colombo, Sri Lanka for their financial support. I am also thankful to the University of Hull for their financial support and generous research facilities. Moreover, I wish to express my thanks to all who have assisted me in the completion of this study.

Above all, I am thankful to my parents, my sister and my husband for their unrelenting support, patience and encouragement. Without their support this study would not have been completed.

Table of Cases

International Court of Justice

Legality of the Threat or Use of Nuclear Weapons, Advisory opinion of 8 July 1996 reproduced in (1996) 17 *HRLJ* 331

Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium) 14 Feb 2002 (<http://www.icj-cji.org>)

Certain Criminal Proceedings in France (Republic of Congo v. France) 2003, ICJ

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory. 9 July 2004, General List No.131

Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America) ICJ. Reports of Judgments, 27 June 1986

International Criminal Tribunal For the Former Yugoslavia

Prosecutor v. Tadic, Case No.IT-94-I-A272, Appeals Chamber of the ICTY, Decision on the Appeal on jurisdiction, 2 October 1995 (<http://www.un.org/icty>)

Prosecutor v. Tadic, Case No.IT-94-1-T, Trial Chamber, Opinion and Judgment, 7 May 1997

Prosecutor v. Martić, (Rule 61) ICTY, Trial Chamber, Case IT-95-11-R61, 8 March 1996, 108 *ILR* 40

Prosecutor v. Karadzic and Mladic (Rule 61) ICTY Trial Chamber I, IT-95-5-R61 and IT-95-18-R61, 11 July 1996, 108 *ILR* 86

Prosecutor v. Delalic, Mucic, Delic and Landzo, (Celebici case) Trial Chamber, Case No. IT-96-21-T, Trial Chamber, Judgment, 16 November 1998

Prosecutor v. Anto Furundzija, Trial Chamber II, IT-95-17/1, 10 December 1998

Prosecutor v. Aleksovski, Trial Chamber, Case No. IT-95-14/I-T, Judgment, 25 June 1999

Prosecutor v. Tadic, Appeals Chamber, Case No.IT-94-1A, Judgment, 15 July 1999

Prosecutor v. Kupreskic et al, Trial Chamber, IT-95-16-T, 14 January 2000

Prosecutor v. Aleksovski, Appeals Chamber, IT-95-14/1-A, Judgement, 24 March 2000

Prosecutor v. Delalic, Mucic, Delic and Landzo, (*Celebici case*) Appeals Chamber, Case No. IT-96-21-A, Judgment 20 February 2001

Prosecutor v. Kunarac, Kovac and Vukovic, Case No: IT-96-23-T & IT-96-23/1-T Judgment of 22 February 2001

Prosecutor v. Kordic and Cerkez, Judgment, Trial Chamber, Case No.IT-95-14/2-T, 26 February 2001

Prosecutor v. Krstic , Case No.IT-98-33-T , Judgement, 02 August 2001

Prosecutor v. Milosevic et al., No.IT-99-37-PT, Second amended indictment, 29 October 2001

Prosecutor v. Krnojelac, Case No.IT-97-25-T , Trial Chamber II, Judgment, 15 March 2002

Prosecutor v. Kunarac, Kovac and Vukovic, Case No.IT-96-23, IT-96-23/1-A , Judgment Appeals Chamber, 12 June 2002

Prosecutor v. Vasiljevic Case No.IT-98-32-T , 9 November 2002

Prosecutor v. Hadzihasanovic and Others, Case No.IT-01-47-PT, Trial Chamber, Decision on Joint Challenge to Jurisdiction, 12 November 2002

Prosecutor v. Milutinovic, Sainovic and Ojdanic, (*Ojdanic, Case*) Case No.IT-99-37-AR72, Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction –Joint criminal enterprise, 21 May 2003

Prosecutor v. Hadzihasanovic and Others, Case IT-01-47-AR72, Appeals Chamber , 16 July 2003

Prosecutor v. Krnojelac, Case No.IT-97-25-A, Appeals Chamber, Judgement, 17 September 2003

Prosecutor v. Simic, Tadic and Zaric, Case No.IT-95-9-T , Judgment, 17 October 2003

Prosecutor v. Galic, IT-98-29-T, Judgment, 5 December 2003

Prosecutor v. Milosevic, Case No.IT-02-54-T, Decision on Motion for Judgment of Acquittal, 16 June 2004

International Criminal Tribunal For Rwanda

Prosecutor v. Akayesu, Case No.ICTR-96-4-T, Trial Chamber, Judgment, 2 September 1998 (<http://www.un.org/icttr>)

Prosecutor v. Kambanda, Case No.ICTR-97-23-S, Judgment and Sentence, 4 September 1998

Prosecutor v. Kayishema and Ruzindana, Case no.ICTR-95-I-T, Judgment and sentence, 21 May 1999

Prosecutor v. Rutaganda, Case No.ICTR-96-3-T, Judgment and Sentence, 6 December 1999

Prosecutor v. Musema, Case No.ICTR-96-13-T, Judgment and Sentence, 27 January 2000

Prosecutor v. Akayesu, Judgment, Appeals Chamber, 1 June 2001

Musema v. The Prosecutor Case No.ICTR-96-13-A, Appeals Chamber, Judgment, 16 November 2001

The Prosecutor v. Semanza, Case No.ICTR-97-20-T Judgment and Sentence, 15 May 2003

Rutaganda v. Prosecutor Case No.ICTR-96-3-A , Judgment, Appeals Chamber, 26 May 2003

Prosecutor v.Kumuhanda, Case No.ICTR-95-54A-T, 22 January 2004

Prosecutor v. Ntagerura, Bagambiki and imanishimwe case No.ICTR-99-46-T Trial Chamber , 25 February 2004

Human Rights Committee

Landinelli Silva et al. v. Uruguay, Communication No.34/1978, CCPR/C/12/D/34/1978 (8 April 1981) (<http://www.unhchr.ch>)

X (a non-governmental organization) v. Uruguay, communication No.137/1983, CCPR/C/19/D/137/1983 (25 July 1983)

Quinteros v. Uruguay, Case No. 107/1981, CCPR/C/19/D/107/1981 (21 July 1983)

Delgado Paez v. Colombia, (195/1985) ICCPR, A/45/40 vol. II (12 July 1990)

E.W.et al., v. The Netherlands, Communication No.429/1990, UN Doc.CCPR/C/47/D/429/1990, Decision on Admissibility, (29 April 1993)

Simunek et al., v. The Czech Republic (516/1992) A/50/40 (19 July 1995)

G.T v. Australia, No.706/1996;CCPR/C/61/D/706/1996 (4 December 1997)

Piandiong et al v. the Philippines, Case No.869/1999, CCPR/C/70/D/869/1999 (19 October 2000)

Mansaraj et al. v. Sierra Leone, Case No. 839-841/1998, CCPR/C/72/D/841/1998 (30 July 2001)

Vaca v. Colombia, CCPR/C/74/D/859/1999 (15 April 2002)

Jayawardena v. Sri Lanka 916/2000, CCPR/C/75/D/916/2000 (26 July 2002)

Saidov v. Tajikistan, Case No. 964/2001, CCPR/C/81/D/964/2001 (20 August 2004)

Singarasa v. Sri Lanka CCPR/C/81/D/1033/2001 (23 August 2004)

Gorji-Dinka v. Cameroon, CCPR/C/83/D/1134/2002 (10 May 2005)

Committee Against Torture

Tapia Paez v. Sweden, Communication No.39/1996, UN Doc. A/52/44 (28 April 1997)

Elmi v. Australia CAT, (120/1998), A/54/44 (14 May 1999)

V.X.N and H.N v. Sweden, Communication Nos.130 and 131 /1999, CAT/C/24/D/130 &131/1999 (2 September 2000)

Dzemajl et al.v. Yugoslavia, CAT/C/29/D161/2000 (02 December 2002)

European Commission of Human Rights

The Greek Case (1969) 12 *Yearbook of the ECHR* 1

Cyprus v. Turkey, Application Nos. 6780/74 and 6950/75, (1982) 4 *EHR* 482

Denmark, Norway, Sweden and Netherlands, v. Greece, Application Nos.3321/67, 3322/67, 3323/67, 3344/67, (1968) 7 *ILM* 818

France, Norway, Denmark, Sweden, and Netherlands v. Turkey. Application Nos. 9940- 44/ 82, (friendly Settlement) 7 December 1985, (1986) 25 *ILM* 308.

European Court of Human Rights

Lawless v. Ireland, judgment, (1979-80) 1 *EHRR* 15

Soering v. UK, No.25803/94 (7 July 1989)

Cruz Varaa v. Swden 20 March 1991

TI v. U.K , Application No. 43844/98, Decision, 7 March of 2000, 2000-III *Reports of the European Court of Human Rights* 437

Papamichalopoulos and others v. Greece, (Just Satisfaction) , A 330-B, Judgment (31/10/1995) (<http://www.echr.coe.int>)

Chahal v. U.K No.00022414/93 (15/11/1996)

Akdivar v. Turkey (21893/93) Judgment, 16 September 1996

Loizidou v. Turkey, 00015318/89 (18/12/1996)

Ahmed v. Austria, No. 0025964/94 (17/12/1996)

H.L.R. v. France, Application No. 00024573/94 (29/04/1997),1997-III *RECHR* 746

D v. UK, Judgment of 2 May 1997, 1997-III *RECHR*778

Mentes and Others v. Turkey (58/1996/677/867) 28 November 1997

Akdivar and Others v. Turkey, 1 April 1998 (Art. 50) 1998-II *RECHR* 711

Selcuk and Asker v. Turkey, 12/1997/769/998-999, Judgment of 24 April 1998

Ergi v. Turkey, No. 66/1997/850/1057, (28 July 1998)

Osman v. United Kingdom, Application no. 87/1997/871/1083) Judgment of 28 October 1998

Mentes and Others v. Turkey, Judgment of 28 November 1998

Cakiciv. Turkey Application no.23657/94, judgment of 8 July 1999

IPEK v. Turkey, No. 25760/94, 17 February 2000

Ilhan v. Turkey, Application No. 22277/93 (27 June 2000)

Tas v. Turkey 24396/94 Judgment of 14 November 2000

Bilgin v. Turkey Application No. No. 23819/94, (16 November 2000)

Dulas v. Turkey, Application No. 25801/94, (30 January 2001)

Bensaid v. U.K., No.44599/98 (6 February 2001)

Conka and others v. Belgium (51564/99) 13 March 2001

Orhan v. Turkey, Application No.25659/94, Judgment (18 June 2002)

Yoyler v. Turkey, No. 26973/95, 24 July 2003

Ozkan v. Turkey, No. 21689/93, (6 April 2004)

Ayder v. Turkey , No. 23656/94, 8 January 2004

Altun v. Turkey, Application No.24561/94 (1 June 2004)

Dogan and Others v. Turkey, applications Nos.8803-8811/02, 8813/02 and 8815-8819/02, Judgment (29 June 2004)

Hasan Ilhan v. Turkey , 22494/93, Judgment (9 November 2004)

Mamatkulov and Askarov v. Turkey, 46827/99 and 46951/99, Judgment of 5 February 2005

Isayeva v. Russia, application no.57950/00, Judgment of 24 February 2005

Isayeva, Yusupova and Bazayeva v. Russia, Application Nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February 2005,

Xenides –Arestis v. Turkey, Application no.46347/99, Judgment of 22 December 2005

Inter-American Commission of Human Rights

Miskitos v. Nicaragua, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V.II.62, doc.10 rev.3 (29 November 1983) (<http://www.cidh.oas.org>)

Maria Mejia v. Guatemala, Case 10.533, Report No.32/96, Inter-American Commission of Human Rights 16 October 1996, OEA/Ser.L/V/II.95, Doc.7rev. (14 March 1997)

Abella v. Argentina Report No.55/97, case 11.137, 1997 Annual Report, OEA/Ser.L/II.98, doc.6 rev. (13 April 1998)

Report No.5/94, Case 10.574 (1 February 1994) Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85, Doc.9 rev. (11 February 1994)

Provisional Measures

110 members of the La Balsita living and working community in Debeiba, Annual Report 2002, OEA/Ser.L/V/II.117, Doc.1 rev.1 (7 March 2003)

Embera Chami indigenous persons. Annual Report 2002, OEA/Ser.L/V/II.117, Doc.1 rev.1 (7 March 2003)

Afro-Colombian Communities in 49 Hamlets in the Naya River, Annual Report 2002, OEA/Ser.L/V/II.117, Doc.1 rev.1 (7 March 2003) Ch.III, para.21.

515 families of Afro-Colombian descent (2,125), members of the Jiguamiando Basin Community Council. Annual Report 2002, Ch.III, para.45.

Inter-American Court of Human Rights

Velasquez Rodriguez v. Honduras, Judgment of 29 July 1988
(http://www.corteidh.or.cr/juris_ing/index.html)

Villagran Morales et al. (the 'Street Children' Case), Inter-American Court of Human Rights, Series C No.63, Judgment of 19 November 1999

Las Palmeras Case, Preliminary Objections, Judgment of February 4, 2000

Bamaca Velasquez v. Guatemala, Series C. No.70, Judgment of November 25 2000

Community Mayagna (Sumo) Awas Tingni v. Nicaragua, Judgment of 31 August 2001.

Bamaca Velasquez v. Guatemala, Reparations February 22, 2002

Provisional measures of the Inter-American Court of Human Rights

Haitians and Haitian Origin in the Dominican Republic 18 August 2000, (Ser.E)

Communities of the Jiguamiando and the Curbarado, (Colombia) 6 March 2003, Order of the Inter-American Court of Human Rights (Ser.E) 2003

Peace Community of San Jose De Apartado, (Colombia) Order of the Inter-American Court of Human Rights, 18 June 2002

Giraldo Caraldo case (Colombia) February 5 1997

African Commission on Human Rights

48/90 *Amnesty International v. Sudan*, 50/91, *Comite Loosli Bachelard v. Sudan*, 52/91 *Lawyers Committee for Human Rights v. Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa v. Sudan*, 13th Annual Activity Report of the African Commission on Human and Peoples' Rights, 1999-2000, AHG/222 (XXXVI) p. 124 (*Amnesty International v. Sudan*) (<http://www.achpr.org>)

54/91, 61/91, 98/93, 164/97 and 196/97, 210/98, *Malawi African Association v. Mauritania*, 13th Annual Activity Report of the ACnHPR, 1999-2000, AHG/222(XXXVI) p.161

211/98 *Legal Resources Foundation v. Zambia*, 14th Annual Activity report of the ACHPR, 2000-2001, AHG/229(XXXVII)

155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, 15th Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, p. 31

228/99 *The Law Office of Ghazi Suleiman v. Sudan* 16th Annual Activity Report of the ACHPR, 2002-2003, p.48

National Courts

Islam (A.P.) v. Secretary of the State for Home Dept., Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah, (1999)2 *All.E.R* 545 (House of Lords)

R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet (No.3) (2000) 1 *AC* 147.

Niyonteze v. Public Prosecutor (2002) 96 *AJIL* 231

Samiha Abbas Hijazi and others v. A. Saron and Y. Yaron, on 12 February 2003

Public Prosecutor v. the 'Butare Four' (2003)1 *Journal of International Criminal Justice* 428.

Table of Treaties and Other International Instruments

- 1945 Statute of the International Court of Justice
- 1948 Universal Declaration of Human Rights
- 1948 Convention on the Prevention and Punishment of the Crime of Genocide
- 1948 American Declaration of the Rights and Duties of Man
- 1949 Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV)
- 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by Protocol No.11 on 1 November 1998)
- 1951 Convention Relating to the Status of Refugees
- 1952 Protocol No.1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
- 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict
- 1963 Protocol No.4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms
- 1966 International Covenant on Civil and Political Rights
- 1966 International Covenant on Economic, Social and Cultural Rights
- 1966 International Convention on the Elimination of All Forms of Racial Discrimination
- 1967 Protocol Relating to the Status of Refugees
- 1969 American Convention on Human Rights
- 1969 OAU Convention on the Specific Aspects of Refugee Problems in Africa
- 1969 Vienna Convention on the Law of Treaties
- 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid
- 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)
- 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
- 1979 Convention on the Elimination of All Forms of Discrimination Against Women
- 1979 Code of Conduct for Law Enforcement Officials
- 1981 African Charter on Human and Peoples' Rights
- 1985 UN Declaration on Basic Principles of Justice for victims of Crime and Abuse of Power
- 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
- 1984 Cartagena Declaration on Refugees
- 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Convention Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980 UN CCW)
- 1986 Amended Protocol II on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the 1980 UN CCW

- 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment
- 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights
- 1989 Indigenous and Tribal Peoples Convention
- 1989 UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions
- 1989 Convention on the Rights of the Child
- 1990 Second Optional Protocol to the International Covenant on Civil and Political Rights
- 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials
- 1990 African Charter on the Rights and Welfare of the Child
- 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
- 1992 Declaration on the Protection of All Persons from Enforced Disappearances
- 1993 Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction
- 1993 Vienna Declaration and Programme of Action
- 1993 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991
- 1994 Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States Between 1 January 1994 and 31 December 1994
- 1995 European Framework Convention for the Protection of National Minorities
- 1995 Turku Declaration on Minimum Humanitarian Standards
- 1995 The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement)
- 1996 Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the 1981 United Nations Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (as amended on 3 May 1996)
- 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction
- 1997 Guiding Principles on Internal Displacement
- 1997 Draft Declaration on Population Transfer and the Implantation of Settlers
- 1998 Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights
- 1998 Statute of the International Criminal Court, (1998)37 ILM 999
- 1999 Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

- 1999 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women
- 2000 International Law Association Declaration of International Law Principles on Internally Displaced Persons
- 2000 Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
- 2001 1980 UN CCW as amended in 21 December 2001
- 2003 Protocol on the Explosive Remnants of War (Protocol V to the 1980 UN CCW)
- 2004 Protocol No14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention
- 2005 Principles on Housing and Property Restitution for Refugees and Displaced Persons

Abbreviations

AC	Appeal Cases
ACHR	American Convention on Human Rights
ACHPR	African Convention on Human and Peoples' Rights
AJIL	American Journal of International Law
All.E.R	All England Reports
Am.Univ.L.Rev.	American University Law Review
Am. U.J.Int'l L & Pol'y	American University Journal of International Law and Policy
Art	Article
BYIL	British Yearbook of International Law
CERD	Convention on the Elimination of All Forms of Racial Discrimination
Ch	Chapter
CRC	Convention on the Rights of the Child
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EHRR	European Human Rights Reports
EJIL	European Journal of International Law
HRQ	Human Rights Quarterly
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
IDP	Internally Displaced Person
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
IHL	International Humanitarian Law
IJRL	International Journal of Refugee Law
ILA	International Law Association
ILM	International Legal Materials
ILR	International Law Reports
IRRC	International Review of the Red Cross
IYHR	Israel Yearbook of Human Rights
JICJ	Journal of International Criminal Justice
LJIL	Leiden Journal of International Law
NGO	Non-Governmental Organisation
NQHR	Netherlands Quarterly of Human Rights
OP-ICCPR	Optional Protocol to the International Covenant On Civil and Political Rights
PYIL	Palestine Yearbook of International Law
Para.	Paragraph
Protocol I	Protocol Additional to the Geneva Conventions of 12 August 1949, And Relating to the Protection of

Victims of International Armed Conflicts
(Protocol I) of 8 June 1977

Protocol II

Protocol Additional to the Geneva Conventions of
12 August 1949, And Relating to the Protection of
Victims of Non-International Armed Conflicts
(Protocol II) of 8 June 1977

Res

Resolution

RECHR

Reports of the European Court of Human Rights

UN

United Nations

YIHL

Yearbook of International Humanitarian Law

YJIL

Yale Journal of International Law

Yale Hum. Rts. & Dev. L.J

Yale Human Rights and Denver Law Journal

Introduction

It is a sad reality that the number of internally displaced persons (IDPs) by internal armed conflicts exceeds the number refugees in the world. By the end of 2004, those who had been displaced within their own states were 25 million¹ and by the same period, the global number of refugees was estimated as 9.2 million persons.² Such an unprecedented level of internal displacement is not an unexpected outcome in a world where internal armed conflicts are the common form of conflicts and in which the most atrocious forms of human rights and humanitarian violations that cause displacement occur.³ The international community has witnessed such massive internal displacements in the former Yugoslavia and Rwanda and continues to witness displacement in states in almost every region of the world, such as Turkey, the Russian federation, Colombia, Sudan, Uganda, Sri Lanka and Indonesia.⁴

Internal displacement by internal armed conflicts is a major human rights and humanitarian catastrophe as in ‘many cases, it breaks up the immediate family. It cuts off important social and cultural community ties; terminates stable employment relationships; precludes or forecloses formal educational opportunities; deprives infants, expectant mothers, and the sick of access to food, adequate shelter, or vital health services; and makes the displaced population especially vulnerable to acts of violence, such as attacks on camps, disappearances, or rape.’⁵ In sum, IDPs would become physically and materially more vulnerable to violations of human rights and humanitarian law than those who are not displaced. The vulnerability of IDPs can be better indicated by comparing them with refugees. Unlike refugees, who are protected by refugee law from the circumstances and the persecutor that caused their displacement, IDPs are not specifically protected as such by international law and also do not enjoy the

¹ Norwegian Refugee Council, *Internal Displacement: Global Overview of Trends and Developments in 2004*, March 2005, at p.9.

² UNHCR, *2004 Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers, Stateless and Other Persons of Concern to UNHCR*, (Geneva, 2005) at p.2.

³ In 2004 there were 30 internal armed conflicts. From 1989 -2004 there had been only one or two inter-state armed conflicts per year, L. Harbom and P. Wallensteen, ‘Armed Conflict and Its International Dimensions:1964-2004’ (2005)42 *Journal of Peace Research* 623, at p.624.

⁴ See ICRC, *Annual Report 2004*.

⁵ W. Kalin and R.K. Goldman, ‘Legal Framework’ in R. Cohen and F. M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement* (Washington D.C, 1998) p. 73, at p.74

protection of refugee law, since border crossing is a necessary condition to become a refugee.⁶

Disaster and development -induced displacement result in socio-economic impoverishment of the displaced persons and even if any coercion or violence is involved in the displacement of the latter category, it is not as much as that in an internal armed conflict.⁷ The protection need of development induced IDPs is restoration of income-generating resources rather than the physical safety and emergency relief.⁸ Displacements caused by natural or man-made disasters involve few human rights issues, as the governments in such situations readily respond or, if unable to provide assistance, seek international assistance (unless those disasters occur during an internal armed conflict with regard to conflict induced IDPs).⁹ These IDPs are not exposed at all or not like conflict -induced IDPs, continuously exposed to abuse of human rights and humanitarian law violations, so that they become physically and materially vulnerable. Unlike the disaster or development induced IDPs, those who are internally displaced by internal armed conflicts are always affected, in addition to the acts of the state, by the acts of armed opposition groups. Therefore, disaster and development related displacement do not necessitate external displacement as in the conflict related displacement.

On the other hand, displacement caused by internal armed conflict raises more human rights issues, ranging from civil and political rights to economic, social and cultural rights, because it is often a symptom of the problems related to structural inequalities that generate such internal armed conflicts. Root causes of such armed conflicts are the underlying structural injustices of 'national political and economic systems, often manifested in discrimination based on racial, ethnic, religious, or cultural identity factors.'¹⁰

⁶ See below, Chapter, 1.

⁷ 'Broadly speaking, the disaster-related problems lie in the field of economic and social rights, rather than civil and political rights' so that they account for part of the problems of refugees and IDPs displaced for conflict reasons. 'Commentary to the Draft Declaration of International Law Principles of Internally Displaced Persons,' *Report of the 69th Conference of International Law Association*, London, 2000 p.791, at p. 796.

⁸ M.Barutciski, 'International Law and Development- Induced Displacement and Resettlement' in C de Wet (ed.), *Development Induced Displacement: Problems, Policies and People* (Oxford, 2006) p. 71, at p.74.

⁹ W.Kalin, 'Legal Protection of Internally Displaced Persons: Protection in International Human Rights Law,' in Jean-Philippe Lavoyer (ed.), *Internally Displaced Persons*, Report of the Symposium (23-25 October 1995) (Geneva, 1996) p.15, at p.16; N. Geissler, 'The International Protection of Internally Displaced Persons' (1999)11 *IJRL* 451 at p. 455.

¹⁰ F.M.Deng, 'Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced' (1995) 8 *LJIL*, 249, at p.252

Therefore in such armed conflicts, civilians belonging to the minority groups are often considered 'as enemies, as inferior, as different, not as their people' due to their association with or their ideological support for the opposition armed groups or because of their being minorities in a society where the state apparatus becomes monopolised by and associated with the dominant ethnic or religious groups and for simply being the other group.¹¹ For instance, in the internal armed conflicts of countries like Sudan, Sri Lanka and Turkey, ethnic factors contributed to the displacement of civilians.¹² The existence of armed opposition groups in Turkey and Sri Lanka has been used by the governments to 'justify campaigns of utter destruction against parts of their own population' which resulted in massive displacement.¹³ As crises of national identity are manifested in the cause of displacement, which involves massive violation of human rights and cruel methods of combat, in its consequences by discriminatory treatment and human rights abuses and even in the official responses to humanitarian problems, IDPs would be profoundly affected and become severely vulnerable.

Internal displacement in such internal armed conflicts not only takes place as a by-product of armed conflicts but is carried out as a method of combat or even an objective of armed conflict. Therefore, the right of IDPs to remain not only in their places of origin but even in places of displacement are threatened. Consequently, IDPs displaced by internal armed conflicts as opposed to disaster induced IDPs would often be left during displacement in an environment which is not conducive to their restructuring and leading a life in safety and dignity in their new places by engaging in economic, educational and other activities to improve their lives.

It can be derived from the above discussion that displacement by internal armed conflicts is a symptom of harm as well as clearly a harm in itself which has human rights implications. Therefore, it is crucial to address the pressing problem of internal displacement by internal armed conflicts rather than disaster or development induced displacement, as the problems

¹¹ R. Cohen, *Masses in Flight: People Under Assault in their Own Countries*, Inaugural Lecture, University of Missouri, 16 January 2001, at p.4 (http://www.brookings.edu/fp/projects/idp/articles/stl_address_cohen.htm); R. Cohen and F. M. Deng, *Masses in Flight*, at p.6.

¹² R. Cohen and F. M. Deng, *Masses in Flight*, at p.20.

¹³ R. Cohen, *Masses in Flight: People Under Assault*, at p.6.

confronting IDPs in the latter situations, are lesser in quality and quantity than those in the former.

As far as IDPs are concerned, international protection in its broad sense would include, *inter alia.*, physical protection from abuses of human rights and humanitarian law, material protection by providing humanitarian assistance, and legal protection. Since this study is confined to the legal protection of IDPs, the relief operations of the international humanitarian organisations and the United Nations agencies on the ground do not form part of this study.¹⁴ International legal protection is important to provide the legal basis to the activities of international humanitarian organisations for protection of IDPs affected by human rights abuses as well as material deprivation. Without such a legal basis, admission of international organisations to a state has to depend on the discretion of the state concerned.

Protection in the definition of the International Committee of the Red Cross (ICRC) covers ‘all activities aimed at obtaining full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law (i.e. human rights law international humanitarian law, refugee law).’¹⁵ This definition presupposes the existence of a normative framework in the protection of displaced persons and its effective implementation or enforcement. Applying this definition to the context of this study it may be stated that legal protection means all the measures taken for the observance of international human rights and humanitarian law (refugee law is not applicable in the context of this study, except for interpreting human rights law by analogy) in response to displacements arising from violations of relevant international law as well as to prevent displacements even before their occurrence. Thus, international protection measures must contain reactive as well as proactive aspects with regard to the problem of displacement and its consequences. To elaborate further, such measures should be adopted in four situations: firstly, they are needed to prevent the occurrence of displacement in situations of internal armed conflicts, as the risk of displacement exists in such situations; secondly, protection measures are necessary to put an end to existing

¹⁴ See generally for such protection, C. Phuong, *The International Protection of Internally Displaced Persons* (UK, 2004); N. Hashimoto, ‘The United Nations and Internally Displaced Persons : At the Crossroads of Human Rights and Humanitarian Affairs’ in A. Bolesta (ed.), *Forced Migration and the Contemporary World: Challenges to the International System* (Poland,2003) p.78.

¹⁵ As cited in ‘Protection of Internally Displaced Persons’, Inter –Agency Standing Committee Policy Paper, New York, 1999 at p.4.

violations, that cause displacement or that occur consequent to the displacement; it is furthermore necessary to extend international protection to prevent the recurrence of violations to stop further internal or external displacement of civilians; finally, international protection in the form of remedies must be provided to those displaced persons whose rights have been violated.¹⁶ Therefore, problems relating to legal protection of IDPs can arise either at the normative level due to the inadequacy of international law or at the implementation or enforcement level because of the ineffectiveness of the control mechanisms to ensure respect for such law or at both levels.¹⁷

The very basis of the formulation of United Nations Guiding Principles on Internal Displacement, (hereafter UN Guiding Principles) which has drawn from the existing human rights and humanitarian law and refugee law by analogy, is the recognition of the fact of existence of protection gaps with regard to IDPs at the normative level.¹⁸ However, UN Guiding Principles on Internal Displacement tries to accommodate a wide range of situations of displacement that occur in non-conflict situations, such as in generalized violence, natural or man-made disasters and large scale development projects, with conflict induced displacement.¹⁹ Moreover the situations intended to be covered by it are not exhaustive, as indicated by the phrase ‘in particular’ before the enumeration of situations.²⁰ Cumulative addressing of the protection of IDPs from broadly differing situations, which in fact entail different kinds of needs, is not a convincing method of extending protection to conflict induced IDPs. Such IDPs have different needs from other persons internally displaced in normal conditions. This complicated method is compounded by the adoption of an approach which resorts to the convergence of human rights and humanitarian law to provide human rights protection to conflict induced IDPs with others, displaced in general disturbances and normal situations.

¹⁶ Based on the activities of the Representative of the Secretary-General on Human Rights of IDPs, Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kalin, E/CN.4/2005/84 (31 December 2004), para.78

¹⁷ H.J. Steiner and P. Alston, *International Human Rights in Context: Law, Politics, Morals*, 2nd ed., (Oxford, 2000), at p.562 state that the implementation and enforcement mechanisms make the legal norms ‘real’ by becoming a bridge between states and the norms.

¹⁸ Guiding Principles on Internal Displacement E/CN.4/1998/53/Add.2 (11 February 1998) Annex.

¹⁹ *Ibid.*, Introduction-Scope and Purpose, para 2 states that ‘internally displaced persons are persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.’; Principle 6 (2) (c) of the UN Guiding Principles.

²⁰ *Ibid.*

Conflict induced IDPs are also not considered separately from those displaced by generalised violence in the Declaration of International Law Principles on Internally Displaced Persons, adopted by the International Law Association (hereafter ILA Declaration on IDPs).²¹ As international humanitarian law applicable to internal armed conflicts excludes situations of general disturbance and internal violence, a separate consideration of the protection of conflict induced IDPs is necessary.²² The current combination of distinct situations not covered by the existing standards of humanitarian law in one framework would tend to dilute the authority of the distinctive system of international humanitarian law and thereby its acceptance and application. It is therefore necessary to consider internal displacement by internal armed conflicts separately.

In this context, the objective of the study is to examine the international legal regimes of human rights and humanitarian law concerning the protection of persons internally displaced by internal armed conflict. Such an examination is undertaken in the context of the convergence between both systems of law in internal armed conflicts. In addition, international criminal law and refugee law by analogy are considered wherever relevant. Apart from examining the existing international legal protection at the normative level, the effectiveness of such protection at the implementation level in providing specific protection of IDPs is also considered. In this regard the discussion evolves on the basis of the following sub questions:

1. Who can be considered as persons internally displaced by internal armed conflict? What is the legal justification for providing specific international legal protection to IDPs? What is the relationship between human rights law and humanitarian law in internal armed conflicts? To what extent do they converge? How can the relationship between the international human rights law and humanitarian law be used in providing maximum protection to the IDPs in internal armed conflicts?
2. Does a right to remain which makes the forced displacement of civilians unlawful in internal armed conflicts exist? If such a right exists, to what extent does it

²¹ Reprinted in (2000) 12 *IJRL* p.673; Art. 1(1) of the ILA Declaration on IDPs describes IDPs as, 'persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife or systematic violations of human rights, and who have not crossed an internationally recognized state border.'

²² See below, Ch.2.

protect civilians from forced displacement in internal armed conflicts? To what extent does the UN Guiding Principles on Internal Displacement precisely restate the law?

3. To what extent is the problem of displacement addressed by humanitarian law and human rights law in terms of its consequences? Are there any gaps in the existing law? Is there any need to clarify the existing law to make it specific enough to meet the needs of IDPs? Is there any possibility of formulating IDP specific rights by cross-fertilization of humanitarian law, human rights law and refugee law by analogy? Does the UN Guiding Principles accurately restate the existing law?
4. To what extent do the existing international humanitarian and human rights mechanisms provide protection specifically to displaced persons? Is such protection effective with regard to the problems of IDPs?
5. How can the outcome be ameliorated to provide an improved protection to persons displaced by internal armed conflict?

For this purpose this study is divided into five parts. Part I, which follows this introduction, discusses the conceptual basis for protection of persons internally displaced by internal armed conflicts by analogy to the concept of refugee in international law and adopts a working definition in this regard. The relationship between human rights and humanitarian law and the extent of their mutual convergence that can contribute to the improvement of the protection of IDPs is discussed in detail.

The main focus of Part II is on the examination of the extent of specific legal protection of IDPs from causes of displacement whether due to deliberate measures or as a by-product of armed conflict in the existing international human rights law, international humanitarian law and international criminal law.

Part III examines the existing protection of IDPs in terms of their specific needs consequential upon displacement in terms of international human rights law, international humanitarian law, international criminal law and refugee law by analogy. Similarly to the previous chapter, this examination is also based on the mutual convergence between international human rights humanitarian law.

Part IV analyses in detail the effectiveness of the implementation and enforcement of international human rights and humanitarian law by global and regional human rights mechanisms and by the International Criminal Tribunals

of former Yugoslavia and Rwanda, the International Criminal Court and by national Courts by virtue of universal jurisdiction.

Part V deals with the justification and necessity for the adoption of a specific treaty for the protection of IDPs.

The general Conclusions presents the conclusions and suggestions for the legal protection of IDPs on the basis of the study.

Part I

Preliminary Issues

Introduction

In evaluating the international legal framework for the existence of protection concerning displaced civilians, examining each system, namely, international human rights, humanitarian, criminal and refugee law (by analogy) as impermeable normative systems is not desirable, as such an approach does not recognise the shortcomings of each system in the situation of armed conflicts to provide a comprehensive and coherent protection to IDPs. This is because, in the spectrum of protection of civilians and IDPs, human rights law and humanitarian law are at one end and international criminal law and refugee law is at the other. Refugee law plays a reactive protective role in relation to external displacement of IDPs resulting from actual violations of or fear of violations of human rights and humanitarian law norms. A reactive protection is also provided by the 'overlapping area of protection' in international criminal law which makes certain serious violations of human rights norms, and humanitarian law norms committed in internal armed conflicts, international crimes subject to punishment.¹

Despite the independent nature of these legal regimes, they are bound by a common thread, namely, the protection of human beings in difficult situations and in the context of this study, in internal armed conflicts. Any improvement by examination of international law concerning the protection of IDPs, without consulting these relevant legal regimes, would result in inadequate protection. Therefore, standard setting that takes into account the convergence among the three regimes and emerges as a result of cross-fertilization, would effectively improve the protection of IDPs.

In this context, a working definition of IDPs by analogy to the definition of refugee is provided in Chapter 1. Chapter 2 examines the relationship between international human rights and humanitarian law for possible cross-fertilization between them.

¹ M.C.Bassiouni, 'Enforcing Human Rights Through International Criminal Law and Through an International Criminal Tribunal' in L.Henkin and J.L.Hargrove (eds.), *Human Rights: An Agenda for the Next Century* (Washington D.C, 1994) p. 347, at p.351.

1. Conceptualizing the Protection of IDPs

A. Definition of IDPs

To embark on the task of examining and providing international legal protection to IDPs, a working definition of IDPs is necessary to determine the basis of their entitlement to protection.¹ As forced and involuntary displacement (in the sense that people are obliged to move) has an adverse impact on the enjoyment of many human rights, a needs based approach is necessary to improve the legal protection of IDPs. For a needs based legal protection, the definition of IDP should be formulated in such a way as to indicate the causes of displacement and the form of protection needed for those who are displaced, in order to identify and to enunciate in detail the standards of protection. As international law has already provided legal protection to externally displaced persons, justification for such protection to IDPs can be made by analogy to the definition of a refugee for the formulation of a working definition of IDPs.

The 1951 Convention Relating to the Status of Refugees which covers displacement by persecution in both peaceful and conflict situations is applicable to those refugees forced to displace by persecution in internal armed conflicts.² According to that definition, a refugee is one who has a ‘well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’³ Persecution includes sustained or systematic violations of humanitarian law such as relocation measures, policy of ethnic cleansing and

¹ C. Beyani, *Internally Displaced Persons in International Law*, Oxford, 1995, at p.22.

² For the application of Refugee Law in internal armed conflicts, see G. S. Goodwin-Gill, *The Refugee in International Law*, 2nd ed., (Oxford, 1996), at pp.75-76; J.C. Hathaway, *The Law of Refugee Status* (Toronto, 1991) at pp.185-188; W. Kalin, ‘Refugees and Civil Wars: Only a Matter of Interpretation?’ (1991) 3 *IJRL* 435; J. Henkel, ‘Who is a Refugee’ in *Asylum Law*, Report and Papers delivered at the first international judicial conference at London, 1 and 2 December 1995, p.17; Guidelines Issued by the Chairperson, Pursuant to Section 65(3) of Immigration Act, *Civilian Non-Combatants Fearing Persecution in Civil War Situations*, Immigration and Refugee Board, Canada, March 7, 1996; M.R. Von Sternberg, ‘The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status’ (1997) 9 *IJRL* 169.

³ Article 1 A (2) of the 1951 Convention Relating to the Status of Refugees (hereafter 1951 Refugee Convention); Article 1(2), (3) of the 1967 Protocol Relating to the Status of Refugees, reprinted in (with the changes to Article 1A(2) of the Convention) in I. Brownlie and G.S. Goodwin –Gill (eds.), *Basic Documents on Human Rights*, 4th ed. (Oxford, 2002) p.112.

indiscriminate attack on civilians and their objects carried out against those belonging to the adverse racial, religious or political group.⁴ However, the 1951 Convention is narrow in its protection, as it only protects those who are the potential targets of persecution on discriminatory grounds stated therein and excludes those externally displaced who are the victims of the general effects of armed conflicts and human rights violations but still require the same basic needs.

However, Von Sternberg argues that, if those externally displaced victims were an internationally protected category of people by a treaty or a customary law, then they would fall within the definition of refugee in the 1951 Refugee Convention on the basis of a social group which has an economically marginalized condition that the group is powerless to change.⁵ According to Von Sternberg, in such a case, if the IDPs who are displaced by general violence or effects of armed conflicts and in need of basic survival requisites manage to cross an international frontier, they would fall within the 'social group' ground of the refugee definition of the 1951 Refugee Convention on the basis of specific designation of IDPs as a class that is in need of special protection and the refusal of the state to permit international humanitarian assistance to such group.⁶ The basis of this argument is that the failure of the state to provide basic needs for the survival of IDPs at the national level and the unwillingness of the state to permit provision of humanitarian assistance to IDPs by international organisations in accordance with its human rights and humanitarian law obligations is a differential treatment on the basis of a particular social group.⁷

Any distinction or exclusion should be considered as discrimination if it has the 'purpose or effect' of nullifying or affecting the equal recognition or

⁴ M.R. Von Sternberg, *The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law* (Hague, 2002) at pp.116- 123; also see below, Section C, 1, a.

⁵ Based on the opinion of Lord Hoffman in *Islam (A.P.) v. Secretary of the State for Home Dept., Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, (1999) 2 All.E.R 545 (House of Lords) and the liberal viewpoints of Arthur Helton, Grahl -Madsen and Guy Goodwin-Gill that social group is an open-ended category, M.R. Von Sternberg, *ibid.*, at pp.194 and 221-230.

⁶ M.R. Von Sternberg, *ibid.*, at p.309.

⁷ *Ibid.*, at pp.298-311.

exercise of rights by all citizens.⁸ Thus, if the IDPs are not provided with basic necessities due to the failure of their own state to take affirmative action, it should be considered as persecution on the basis of ‘social group.’ Here the persecution by the state is not so much with a ‘discriminatory motive’ (that provides the ‘purpose’ of discrimination) with respect to IDPs for reasons of their race, religion, language or political opinion but because of the act of the state ‘*in disregard of the rights of a specifically protected class so that the underlying action is discriminatory in effect.*’⁹ Such a broad interpretation of ‘social group’ to accommodate persons internally displaced by general effects of armed conflicts and consequent economic marginalisation due to the inaction of the state can derive further support if the internal armed conflict is fought on race, religion or language or other discriminatory grounds. However to fall within the ground of ‘social group,’ IDPs should have been designated as a ‘beneficiary of a treaty or customary norm’¹⁰ and since this is not the position with regard to IDPs, this interpretation of Von Sternberg cannot be considered for the purpose of justifying international protection to IDPs by analogy with the definition of refugee.

Except for the Convention on the Specific Aspects of Refugee Problems in Africa of 1969 and the Cartagena Declaration on Refugees of 1984, the international treaty-based definition of refugee does not explicitly cover the victims of internal armed conflicts. The regional refugee instruments protect those who are compelled to leave their places of habitual residence to seek refuge in another place outside their country of origin due to ‘events seriously disturbing public order’ in either part or the whole of their country of origin,¹¹ and refugees ‘who have fled their country because their lives, safety or freedom have been threatened by...internal armed conflicts.’¹² However, unlike under the former, under the latter Declaration a refugee claimant has to prove the real risk of harm arising from the abuse of power rather than the subjective perception of the refugee claimant. In addition to the real risk of harm to him/herself, the refugee claimant

⁸ *Ibid.*, at p.236.

⁹ *Ibid.*, at p.237(emphasis added by the author).

¹⁰ *Ibid.*, at p.309.

¹¹ Article I (2) of the 1969 Convention on the Specific Aspects of Refugee Problems in Africa, reprinted in I. Brownlie and G.S. Goodwin –Gill (eds.), *Basic Documents*, p. 722.

¹² Section III(3) of the 1984 Cartagena Declaration on Refugees, OAS/Ser.L/V/II.66, doc.10, rev. 1, pp.190-3.

has to establish that other persons in the same country are also exposed to such a harm by the internal conflict that affects the whole country.¹³ These definitions demonstrate the fact that lack of state protection, which is the underlying rationale of the concept of refugee, can arise from other causes apart from persecution such as incidental effects of armed conflicts that affect not only the civil and political rights but also the economic and social rights.

Despite the persecution-based, narrow protection of the 1951 Convention, State practice reflects a ‘universal recognition of humanitarian obligations towards those in need.’¹⁴ States extend complementary protection by international human rights law to ‘persons in need of protection’ in their national laws, when it is decided that the asylum seeker is not entitled to asylum but his/her life is threatened if he/she is returned to his/her country of origin during such conflicts.¹⁵ As complementary protection is a legal status provided upon individual determination of protection needs, it should be distinguished from temporary protection provided in mass displacements.¹⁶

In large-scale arrivals of people as a result of the indiscriminate effects of internal armed conflicts, the concept of temporary protection /refuge is adopted ‘to ensure immediate access to safety and protection of basic human rights, including protection from refoulement’¹⁷ The customary principle of *non-refoulement* is the basis also of the concept of ‘temporary protection/refuge.’¹⁸ There is a general consensus as to the customary nature of the concept of

¹³ O. Shoyele, ‘Armed Conflicts and Canadian Refugee Law and Policy’ (2004)16 *IJRL* 547, at p.553.

¹⁴ G.S. Goodwin- Gill, ‘Non Refoulement and the New Asylum Seekers’ in *The Ninth Sokol Colloquium on International Law, New Asylum Seekers : Refugee Law in the 1980s* (Hague, 1988) p. 103, at p.105.

¹⁵ For instance, Canada–Immigration and Refugee Protection Act 2001, Article. 97; also see below Ch. 5, Section B, 3.

¹⁶ UNHCR, ‘The International Protection of Refugees: Complementary Forms of Protection’, April 2001, para.27.

¹⁷ *Ibid.*, para.26.

¹⁸ G.S. Goodwin-Gill, *The Refugee* at p.200 ; temporary protection was granted during the 1990s in Europe as a protective response to the crisis in the former Yugoslavia where large numbers of people fled human rights abuses and armed conflict; this concept is also known as ‘temporary refuge’ and can be traced back to 1936 when safe haven was provided to the fleeing people by France and Britain, for the duration of the Spanish civil war. *ibid.*, at p.559.

temporary protection / refuge,¹⁹ even though views differ as to the jurisprudential basis of temporary refuge.²⁰

The protection of temporary refuge, however, is different from the protection of refugee status under the 1951 Convention. Temporary refuge is granted for a pre-defined period and extending only a temporary stay for the duration of armed conflict with the minimum standards for treatment as opposed to the protection of asylum.²¹ Voluntary repatriation is thus considered as a lasting solution with regard to temporary refuge.

The foregoing discussion indicates the extent of recognition of protection needs by international law of those who are displaced due to threats to their lives, liberty and security of person by the effects of internal conflicts and human rights violations. Despite the selective application of such protection, inclusion of broader categories of persons, in particular, those included in the regional refugee instruments for international protection, clearly demonstrates the inadequate theoretical basis of the legal definition in the 1951 Refugee Convention and strengthens the theoretical basis of the concept of refugee.

The general concept of refugee is broader than the legal concept in the 1951 Refugee Convention, because the persecution requirement in the latter is one form of expression of the absence of protection by the state of origin that justifies

¹⁹ Executive Committee of the High Commissioner's Programme, 'Note on International Protection', A/Ac.96/951 (13 Sept 2001) para.16; Ann Vibeke Eggli, *Mass Refugee Influx and the Limits of Public International Law* (Hague, 2002) at p.166; but see K. Hailbronner, 'Non-Refoulement and "Humanitarian" Refugees: Customary International Law or Wishful Legal Thinking?' in *The Ninth Sokol Colloquium on International Law, New Asylum Seekers: Refugee Law in the 1980s* (Hague, 1988) p.123.

²⁰ Goodwin-Gill, 'Non- Refoulement' at p.105, maintains that the protection needs of those whose lives and freedom are threatened if returned to their country of origin is based on the customary principle of non- refoulement; also see E. Lauterpacht and D. Bethlehem, 'The Scope and Content of the Principle of *Non- Refoulement*: Opinion' in E. Feller et al (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge, 2003) p.87, at p.120,para.108; Executive Committee Conclusion No.19, 'Temporary Refuge', 1980, 31st Session; Article 3(2) of the Council of the European Union Directive on Minimum Standards for giving Temporary Protection in the Event of a Mass Influx of Displaced Persons 2001/55/EC (20 July 2001); but Perluss and Hartman consider that temporary refuge is not an extension of the concept of refugee law but a norm of customary humanitarian law, D. Perluss and J.F. Hartman, 'Temporary Refuge: Emergence of a Customary Norm' (1986) 26 *Virginia Journal of International Law* 551, at p.602.

²¹ As Goodwin-Gill, *The Refugee* at p.202,states, '[t]he concept of temporary refuge/temporary protection, in the contexts of large movements, thus stands paradoxically as both the link and the line between the preemptory, normative aspects of non-refoulement and the continuing discretionary aspect of a State's right in the matter of asylum as a permanent or lasting solution, and in the treatment to be accorded to those in fact admitted.' Executive Committee Conclusion No.22, 'Protection of Asylum seekers in Situations of Large- Scale Influx' 1981.

international protection of refugees.²² Similar international protection should be granted to ‘persons deprived of all other basic needs’ due to unwillingness or inability of the state to protect people displaced by the general effects of hostilities.²³ Those who are obliged to relocate by conflict are thus obviously considered as refugees according to the general concept of refugees. As Patrnoic states, the difference between refugee as a general concept and a legal concept is,²⁴

[i]n the general concept, a refugee is a person who flees to find refuge and who feels compelled to leave his normal place of abode on account of any kind of circumstance. ... In the international legal concept, a refugee is an alien who finds himself outside his country of origin or nationality for serious reasons. ... Thus, while in municipal law the term refugee can also be applied to nationals, in international law the refugee is an alien.

As such, the general concept of refugee which is based on forced displacement, regardless of the circumstances and destination of displacement, is broader than the legal definition of refugee in the 1951 Refugee Convention.²⁵

As proposed by Shacknove, the concept of refugee includes persons who are deprived of physical security, other human rights as well as subsistence needs due to absence of the protection of the state of origin and ‘who have no remaining recourse other than to seek international restitution of their needs, and who are so situated that international assistance is possible.’²⁶ The possibility for international protection in the form of assistance arises when a state of nationality prefers to permit access to such assistance or a state is unable to prevent the provision of such protection.²⁷ Latter situation arises when the refugees are deprived of their economic, social and cultural rights in internal armed conflicts.²⁸ In this sense, the concept of refugee is broader to include, in addition to the

²² A. Shacknove, ‘Who is a Refugee?’ (1985) 95 *Ethics* 274, at p.277.

²³ *Ibid.*

²⁴ J. Patrnoic, ‘Refugees-A Continuing Challenge’ (1982) 30 *Annuaire de droit international medical*, 73 at p.74 as cited in J. C. Hathaway, *The Law of Refugee Status*, at p.29, n.3.

²⁵ C. Phuong, ‘Internally Displaced Persons and Refugees: Conceptual Differences and Similarities’ (2000) 18 *NQHR* 215, at p. 222.

²⁶ A.Shacknove, ‘Who is a Refugee?’ at pp.277, 281.

²⁷ A.Shacknove, *ibid.*, at p.283.

²⁸ See below, Ch.5, Section E.

protection of asylum, the other forms of international protection such as material assistance and diplomatic assistance.²⁹

Such a conclusion can be further implied from the non-insistence of the requirement of alienage in the concept of refugee.³⁰ According to Shacknove refugeehood is a severed political bond between citizen and the state, which is not always manifested by border-crossing.³¹ Shacknove cites the Immigration and Nationality Act of the United States which recognises IDPs on the basis of persecution as refugees, applying that status to members of the opposition from Argentina and Chile and to Soviet Jews, for resettlement.³² Such instances are limited and cannot provide the physical protection of asylum to conflict induced refugees without their crossing international borders. Alienage is an 'essential element' of the legal definition of refugee as opposed to a 'constitutive element' underlying the concept of refugee and places the refugee within the practical reach of the international community, especially of the country of asylum, to determine the refugee status.³³ Though crossing the international border is not necessary to invoke the international legal protection to receive international humanitarian assistance in terms of the concept of refugee, it is necessary for the international legal protection of asylum or temporary refuge in terms of the legal definition of refugee.

The conceptual basis discussed by Shacknove is obviously broad enough to include IDPs displaced by internal armed conflicts and provides justification for international legal protection. As such, it can be stated that IDPs and refugees have conceptual similarities as both have been subjected to displacement from their places of origin or residence by internal armed conflicts due to persecution, by systematic violations of human rights and by the

²⁹ A. Shacknove, 'Who is a Refugee?' at p.277, n.8. means by 'access,' the supply of material assistance and diplomatic assistance.'

³⁰ According to J.C. Hathaway, the requirement of border crossing is included only for three historical reasons, namely, protecting IDPs would necessitate more resources than are available to the international community, providing protection to internal refugees would result in states shifting their responsibility onto the international community and the concern that any attempt to protect the needs of internal refugees would result in interference with the territorial sovereignty of the state concerned, and not on any conceptual grounds, *The Law of Refugee Status*, at pp.31-32; A. Shacknove, 'Who is a Refugee?' at p.277.

³¹ A. Shacknove, at pp.277, 283.

³² *Ibid.*, at pp.283-84, n.20

³³ See D. Turton, 'Refugees and 'Other Forced Migrants', Refugee Studies Centre Working Paper No.13, Oxford, October 2003, at p.15; J.C. Hathaway, *The Law of Refugee Status*, at pp.31-32.

effects of hostilities that threaten their lives, safety or freedom; have similar protection needs as a consequence; and are unable to get the protection of their own state due to the inability or unwillingness on the part of the state.³⁴

Despite the conceptual similarity between refugees and IDPs which justifies their international legal protection, they cannot be considered as the same in terms of international law. Therefore, IDPs cannot be referred to as 'internal refugees' as has been used by some scholars and in some cases³⁵ despite the conceptual justification for such use. The term IDPs is used for practical purposes, associated with the concern to avoid weakening the protection available under the legal definition of refugee under 1951 Convention, of which alienage is an 'essential element.'³⁶

Similarly, the conceptual similarity between refugee and IDP would not lead to de-emphasis on the element of alienage to the extent of a legal synthesis between IDPs and refugees to justify the assertion of international protection to IDPs by the international community.³⁷ This is because such in-country protection for IDPs based on identical legal status would render the protection of asylum no longer necessary.³⁸ The legal position that can be caused by the factual situation of IDPs is not similar to that of refugees, as IDPs remain within the territory of their own state and are entitled to the protection of their own state. Therefore, the international legal protection of refugees is 'substitute' in its nature, due to the absence of protection from their own state which they have left,³⁹ whereas the international legal protection of IDPs is

³⁴ See J.C.Hathaway, *The Law of Refugee Status*, at pp.29-30; E. Mooney, 'The Concept of Internal Displacement and the Case for Internally Displaced Persons As A Category of Concern' (2005)24 *Refugee Survey Quarterly* 9, at p.14 states, 'internally displaced persons are denied the protection and assistance of their government, they are of legitimate concern to the international community.'

³⁵ J.C.Hathaway, *Ibid.*, at p.29; J. Schrijvers, 'Fighters, Victims and Survivors: Constructions of Ethnicity, Gender and Refugeeeness among Tamils in Sri Lanka' (1999)12, *Journal of Refugee Studies* 307, at p.309; G. Melander, 'Internally Displaced Persons' in G.Alfredsson and P.Macalister-Smith (eds.), *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups in Memory of Atle Grahl-Madsen* (Kehl, 1996) p.69, at p.70; *Isayeva, Yusupova and Bazayeva v. Russia*, Judgment of 24 February 2005, Application Nos. 57947/00, 57948/00 and 57949/00, para. 193.

³⁶ D.Turton, 'Refugees and 'Other Forced Migrants'' at p.16.

³⁷ L. T. Lee, 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis' (1996) 9, *Journal of Refugee Studies* 27, at pp.30-38, Lee proposes a legal synthesis of IDPs and refugees, by de-emphasising border-crossing as a determining element for eligibility of international protection of refugees on historical, practical, juridical and human rights grounds; L.T.Lee, 'The Refugee Convention and Internally Displaced Persons' (2001) 13 *IJRL* 363, at p. 366.

³⁸ C.Phuong, 'Internally Displaced Persons and Refugees' at p.224.

³⁹ J.C.Hathaway, *The Law of Refugee Status*, at p.124.

‘complementary’ in nature, as it provides protection along with national protection, if the national protection is not available or not adequate.⁴⁰ Without the factual similarity of the location of displacement, a legal synthesis of IDPs and refugees is not possible, despite other similarities between them and the fact that both are entitled to human rights as human beings, regardless of their nationality.⁴¹ Moreover, such a legal synthesis is not necessary to provide international protection to IDPs in the form of assistance by international humanitarian organisations.

The differences in the protection of refugees according to reasons of their displacement, cannot be brought into the protection of IDPs on the basis of conceptual similarity between them. Melander differentiates between those who are externally displaced, due to persecution as human rights refugees and due to the effects of an armed conflict, as humanitarian law refugees according to their international legal protection which is more favourable to the former category.⁴² According to Melander the same distinction to be maintained between human rights IDPs and humanitarian law IDPs as the latter is provided with less international legal protection.⁴³ Notwithstanding the distinction between both categories of refugees with regard to international legal protection, such a distinction of IDPs is misleading due to the reasons, that these categories are not precise as both situations overlap for instance, in an internal armed conflict fought on ethnic lines; whether displaced by armed conflict or by persecution, IDPs are in need of protection of their human rights especially due to their material deprivation; that human rights protection is not confined to persecution alone but includes other violations of human rights as an element of violence in internal armed conflicts as well as humanitarian law violations; therefore humanitarian

⁴⁰ C. Phuong, ‘Internally Displaced Persons and Refugees’ at p.224

⁴¹ For a human rights based argument L. T. Lee, ‘Internally Displaced Persons and Refugees’ at pp.36-37.

⁴² G. Melander, ‘Internally Displaced Persons,’ at pp.69-70.

⁴³ G. Melander, *ibid.*, justifies this on the basis that international humanitarian treaty law with regard to protection of IDPs by internal armed conflict is less developed and contain ineffective monitoring system, ‘Internally Displaced Persons’ at pp.70-71; such an argument ignores the role of human rights law and customary humanitarian law in such situations. Moreover, ineffective monitoring cannot be considered as a reason for making distinction between IDPs on the basis of normative protection.

law violations whether based on discriminatory grounds or not could violate the human rights of IDPs as well.⁴⁴

In particular, such a distinction between refugees should not be brought into the definition of IDPs, as IDPs are nationals who are entitled to the equal protection of their own state and if that protection is not extended to them then they should be provided with international protection. The considerations applicable to asylum seekers are different from those applicable to IDPs as the former displace to a state other than their own state which does not have the same human rights obligations as their own state towards asylum seekers.

The requirement of alienage in the legal definition of refugee can be considered therefore in a positive manner to emphasize the distinct and greater protection needs of IDPs than of refugees, due to the factual situation of the IDPs. This is because, as with refugees, the failure of IDPs' own state to provide protection due to its inability or unwillingness is a necessary element for their international protection. IDPs are still within the territory of their national state, and they are entitled to the protection of their own state in terms of human rights and humanitarian law, in the same way as other fellow citizens, but the state is unable or unwilling to provide protection.

Compared with refugees, who move out of the territory of their national state and are therefore free from the control of that state, IDPs are more vulnerable, because they remain within the territory of their own state which has subjected them to persecution or where their lives and survival were in peril due to the effects of hostilities. As Deng observes, '[o]verwhelmingly, they live under adverse conditions of a hostile domestic environment, where their access to protection and assistance is constrained by national sovereignty, despite their severe vulnerability.'⁴⁵ Refugees are in a more protected situation by virtue of the international legal status provided for them by the 1951 Convention. Despite the similarity between IDPs and refugees, in the plight that caused displacement, the difference in the protection afforded to them can be clearly illustrated, for instance, by the armed conflict in Darfur, Sudan. Among the 1.4

⁴⁴ See below, Ch. 2 for the convergence of human rights law and humanitarian law that contributes to the human rights approach to the protection of IDPs in internal armed conflicts.

⁴⁵ F. M. Deng, 'Frontiers of Sovereignty' at p.250.

million Sudanese subjected to forced displacement in the armed conflict in Darfur, 200,000 Sudanese who managed to cross the border and enter into Chad were protected as refugees, whereas those 1.2 million internally displaced within Sudan, although having similar needs, had to wait for international protection, as the Sudanese government was unwilling to provide assistance.⁴⁶

As far as IDPs are concerned, the difference between those who are obliged to move due to the accidental effects of cross fire or indiscriminate violence and those who are forced to move due to a differential attack on them as a particular group, on discriminatory grounds, is that the former are 'victims' and the latter are the 'targets' of armed conflicts.⁴⁷ IDPs themselves can be both 'victims' and 'targets' in armed conflicts. Therefore these two categories of IDPs are not always mutually exclusive, as in internal armed conflicts displacement of civilians occurs due to 'multiple, overlapping, and interrelated reasons.'⁴⁸

Yet the commonality between both groups that causes displacement is the element of coercion which exists regardless of the nature of displacement, whether forced (deliberate) or involuntary (as a by-product of armed conflict). In such situations the test can be that '[i]f a real choice exists for the persons concerned as to whether to leave or not, in other words, if they could reasonably be expected to choose to remain in their home areas, their movement is voluntary.'⁴⁹ In other words, coercion in relation to displacement can be defined as 'reduction in the options in the choice' available to the IDPs⁵⁰ to stay in their place of origin or habitual place of residence and to return to the same or to have a stable life elsewhere in the country in safe and dignified conditions.

In addition, the consequences that follow from the displacement of both categories of IDPs are similar in nature. Even those displaced by the effects of

⁴⁶ See, Report of the Representative of Secretary-General on Internally Displaced persons, Francis M. Deng, *Mission to Sudan- The Darfur Crisis*, E/CN.4/2005/8 (27 September 2004) para.10

⁴⁷ A.R. Zolberg, A.Suhrke and S.Aguayo, *Escape from Violence: Conflict and Refugee Crisis in the Developing World* (Oxford, 1989) at p. 269.

⁴⁸ R.Cohen and F.M. Deng, *Masses in Flight*, at p.23.

⁴⁹ Report of the Representative of the Secretary-General, Mr. Francis Deng, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection Against Arbitrary Displacement*, E/CN.4/1998/53/Add.1 (11 February 1998) para.3.

⁵⁰H. Adelman, 'The Place of IDP Research in Refugee Studies'(2003) at p. 6 (http://www.idp.ntnu.no/conference/conference_papers.asp?page=literature&literaturid=76...)

internal armed conflicts or by violations of human rights may undergo 'fundamental marginalization' because of the incapacity of the government due to lack of adequate resources, which is equally harmful to the 'civil or political discrimination' suffered by IDPs who have been subjected to deliberate forced displacement.⁵¹ Broadly speaking, all such IDPs are in one way or other the 'victims' of human rights violations, because of the failure of the government concerned to provide protection due to its inability or unwillingness.

Thus, based on this discussion, there are three factors that should be taken into account in formulating a working definition of IDPs for the sake of providing international legal protection: forced displacement or displacement by the effects of conflicts and human rights violations beyond the control of the state or caused by the state; failure of the person's own state to provide protection due to unwillingness or inability on its part; and the person's remaining in the situation of displacement within their own territory.⁵² The first factor is the condition precedent for the application of the definition.⁵³ The second factor is determined in accordance with the causes and consequences as stated in the first factor. The third factor differentiates the legal concept of refugee from that of IDPs and activates the international legal protection of IDPs when the first and second factors have been satisfied.

The definition of the UN Guiding Principles adopted 'forced' displacement to describe the deliberate displacement by parties to the conflict and 'obliged' to leave to cover displacements otherwise compelled by human rights violations or the effects of conflicts.⁵⁴ Such a distinction is maintained in the working definition adopted by this study for the purpose of examining specifically the international legal protection to both type of IDPs. It is based on the rationale for the international protection of IDPs, namely, coerced displacement is an exceptional situation that results in specific protection needs by its very nature as opposed to non-displacement which is considered as relatively the normal situation in armed conflicts, which would not involve as much specific protection needs as internal displacement.

⁵¹ J.C. Hathaway, *Law of Refugee Status*, at pp.138-39

⁵² C. Beyani, *Internally Displaced Persons* at p.25; R. Cohen and F. M. Deng, *Masses in Flight*, at p.17.

⁵³ C.Beyani, *ibid.*

⁵⁴ R. Cohen and F. M. Deng, *Masses in Flight*, at p.17.

The definitions of IDPs provided in the UN Guiding Principles on Internal Displacement and the Declaration of International Law Principles on Internally Displaced Persons of the International Law Association include IDP situations other than internal armed conflicts and are not explicit as to the situation in which their protection ceases to exist.⁵⁵ Though it is difficult to state precisely the circumstances in which their protection ceases to exist, since the protection of IDPs is based on their movement, the need for such protection presumably ends when their displacement is reversed, whether by return in safety and dignity to their original places or by a permanent and durable resettlement in some other place within the state and their protection needs are fulfilled.⁵⁶ The working definition adopted in this study includes such situations to underscore the protection needs of IDPs.

Moreover the definition refers to the terms 'flee' or 'leave' to include both spontaneous and systematic displacements. It includes both those who are actually subjected to human rights and humanitarian law violations or effects of hostilities and those who leave in fear of imminent dangers, as indicated by the phrases 'as a result of' or 'in order to avoid.' Based on the above discussion, a working definition is adopted for the purposes of this study stating the basis of international legal protection and implying the protection needs of IDPs. Accordingly, internally displaced persons can be described as persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence by internal armed conflicts as a result of or in order to avoid systematic human rights violations and the effects of internal armed conflicts, who have not crossed an internationally recognised State border, and are not able to return, reintegrate or resettle voluntarily, in safety and dignity or despite such return or resettlement, their protection needs related to displacement have not been fulfilled.

⁵⁵ Para 2 of the Introduction to the UN Guiding Principles on Internal Displacement ; Article 1 of the ILA Declaration on IDPs.

⁵⁶ See for the discussion of this aspect, below, Ch 6, Section D.

2. Normative Frameworks

A. International Human Rights and Humanitarian Law: Their Relationship and the Protection of IDPs

Though there are differing views as to the exact nature of the relationship between the regimes of humanitarian law and human rights law, the academic opinion has emerged that the two regimes are related but distinct.¹ As these two regimes are related to the extent they converge with each other, both sets of norms can be applied cumulatively in internal armed conflicts where their scope of protection overlaps, in order to maximize the protection of IDPs.² Their inter-relationship can be used to strengthen the normative protection of IDPs in two ways: by reinforcing both systems through each other; and by interpretation of laws in the context of each other.³

As international human rights and humanitarian law differ fundamentally from each other, without identifying the similarities between the two systems in certain aspects, cross-fertilization would not be possible. At the same time, compromising the differences between the normative structures would affect not only the validity of such a process but also the credibility and the benefit of different methods of protection afforded by such systems. Therefore, to provide IDPs with the benefit of dual protection of these regimes, it is important to examine the normative structure of these systems to

¹ L. Moir, *The Law of Internal Armed Conflict*, (Cambridge, 2002) at p.193, n.2; T. Meron, *The Humanization of Humanitarian Law* (2000)94 *AJIL* at p.240; F. J. Hampson, 'Human Rights Law and International Humanitarian Law: Two Coins or Two Sides of the Same Coin?' in *Bulletin of Human Rights, Human Rights and Humanitarian Law, Human Rights and Refugee Law* (New York, 1992) pp.46-54; R.E.Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998)1 *YIHL* 69, pp.69-110; C. Greenwood, 'Rights at the Frontier-Protecting the Individual in Time of War' in B.Rider (ed.), *Law at the Centre: The Institute of Advanced Legal Studies* (Hague, 1999) p.277; for a detailed evaluation of differing views see generally, J.Patrnogic and B. Jakovljevic, *International Humanitarian Law in the Contemporary World* (San Remo,1991) at pp.21-30.

² See W. Kalin and L. Gabriel, 'Human Rights in Times of Occupation: An Introduction' in W.Kalin (ed.),*Human Rights in Times of Occupation: The Case of Kuwait*, (Berne, 1994) p.1, at p.27; Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' *Law* (2004) 86, No.856 *IRRC* 789, at p.793; L. Doswald-Beck and Sylvain Vite, 'International Humanitarian Law and Human Rights Law' (1993)No.293 *IRRC* 94; T.Meron, 'Human Rights in Time of Peace and in Time of Armed Strife: Selected Problems' in T.Buergenthal (ed.), *Contemporary Issues in International Law: Essays in Honor of Louis B. Sohn* (Kehl, 1984) 1; Human Rights Committee, General Comment No.31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004) para.11.

³ See below, Chapter 8, section 2.

identify any similarities between them, while also appreciating their differences or specificities, so they may influence and enrich each other.⁴

As far as the material field of application (*Ratione materiae*) of human rights law is concerned, in terms of Article 4 (1) of the 1966 International Covenant of Civil and Political Rights (hereafter ICCPR) except for certain non-derogable norms specified in Article 4(2), a state may temporarily suspend other human rights during a ‘public emergency which threatens the life of the nation.’ Though an armed conflict situation is not explicitly stated therein, it does not seem to exclude a situation of internal armed conflict as an extreme emergency, if that adversely affects the life of the nation.⁵ Similarly, Article 15 of the 1950 European Convention on Human Rights (hereafter ECHR) and Article 27 of the 1969 American Convention on Human Rights (hereafter ACHR) permit derogation from human rights norms ‘in time of war’ as one of the situations of ‘public emergency threatening the life of the nation.’⁶ Though certain human rights norms are derogable during armed conflict situations, the protection of the human rights regime as a whole does not cease to apply during such situations. As the International Court of Justice observes in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons* case, ‘the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.’⁷ This view of the Court was later confirmed by its advisory opinion in the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*.⁸

⁴ To similar effect see the observation of Trial Chamber of the ICTY in *Prosecutor v. Kunarac, Kovac and Vukovic*, Trial Chamber of the International Criminal Tribunal for Yugoslavia (hereafter ICTY) Case No: IT-96-23-T & IT-96-23/1-T Judgment of 22 February 2001, paras. 471 and 496, in borrowing the definition of torture from human rights law.

⁵ M. Nowak, *U.N. Covenant on Civil and Political Rights, CCPR Commentary* (Strasbourg, 1993) at p.78; absence of reference to war is deliberate as such reference was considered as indirectly legitimizing war and inappropriate in a United Nations instrument.

⁶ ICCPR, ECHR, ACHR and 1981 African Charter on Human and Peoples’ Rights (hereafter ACHPR) are reprinted in I. Brownlie and G.S. Goodwin-Gill (eds.), *Basic Documents*, respectively in pp. 182, 398, 671 and 728; ACHPR however does not contain a derogation clause.

⁷ Advisory Opinion of 8 July 1996, reproduced in (1996) 17 *HRLJ* 331, para.25; Human Rights Committee, Concluding Observations : Israel (CCPR/C/79/Add.93 (18/08/1998), para.10

⁸ Advisory Opinion of 9 July 2004, General List No.131 (<http://www.icj-cji.org>).

Derogation of certain human rights does not mean that the states are free to take any measures in derogation of such human rights. Article 4(1) of the ICCPR 'subjects both this very measure of derogation, as well as its material consequences, to a specific regime of safeguards'⁹ similar to Article 15 of the ECHR and Article 27 of the ACHR. Thus, in order to invoke the measure of derogation under these provisions, apart from the fact that the situation of internal armed conflict must be a public emergency threatening the life of the nation, the State must have officially declared a state of emergency. Official proclamation of emergency is a condition precedent for the derogation of human rights, as it is essential that the affected public should know the exact scope of the emergency and its impact on their human rights, to satisfy the principle of legality and rule of law.¹⁰ Without the official declaration of emergency, a state cannot rely on the provision of derogation to take strict measures, notwithstanding the existence of a situation of internal armed conflict.¹¹

The other procedural requirement is the notification of such state of emergency to other state parties through the Secretary-General of the United Nations so as to subject the protection of IDPs during such time to the international monitoring.¹²

The consequences of derogatory measures are limited by the substantive principles, namely, the principle of non-derogability, which requires that certain human rights stated in the derogation clause cannot be derogated even in situations of public emergency threatening the life of the nation,¹³ the principle of proportionality, which requires that any derogatory measures must be strictly proportionate to the exigencies of the situation, the principle of non-discrimination, which requires that derogatory measures must not involve discrimination and the principle of consistency, which requires that the derogatory measures must not be

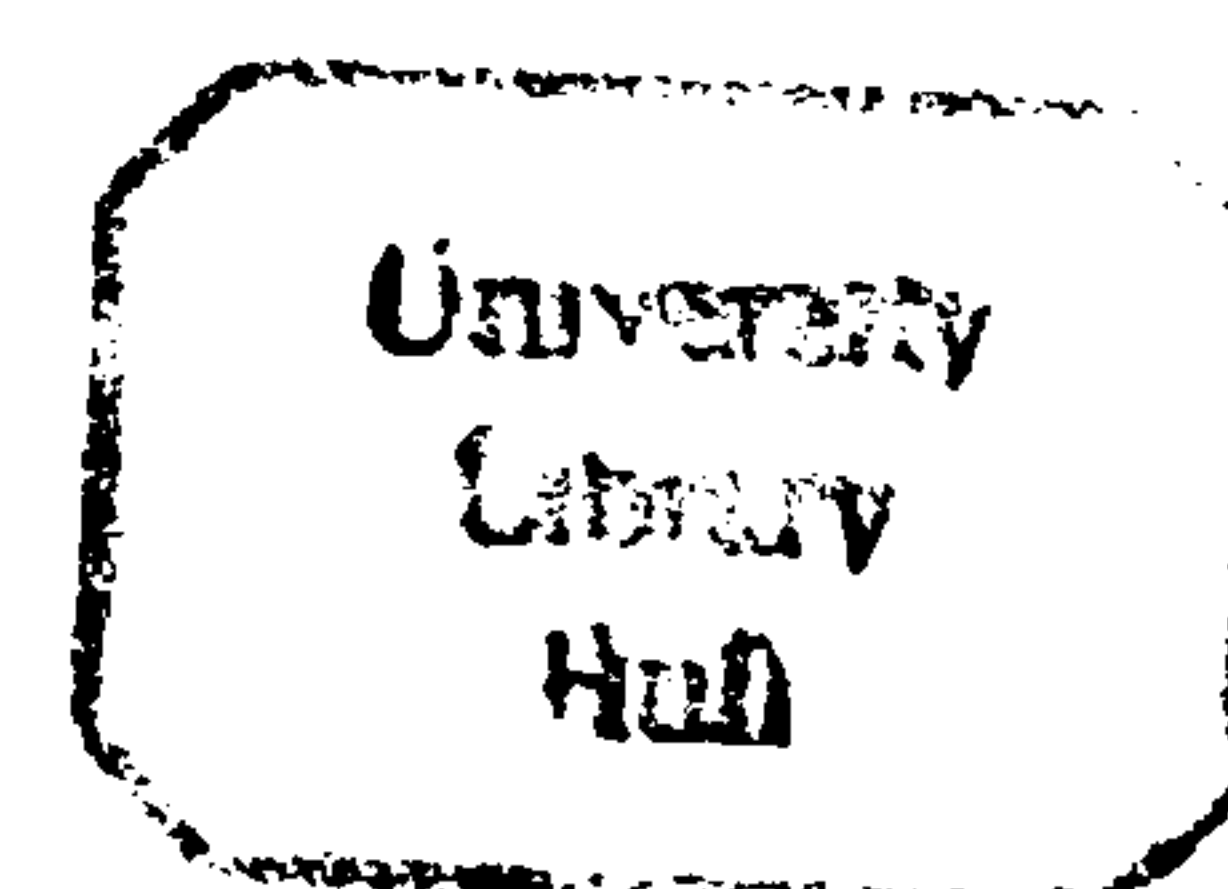
⁹ Human Rights Committee, General Comment No.29, 'States of Emergency' (Article 4) CCPR/C/21/Rev.1/Add.11 (31 August 2001) para.1.

¹⁰ *Ibid.*, para. 2; however, Articles 15 and 27 of the ECHR and ACHR do not explicitly state such a requirement.

¹¹ M. Nowak, *U.N. Covenant*, at p.80; see below Chapter 8, Section 1.

¹² However, non-compliance with this requirement do not affect the validity of the derogatory measures, M.Nowak, *ibid*; *Landinelli Silva et al. v. Uruguay* Communication No.34/1978, CCPR/C/12/D/34/1978 (8 April 1981) para.8.3; Human Rights Committee, General Comment, 'State of Emergency' para.17; J.F.Hartman, 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision' (1985)7 *HRQ*, 89, at p.103.

¹³ Such non-derogable human rights vary in the ICCPR and two other regional human rights instruments i.e., ECHR and ACHR; the ICCPR contains seven rights and the other two respectively contain four and eleven rights.



inconsistent with other international obligations of the state.¹⁴ This fourth principle can include the international humanitarian law and thereby would become an important means for the convergence of both laws. These safeguards not only ensure the legality of the invocation of derogation measures and their consequences but also emphasize the fact of continued application of human rights during internal armed conflicts. Such continued applicability necessitates the interpretation of human rights and humanitarian law norms in the context of each other. Therefore it can be stated generally, that IDPs are protected by human rights law during internal armed conflicts to the extent they are considered as non-derogable and by the derogable norms to the extent that they are safeguarded by the requirements stated in the provisions of derogation.

Unlike international human rights law, which is designed to be operated primarily during times of peace,¹⁵ for the application of international humanitarian law the existence of the factual situation of an internal armed conflict is a pre-condition.¹⁶ Being a *lex specialis* to be applicable during armed conflicts to protect civilians, humanitarian law is not subject to any derogation. Compliance with the latter does not moreover, depend on the requirement of reciprocity, as it imposes unilateral mandatory obligations.¹⁷ Depending on the nature of armed conflict, the extent of the application of humanitarian law varies and so does the protection of IDPs.

Common Article 3 of the 1949 Geneva Conventions requires an 'armed conflict not of an international character' for its application and Additional Protocol II requires a higher criterion than common Article 3 for the existence of a non-international armed conflict and, in turn, for the application of common Article 3 and Additional Protocol II to IDPs.¹⁸

¹⁴ J. Oraa, *Human Rights in States of Emergency in International Law*, (Oxford, 1994) at p.139; Article 15 of the ECHR does not contain the requirement of non-discrimination.

¹⁵ J. Dugard, 'Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders', (1998) No.324 *IRRC* p.445, at p.446; C. Greenwood, in 'Historical Development and Legal Basis', D.Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford, 1995) at p.9.

¹⁶ H. McCoubrey, 'Yugoslavia at War: International Laws of Armed Conflict and the Yugoslav Crisis' (1992) 136 *Solicitors Journal* 914, at p.914; D.Weissbrodt, 'Ways International Organizations Can Improve Their Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict', in E.L. Lutz, H.Hannum & K. J. Burke (eds.), *New Directions in Human Rights* (Philadelphia, 1989) p.63, at p.71

¹⁷ R.E. Vinuesa, 'Interface,' at p. 77.

¹⁸ Common Article 3 to the Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of August 12 1949 ; Geneva Convention II

Internal disturbances are explicitly excluded from the negative definition of armed conflicts in Additional Protocol II.¹⁹ The minimum requirement for the application of the norms of customary international humanitarian law, as stated in the *Tadic case*, is a ‘protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.’²⁰ This authoritative definition of the Appeals Chamber is pertinent for the applicability of common Article 3 because of the latter’s undefined, general nature.²¹

Though the definition of the Appeals Chamber is ‘not particularly helpful in elucidating the level of violence that may be necessary,’²² the references to the protracted duration of armed violence and to the organization of armed groups, however, presuppose the ability of the insurgents to maintain resistance against the adversary and therefore a certain intensity in the armed conflict and also of the organisation of the parties to the conflict.²³ As such it could be stated that exclusion of situations of internal disturbances from the scope of common Article 3 is confirmed.²⁴ Armed conflicts between armed groups, where the government is

for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of August 12 1949; Geneva Convention III Relative to the Treatment of Prisoners of War, of August 12 1949; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, of August 12 1949 (hereafter common Article 3); Article 1(1) of the Protocol Additional to the Geneva Conventions of 12 August 1949, And Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977 (hereafter Additional Protocol II), reprinted in (1977) 16 *ILM* 1442.

¹⁹ Article 1(2) of the Additional Protocol II.

²⁰ *Prosecutor v. Tadic*, Case No.IT-94-I-A272, Appeals Chamber of the ICTY, Decision on the Appeal on jurisdiction, 2 October 1995, para. 70.

²¹ This definition was applied to common Article 3 armed conflict in the *Prosecutor v. Akayesu*, Case No.ICTR-96-4-T, Trial Chamber I International Criminal Tribunal for Rwanda (hereafter ICTR) Judgment of 2 September 1998, para.619.

²² A. McDonald, ‘Introduction to International Humanitarian Law and the Qualification of Armed Conflicts,’ in P.J. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause* (Hague, 1999) p. 79, at p. 92.

²³ See, *Akayesu*, Trial Chamber I para. 620.

²⁴ L. Moir, *Law of Internal Armed Conflict*, at p. 37, n. 20; Article 8 (2)(d) of the ICC Statute explicitly excludes internal disturbances from the scope of common article 3 armed conflicts, the statute of International Criminal Court (here after Statute of the ICC); D. Schindler, ‘The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols’ (1979)II *Recueil des Cours* 117, at pp.146-47; Article 1(2) of the 1996 Amended Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects (hereafter 1996 Amended Protocol II to the 1980 UN CCW) reprinted in A. Roberts and R. Guelff, *Documents on the Laws of War* 3rd ed. (Oxford, 2000); Article 1(2) of the 1980 UN CCW as amended in 21 December 2001; Article 22(2) of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property

disintegrated or is too weak to suppress such conflicts, are also covered by common Article 3 and the customary definition of internal armed conflicts.²⁵

Customary international law as an independent source of law is valuable to overcome the application difficulties in humanitarian treaty law, even if the norms 'belonging to [these] two sources of international law appear identical in content.'²⁶ The application problem of treaty law arises in internal armed conflicts: where the state concerned is not a party to the Geneva Conventions or Additional Protocol II;²⁷ where the state concerned denounces the Geneva Convention;²⁸ where the parties concerned deny the application of Additional Protocol II, on the ground that the armed conflict has not reached the required threshold or existing treaty law does not contain certain rules on conduct of hostilities or the rules it contains are only in skeleton form.²⁹ Moreover, the existence of customary international law is significant to

in the Event of Armed Conflict 1999; for a contrary view, see R. Abi-saab, 'Humanitarian Law and Non-International Armed Conflicts', paper presented at the ICRC-Graduate Institute Training Seminar on International Humanitarian Law for University Teachers, Geneva, 10-15 August 1998, at p. 16; F. Hampson, 'Human Rights and Humanitarian Law in Internal Conflicts', in M.A. Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (London, 1989) p.55, at p.67 argues for an extensive application of common Art.3 on 'humanitarian grounds if no other.'

²⁵ However, Additional Protocol II always necessitates armed forces of a state as one of the parties to the conflict and therefore it is not applicable to conflicts between armed groups, S. S. Junod, 'Commentary on Protocol II' in Y.Sandoz, C.Swinarski, and B.Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva, 1987) 1319, at p.1351; in such situations customary humanitarian law can be resorted to.

²⁶ *Military and Paramilitary Activities in and Against Nicaragua*, (*Nicaragua v.U.S*) ICJ Judgment of 27 June 1986 (Merits) para.178; customary international law is customary practice of states followed with the conviction of legal obligation and thus constituted by two elements namely, the objective one of 'general practice' (*usus*) and the subjective one of 'accepted as law' (*opinio juris*), Article 38(1) of the 1945 Statute of the International Court of Justice.

²⁷ Due to universal acceptance of the Geneva Conventions, the customary nature of common Article 3 would not make much difference to application; however as Additional Protocol II is concerned, some states involved in internal armed conflicts such as Sudan, Sri Lanka, Indonesia and Somalia are not parties to it.

²⁸ By virtue of Article 158 of the Fourth Geneva Convention of 1949 that states, '[i]t [denunciation] shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and dictates of the public conscience.' [emphasis added] The word 'conflict' in this provision is broad enough to include common Article 3, Jean S. Pictet, *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva, 1958) at p.625.

²⁹ Such a situation is referred to in the Martens Clause in para. 4 of the preamble to the Additional Protocol II as, 'in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience.'

establish the individual criminal responsibility of armed opposition groups.³⁰ The existence of customary norms is useful in formulating IDP - specific international human rights standards such as the UN Guiding Principles on Internal Displacement, to overcome the application problems of humanitarian law to provide a common international protection to IDP in internal armed conflicts rather than an *ad hoc* and inadequate protection depending on the application of Common Article 3 or Additional Protocol II to the state concerned.

The 1998 Statute of the International Criminal Court (ICC) can be regarded as a persuasive indication of customary international law for two reasons: due to its adoption by a large number of states and the guiding principle that the crimes within the scope of the Statute of the ICC should be indicative of customary international law.³¹ It was considered that the ICC should have jurisdiction over only those crimes which are universally recognised as such; therefore in order to become a party to the Statute of the ICC, there is no pre-condition that the state party concerned should have already become party to other humanitarian law instruments containing similar substantive norms.³² As such, for the examination of customary humanitarian law, the Statute of the ICC, which declares the law that existed during the negotiations of its adoption, even though it does not necessarily represent the present position of customary law in certain respects, is relevant.³³ To the present position of customary law, the ICRC Study on customary international humanitarian law applicable to internal armed conflict which is more extensive than that in the Statute of the ICC, should be taken into account.³⁴

The consequence of the customary definition of armed conflict as stated in the *Tadic* case and confirmed by the Statute of the ICC is the removal of the

³⁰ T. Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law' (1996) 90 *AJIL* 238, at p.246.

³¹ D. Robinson and H. Von Habel, 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute' (1999) 2 *YIHL* 193, at p.208; L. Moir, *Law of Internal Armed Conflict*, at pp.160-61.

³² D. Robinson and H. Von Habel, *ibid.*

³³ Art.10 of the Statute of the International Criminal Court (hereafter ICC) UN Doc.No.A/CONF.183/9 reproduced in (1998)37 *ILM* 999.

³⁴ Jean-Marie, Henckaerts, and L. Doswald-Beck, *Customary International Humanitarian Law, Volume I : Rules* (Cambridge, 2005); but see for a contrary view W. Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya,' (2005)16 *EJIL* 741, at pp.749-50.

distinction between common Article 3 and Additional Protocol II armed conflicts.³⁵ The reference to protracted armed conflict in ‘other serious violations of the laws and customs’ applicable in internal armed conflict and its omission from the serious violations of common Article 3 in the Statute of the ICC, cannot be subjected to a *contrario* interpretation, because the Appeals Chamber in the *Tadic* case in fact referred to an identical definition only with regard to common Article 3 conflicts.³⁶ Therefore there is no reason whatsoever to differentiate between the situations as they are more or less the same and strictly related.³⁷

The requirement of protracted armed conflict in the Statute of the ICC maintains the less stringent definition of internal armed conflict stated in the *Tadic case*, which eliminates the Additional Protocol II requirements of control of territory and sustained and concerted military operation for the application of certain rules of conduct in hostilities. The low threshold required in terms of duration (implies certain level of intensity) and organisation of armed groups (implies the ability to carry out humanitarian law obligations) for the application of customary humanitarian law³⁸ is a step forward in the protection of IDPs during internal armed conflict, as it removes the difficulties hitherto prevailing in the distinction between the legal application of common Article 3 and Additional Protocol II. It thereby renders an extensive body of substantive norms applicable to an internal armed conflict.

Despite the possibility of concurrent application of international human rights law and humanitarian law in public emergency which is also an internal armed conflict, territorial field of application (*Ratione loci*) of the two regimes are not always the same. An emergency is an exceptional situation or crisis that affects the entire population and either the whole or part of the territory of a state and amounts to a threat to the organized life of

³⁵ L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge, 2002) at p.142; the only difference is that the definition in the Statute of the ICC uses the term armed ‘conflict’ instead of armed ‘violence used in the definition of the Appeals Chamber in *Tadic*.

³⁶ Article 8(2)(c) and (e) of the Statute of the ICC.

³⁷ L. Zegveld, *The Accountability*, at p.142; but see for a contrary view: R. Provost, *International Human Rights and Humanitarian Law*, (Cambridge, 2002) at pp.268-69; L. Condorelli, ‘War Crimes and Internal Conflicts in the Statute of the International Criminal Court’ in M. Politi & G. Nesi (eds.), *The Rome Statute of the International Criminal Court: A Challenge to Impunity* (Ashgate, 2001) p.107, at pp.112-13.

³⁸ L. Moir, *The Law of Internal Armed Conflict*, at p.43.

the community.³⁹ Thus, a state of emergency can be declared in situations that fall short of armed conflicts, such as internal disturbances, natural disasters and public disasters, if they threaten the life of the nation.⁴⁰ Therefore, it seems that public emergency situations need not necessarily be internal armed conflicts.

Likewise, not every internal armed conflict situation is a public emergency situation. This occurs when states decide not to derogate from their human rights obligations, despite the existence of an internal armed conflict.⁴¹ This means that the derogation of human rights norms in times of national emergency under Article 4 of the ICCPR is not automatic but is a conscious act of the state. However, a state cannot declare a state of emergency even in an internal armed conflict, if the situation does not meet the exceptional threat requirement in the provisions for derogation. If a State has not formally declared a public emergency, it cannot then rely on such a situation as a justification for taking measures in derogation of human rights.⁴² The absence of a declaration implies the conclusion of the state authorities that no derogations were necessary in such a conflict situation.⁴³ As will be discussed later, this aspect is an important condition precedent for the convergence of international humanitarian law with human rights norms.

This is in contrast with the application of humanitarian law, which applies regardless of the subjective judgment of the parties to the conflict.⁴⁴ Accordingly, even if a state does not recognise the existence of an internal armed conflict in its territory, a court can decide its existence according to an objective criterion in order to protect civilian victims and in the context of this study to protect displaced

³⁹ *Lawless v. Ireland*, judgment, 1 July 1961, (1979-80) 1EHRR 15, at p.31; *The Greek Case* (1969) 12 *Yearbook of the ECHR* para.153; ‘Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights’, (1985)7 *HRQ* 3, at p.7, Principle 39.

⁴⁰ J. Oraa, *Human Rights*, , at p.33.

⁴¹ El Salvador and Nicaragua lifted the emergency respectively in 1987 and 1988 despite the ongoing armed conflict, Annual Report of the Inter-American Commission on Human Rights 1987-88, Ch.IV OEA/Ser.L/V/II.74, doc.10 rev.1, (16 Sept 1988) [<http://www.cidh.org>]; Russian Federation did not declare a public emergency during internal armed conflict in Chechnya.

⁴² *Cyprus v. Turkey*, Application Nos, 6780/74 and 6950/75, 10 July 1976, (1982) 4 *EHRR* 482, para.527.

⁴³ F.Pocar, ‘Human Rights Under the International Covenant on Civil and Political Rights and Armed Conflicts’ in L.C.Vohrah *et al.*(eds.), *Man’s Inhumanity to Man*, (Hague, 2003) 729, at p.735.

⁴⁴ *Akayesu*, Trial Chamber I, para.603.

civilians and potential IDPs.⁴⁵ Moreover, there are situations where the existence of an internal armed conflict in part of a state's territory does not suffice to trigger a public emergency because it does not threaten the life of the whole nation. In such a situation, IDPs would remain under the protection both of human rights law without derogation, and of the relevant humanitarian law norms. Despite the application of human rights law without any derogation in the above discussed situations, states can resort to laws to restrict the rights of IDPs in terms of limitation clauses. For instance, in the context of an internal armed conflict occurring in the part of a country, a state can enact laws 'to protect national security,' to restrict the movement of IDPs belonging to a minority group to other parts of the country, by imposing severe conditions.⁴⁶ However, it should be noted that even such limitations of human rights are subject to the safeguard of the principle of proportionality.⁴⁷

Conversely, a 'public emergency which threatens the life of the nation' which is also an internal armed conflict situation, can exist concurrently in a part of a state such as in one of its provinces.⁴⁸ In such circumstances, the principle of proportionality which requires that the derogatory measures must be taken only to the extent required by the exigencies of the situation, would limit the geographical extent of the applicability of such measures.⁴⁹ As a result, the IDPs in that part of the territory where armed conflict is taking place and in respect of which a public emergency situation has been declared will be subject to limited protection of the human rights regime, as opposed to civilians displaced to other parts of the country. IDPs who have moved from the area of conflict may be protected by human rights law without derogation, unless a state of emergency is declared in the whole state.⁵⁰

⁴⁵ *Abella v. Argentina* Report No.55/97, Case 11.137, Annual Report 1997 of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.98, doc.6 rev. (13 April 1998) where the Commission decided the situation as an internal armed conflict; but European Court of Human Rights was reluctant in cases involving Turkey and Russian Federation, See below, Ch.8, Section 1; see for a detailed discussion, R.Provost, *International Human Rights*, Ch.7 on 'Legal Effect of Characterisation', at pp.277-342.

⁴⁶ See below, Chapter 5, Section B, 1.

⁴⁷ J.Oraa, *Human Rights*, at p.140.

⁴⁸ T.Buergenthal, 'To Respect and Ensure: State Obligations and Permissible Derogations' in L.Henkin,(ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York,1981) p.72, at p.80.

⁴⁹ Human Rights Committee, 'States of Emergency,' para.4.

⁵⁰ For instance, in Sri Lanka, despite the existence of an armed conflict in the Northern and Eastern parts of the country, a state of public emergency is being declared with respect to the

As far as humanitarian law is concerned, armed conflict even in one part of the territory will render it applicable to the whole territory, regardless of the absence of actual combat activities in other parts.⁵¹ Neither common Article 3 nor Additional Protocol II to the 1949 Geneva Conventions contain an explicit provision regarding their territorial applicability.⁵² However, it could be inferred from common Article 3 and Article 2(1) of Additional Protocol II that the territorial applicability is based on the criterion of ‘persons’ and not on ‘places.’⁵³ This means that the application of Additional Protocol II is based on the persons affected, regardless of whether they are in the narrow area of conflict or in an area which is far way from it.⁵⁴

This was supported by the Appeals Chamber in the *Tadic case*, where it was stated that the humanitarian law is applicable from the beginning of the armed conflict to the cessation of hostilities, until a peaceful settlement is reached.⁵⁵ Until that time, it is applicable to “the whole territory under the control of a party, whether or not actual combat takes place there.”⁵⁶ This clearly indicates that the international humanitarian law norms apply not only even beyond the narrow geographical zone of actual hostilities, but also to the areas within the control of a party to the conflict. Therefore, IDPs have the benefit of the protection of both regimes. Such a broader territorial application is essential; otherwise, those IDPs who have moved from the combat area to relatively safer areas of the country within the control of an adverse party⁵⁷ and are often subjected to discriminatory treatment in the form of torture and extra judicial killings, would not fall within the protection of international

whole state.

⁵¹ *Tadic*, Jurisdiction, para.70.

⁵² *Akayesu*, Trial Chamber I, para.635.

⁵³ S. S.Junod, ‘Commentary on Protocol II’ at p. 1360; common Article 3 is applicable to persons who do not take active part in hostilities ‘at any time and in any place whatsoever;’ *Tadic* Jurisdiction, para.69; Additional Protocol II applies to ‘all persons affected by an armed conflict as defined in Article 1.’

⁵⁴ *Akayesu*, Trial Chamber I, para.635.

⁵⁵ *Tadic*, Jurisdiction, para.70.

⁵⁶ *Ibid.*, para 70; M. Bothe, K. J. Partsch, and W. A.Solf, *New Rules for Victims of Armed Conflicts: Commentary to the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (The Hague, 1982) at p. 630; Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, OEA/Ser.L/V/II.102, Doc, 9 rev.1 (26 February 1999) para.83 (hereafter, *Third Report on Colombia*).

⁵⁷ See *Akayesu*, Trial Chamber I, para.636; IDPs moved as such would be regarded as ‘in the hands of’ or in the power of the party which controls the territory, Jean S. Pictet, *Commentary*, at p.47.

humanitarian law.⁵⁸ The protection is, therefore, extended to actual and potential civilian victims in areas free from combat activities, who are and have been affected by abuse of power for conflict-related reasons, in all phases of their displacement.⁵⁹

This means that human rights law differs from humanitarian law, which applies to the whole territory on the basis of the organised or collective ‘source’ of the conflict, even if it occurs in a part of the territory.⁶⁰ International human rights law, rather, considers the collective ‘effect’ of the emergency on the community as a whole, even as regards the declaration of an emergency in part of a territory.⁶¹ In order to declare a state of emergency which would permit the states to derogate from many rights, the existence of exceptional threat is necessary. Therefore, the thresholds for a state of emergency and an armed conflict ‘remain unconnected, and the conclusion as to one does not necessarily affect the other,’ reflecting the independent nature of the applicability of the two systems.⁶² But whenever the material field of application of human rights law and humanitarian law overlaps, there is a possibility of convergence.

The other difference between humanitarian law and human rights law is in their personal field of application (*Ratione personae*) which is concerned with the issue of responsibility of the parties to the conflict and the protection of victims including IDPs.

As humanitarian law binds both State and armed opposition groups, the protection of IDPs within the control of the parties to the conflict is not problematic. However, human rights law makes the State alone responsible for

⁵⁸Sudanese law differentiated between “squatters” who arrived in the capital, Khartoum mainly due to drought and famine in southern Sudan before 1984 and the war “displaced” civilians, mainly southerners and Nuba, who arrived after 1984, allowing only the former to settle in Khartoum. See Amnesty International, ‘In Search of Safety: the Forcibly Displaced and Human Rights in Africa’, AFR 01/05/97 (20 June 1997); these displaced southern Sudanese were subjected to round ups and other restrictive practices different from others in the city, R.Cohen and F.M.Deng, *Masses in Flight*, at p.28; the minority Tamil IDPs from north or east of Sri Lanka who moved to the capital of Colombo faced such risks including arbitrary arrests and detention, Amnesty International, Canadian Section, ‘Amnesty International’s Concerns With Respect to Tamils Returned to Sri Lanka’, (Ontario: Refugee Coordinators’ Office, 18 May 2000); however, humanitarian law applicable in internal armed conflicts does not protect IDPs from arbitrary arrests and detention but provides only for their humane treatment during detention and due process in criminal proceedings, Common Article 3 and Articles 4, 5 and 6 of Additional Protocol II of 1977.

⁵⁹ See *Prosecutor v. Rutaganda* Case No. ICTR-96-3-T, Judgment, Trial Chamber I of the ICTR (6 December 1999) para.96.

⁶⁰ R. Provost, *International Human Rights*, at p.272.

⁶¹ R. Provost, *ibid*; J. Oraa, *Human Rights*, at p.33.

⁶² R. Provost, *ibid.*, at p. 275.

violations of acts committed by armed forces or by paramilitary groups, with its consent ^{of} its acquiescence. It would also become responsible for the violent activities of individuals against other individuals in internal armed conflicts, such as the forced displacement of IDPs by armed opposition groups or by violent activities of an adverse group of civilians (horizontal effects) if it fails to protect against such acts.⁶³ Such responsibility of states to protect arises due to the obligation to 'ensure respect' for those rights stated in the ICCPR at the horizontal level between individuals.⁶⁴ A state would become responsible for deliberate inaction for the acts of law enforcement officials or paramilitary groups for instance, in racially motivated forced eviction and displacement.⁶⁵ States are obliged to exert due diligence in protecting IDPs from attacks by armed opposition groups as well, but this is subject to the 'availability of means' and the 'foreseeability of harm.'⁶⁶ When IDPs are in territory controlled by armed opposition groups, a state cannot reasonably be expected to exert due diligence due to its factual inability and therefore cannot be responsible in international law for failure to ensure their rights. In such situations, the responsibility for such acts by the armed opposition groups will have to be covered by international humanitarian law to protect IDPs. However non-state entities can also be made criminally responsible for human rights related violations that constitute international crimes, namely, crimes against humanity and genocide.⁶⁷

As such, the protection of international humanitarian law has an important role in internal armed conflict to hold the armed groups responsible for their violations. International humanitarian law is based on international 'public order norms which impose obligations directly on individuals as well as on states and

⁶³ M. Nowak, *U.N. Covenant*, at p.38; Fourth Report of the Special Rapporteur, R.Ago, 'State Responsibility', *Yearbook of the International Law Commission*, Vol. I, 24th Session, 1972, p. 72, at p.126, para.145.

⁶⁴ Human Rights Committee, General Comment 20: 'Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art.7)' 10/03/92 para.2; Human Rights Committee, 'The Nature of the General Legal Obligation', para.8; *Velasquez Rodriguez v. Honduras*, Inter-American Court of Human Rights, Judgment of 29 July 1988, Series C, No.4, para.172; *Osman v. United Kingdom*, Application no. 87/1997/871/1083) Judgment of 28 October 1998, paras.115-116; 155/96 *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, 15th Annual Activity Report of the African Commission on Human and Peoples' Rights, 2001-2002, p. 31, paras.57-58.

⁶⁵ *Dzemajl et al. V. Yugoslavia*, CAT/C/29/D/161/2000 (02/12/2002) para. 9.2.

⁶⁶ See for a detailed discussion L.Zegveld, *The Accountability*, at p.188-196; see below, Chapter 5 Section B, 3.

⁶⁷ Articles 6 and 7 of the Statute of the ICC.

groups,' whilst international human rights law regulates the relationship between the governed and their government, with the objective of protecting individuals from the abuse of state power.⁶⁸ The international public order basis of humanitarian law is reiterated by the imposition of individual obligations on armed forces of both state and non-state parties to the conflict as power-holders in an armed conflict situation. Unlike human rights violations, humanitarian law violations are prosecuted and punished because they exceed the individual interests and affect the collective human interests of human beings.⁶⁹ As human rights violations are concerned with individual interests, the right of action is often given to the victims for the redress of compensation or restoration of the previous situation (*status quo ante*) by the state.⁷⁰ However, since gross or systematic human rights violations affect the collective interests of human beings, opposition armed groups can also be prosecuted and punished for crimes against humanity and genocide in international criminal law. Therefore, any convergence of humanitarian law (including international criminal law) with human rights law would cover the obligations of state parties to the conflict alone in internal armed conflicts.

As far as the persons entitled for the protection of human rights are concerned, human rights law protects the physical integrity and dignity of persons within the jurisdiction of a state in all circumstances, and regardless of their nationality.⁷¹ Therefore, despite the fact that IDPs are not provided with specific protection similar to that of women and children by any international human rights instruments, internally displaced persons by internal armed conflicts who are the nationals of a state are entitled for the general protection of human rights law.⁷²

⁶⁸ R.Provost, *International Human Rights*, at p.98.

⁶⁹ *Ibid.*, at p.104.

⁷⁰ *Ibid.*

⁷¹ C.H.M.Waldock, 'Human Rights in Contemporary International Law and the Significance of the European Convention' (1965) 11 *ICLQ* p.1, at p3; Article 1 of the Universal Declaration of Human Rights, 1948 states that '[a]ll human beings are born free and equal in dignity and rights.'; para 2 of the Preamble to the ACHR; see for its extra-territorial applicability, Mission Report of Special Rapporteur, G.Giacomelli, on *Israel's Violations of Human Rights in the Palestinian Territories Occupied Since 1967*, E/CN.4/S-5/3 (17 October 2000) para.7; however, some human rights are granted only to nationals, e.g., Article 25 of the ICCPR; T. Meron, 'The Humanization' at p.240.

⁷² 1989 Convention on the Rights of the Child (CRC); 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW). Reprinted in I. Brownlie and G.S. Goodwin-Gill (eds.), *Basic Documents*, respectively at pp. 241 and 212.

International humanitarian law applicable in international armed conflicts provides protection to civilians belonging to an adverse party.⁷³ Such application is not significant as regards IDPs in internal armed conflicts, despite the fact that parties to the conflict have common nationality. The very fact of forced displacement itself is sufficient to indicate the discriminatory treatment on ethnic, language and religious or similar grounds practised against one group of civilians, as an adverse party in internal armed conflicts. Such practices are prohibited by common Article 3 and Additional Protocol II which stipulate that the treatment of civilians should be ‘without adverse distinction.’⁷⁴

However, the matter of concern here is the applicability of humanitarian law to IDPs from the ethnic group of a party to a conflict if the former are targeted as collaborators with the adverse party by the latter because of ‘their attitude towards the conflict.’⁷⁵ The preliminary part of subsection (1) of common Article 3 states:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The reference to ‘without adverse distinction’ in the above section of common Article 3 does not ‘qualify the overriding requirement of humane treatment of all persons taking no active part in hostilities, and in particular does not restrict the acts prohibited by that article to acts committed with a discriminatory

⁷³ T.Meron, ‘Human Rights in Time of Peace and in Time of Armed Strife’ at p.10; in international armed conflicts, international humanitarian law is applicable to nationals of enemy state as protected persons. D. Schindler, ‘Human Rights and Humanitarian Law: Interrelationship of the Laws’, (1982)31 *Am.Univ.L.Rev.* at p. 938; see Article 4 of the IV Geneva Convention of 1949; however even in international conflicts, there are exceptions which render the application of some provisions of Geneva Convention IV to all persons within the territory under control of the party to the conflict including its own nationals, Art.13 of Geneva Convention IV of 1949 and Art.75 of Additional Protocol I; also see *Prosecutor v.Delalic, Mucic, Delic and Landzo (Celebici case)* Trial Chamber, IT-96-21-T (16 November 1998) para.266 for the influence of human rights on the concept of ‘protected persons’ in customary law which enabled a flexible interpretation.

⁷⁴ Articles 2(1) and 4 (1) of Additional Protocol II.

⁷⁵ J. Pictet and C.Pilloud, ‘Article 75 –Fundamental Guarantees’ in Y.Sandoz, C.Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva,1987) p. 861, at p.867.

motivation.’⁷⁶ The violations of humane treatment need not be accompanied by discriminatory intent. It is sufficient if there is a serious breach of common Article 3 or Article 4(2) of Additional Protocol II, which protect the important value of humane treatment, and that such breach results in serious consequences for the victims. This reasoning is applicable even to the rules of hostilities. Therefore it is applicable to all ‘affected’ residents within the jurisdiction of a state,⁷⁷ regardless of their position as persons belonging to the same or a different ethnic group of a party to the conflict which commits harmful acts. For instance, killing of civilians belonging to the same ethnic group of an armed opposition group for ideological differences is prohibited in common Article 3 and recruitment of displaced children of their own ethnic group as child soldiers or combatants by the parties to the conflict is prohibited in Additional Protocol II.⁷⁸ Principle of humanity is the basis for such protection extended to civilians in international humanitarian law applicable to internal armed conflicts.⁷⁹

Additional Protocol II provides protection to all those individuals who are not taking part in hostilities at the given time in contrast to those who are taking a direct part in hostilities. Thus, an individual can lose his right to protection of his life by his conduct, i.e., by engaging in hostilities, and not on the basis of his nationality. Similar to human rights law, common Article 3 and Additional Protocol II, although they do not explicitly refer to IDPs, protect them as civilians. Being predominantly civilians, IDPs would be covered by any reference to civilians as persons ‘affected’ by the abuse of power or by conduct of hostilities in armed conflicts, by common Article 3 and Additional Protocol II.⁸⁰

Common Article 3 and Articles 4 to 6 and 7 to 9 of Additional Protocol II protect all ‘persons who do not take a direct part’ in hostilities without specifying the word ‘civilian.’ Undoubtedly IDPs are covered as those who do not take a direct part in hostilities. As humane treatment is offered to all within the

⁷⁶ *Prosecutor v. Aleksovski*, Judgement, Appeals Chamber, IT-95-14/1-A (24 March 2000), para.22; the same reasoning can be extended to Additional Protocol II as it supplements common Article 3.

⁷⁷ S. S.Junod, ‘Commentary on Protocol II’ at p.1359; also see Arts. 1 and 2 of Additional Protocol II.

⁷⁸ Article 3 (1)(a) of the 1949 IV Geneva Convention; Article 4(3)(c) of Additional Protocol II.

⁷⁹ T. Meron, ‘Human Rights in Time of Peace and in Time of Armed Strife’ at p.10.

⁸⁰ Common Article 3; Art.2(1) of Additional Protocol II.

power of the parties to the conflict, without making a distinction between those ‘who had taken part in hostilities and those who had not,’ the concept of civilians is not relevant here.⁸¹ Therefore, both those who do not take part in hostilities and those who have ceased to take part in hostilities (*hors de combat*) are similarly protected as victims.⁸²

‘Civilians’ are referred to and defined in Part IV of Additional Protocol II as those who ‘for such time’ do not ‘take a direct part in hostilities’ in contradistinction to those who do take part in hostilities.⁸³ Accordingly civilians are persons who are not members of armed forces or groups and those who do not take direct part in hostilities.⁸⁴ This means that insurgents who are identifiable as such, even if they are not involved in hostilities at the time, are liable to be attacked as a legitimate military target, as distinguished from civilians.⁸⁵ This fact renders the position of civilians precarious because of the difficulties often involved in distinguishing insurgents and civilians in internal armed conflicts.⁸⁶ Therefore in such circumstances, those persons who are of doubtful identity must not be targeted.⁸⁷ Otherwise the immunity of civilians would be rendered meaningless. As stated by the Inter-American Human Rights Commission, persons whose identity is in doubt can be regarded as ‘legitimate military targets only for such time as they actively participated in the fighting’⁸⁸ ‘Active’ or ‘direct’ participation in the hostilities means, ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.’⁸⁹ Thus, humanitarian law in internal armed conflicts has adopted a pragmatic solution in providing protection to ‘civilians’ according to the actual behaviour of an individual which causes immediate consequences during the conduct of hostilities. This means that those who indirectly help parties to the conflict by

⁸¹ G. Abi-saab, ‘Non-International Armed Conflicts’ in UNESCO, *International Dimensions of Humanitarian Law* (Dordrecht, 1988) p.217, at p.235; S. S. Junod, ‘Commentary on Protocol II’, at p.1359.

⁸² See L. Zegveld, *The Accountability*, at p.61; however *hors de combat* may be subjected to criminal prosecution subject to judicial guarantees for their alleged participation in the conflict against the state.

⁸³ G. Abi-Saab, ‘Non-International Armed Conflicts’ at p.235.

⁸⁴ The term combatant is not mentioned in Additional Protocol II.

⁸⁵ The war crime of treacherous killing or wounding of a combatant adversary in internal armed conflict implies making them legitimate target of attack, Art.8(2)(e) (ix) of the Statute of the ICC

⁸⁶ In particular, when the insurgents stay among civilians without wearing uniforms or bearing arms openly, L. Moir, *The Law of Internal Armed Conflict*, at pp.58-69.

⁸⁷ L. Moir, *ibid.*, at p.59.

⁸⁸ *Third Report on Colombia*, para.189.

⁸⁹ *Prosecutor v. Rutaganda*, Trial Chamber, para.100.

offering information or food would not be regarded as persons taking an 'active' or 'direct' part in hostilities. IDPs are therefore protected as civilians as long as they do not take direct part in hostilities.

Accordingly, humanitarian law is applicable in internal armed conflict to all IDP civilians who are 'affected' by an internal armed conflict, regardless of their ethnicity, religion, language or attributes. This basic human rights approach of humanitarian law in internal armed conflict as a system to be applicable to the nationals of a state without any distinction can be used in the cross-fertilization between these systems. Therefore the mutual convergence between these two systems in the personal field of application can be used as a basis for the improvement of normative protection of IDPs.

Despite the differences between human rights and humanitarian law, due to their similarity and overlap in the material field of application, personal field of application and territorial field of application an interplay could occur between these two regimes at the normative level in three situations in internal armed conflicts. Firstly, in a state of concurrent recognition of both an internal armed conflict and public emergency situation, interplay could occur through the principle of consistency in Article 4(1) of the ICCPR with regard to *derogable* and *non-derogable* norms; secondly, in an internal armed conflict even in the absence of a public emergency situation, interpretation and the reinforcement of *non-derogable* human rights and humanitarian law norms such as right to be free from torture or right to life may be achieved by mutual reference due to the concurrent application of these norms in such situations; thirdly, in an internal armed conflict situation, where a state does not declare a state of emergency but restricts existing human rights on the pretext that such a human right is not recognised or recognised to a lesser extent, convergence of two systems may take place through Article 5(2) of the ICCPR as such limitation would be in compliance with other human rights and humanitarian law obligations of the state party concerned.⁹⁰ However, the latter situation cannot be considered for the purposes of determining the internationally acceptable common criteria for derogable human rights norms as it depends on the domestic incorporation of

⁹⁰ For instance, the right to property; see similar provisions, Article 60 of the ECHR and Article 29(b) of the ACHR.

international humanitarian law by a particular state.⁹¹ Nevertheless its protective value to IDPs in internal armed conflicts of the state concerned should not be underestimated, as any infringement of it can be monitored by international human rights mechanisms.

In the concurrent existence of public emergency and internal armed conflict, an inter-play between these two systems is evident with regard to derogable and non-derogable human rights norms. A state has no discretion in taking derogatory measures inconsistent with its other international obligations, including its humanitarian law obligations, under a treaty law or customary law to regulate internal order and safety under a particular human rights convention such as Article 4 of the ICCPR.⁹² However, such convergence of law is only possible if the state formally declares a public emergency under a relevant human rights convention, in order to derogate from human rights norms.⁹³ In a state of emergency which constitutes an internal armed conflict, the derogable norms under a particular human rights instrument cannot be validly derogated from, if those norms are 'restated in, or otherwise protected by, the applicable humanitarian law.'⁹⁴ Such overlap between substantive norms would improve the lacuna in the definitive criteria for determining the extent of derogation of human rights norms.

As such, in an internal armed conflict, human rights law and humanitarian law can be interpreted in the context of each other. For instance, in human rights law, apart from judicially pronounced execution, to deprive

⁹¹ F.J.Hampson, 'Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts' (1992)31 *Military Law and Law of War Review*119, at pp.126-127; however, Article 53 of the ECHR and Article 29(b) of the ACHR which have the similar effect whether or not such international agreements internally incorporated.

⁹² Human Rights Committee, 'States of Emergency,' para.9; a state cannot derogate from its other human rights obligations under treaties containing similar obligations of the ICCPR, for which it is a party: when such treaties do not contain derogation clauses, e.g, International Covenant on Economic Social and Cultural Rights 1966 (hereafter ICESCR), International Convention on the Elimination of All Forms of Racial Discrimination 1966(hereafter CERD), Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984(hereafter CAT) and CRC 1989, reprinted in I. Brownlie and G.S. Goodwin-Gill (eds.), *Basic Documents*, respectively at pp. 172, 160 and 229; when such treaties have additional non-derogable norms other than that of the ICCPR, e.g., ECHR, ACHR; it cannot also derogate from customary human rights norms of non-derogable nature in addition to those non-derogable norms in the ICCPR such crimes against humanity and genocide; see below for discussion of these and other norms.

⁹³ L.Zegveld, 'Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the *Tablada* Case' (1998) No.324 *IRRC* 505, at p.510 (in the context of Article 27(1) of the ACHR).

⁹⁴ L.Moir, *Law of Internal Armed Conflict*, at p.196.

anyone of life is not generally permitted, whereas in humanitarian law, the killing and injuring of civilians as collateral effects of armed conflict is permitted to the extent that the rules of hostilities are observed. To interpret the arbitrary deprivation of life in human rights law, humanitarian law applicable to internal armed conflicts can be used as *lex specialis*.⁹⁵

However, without a declaration of public emergency or martial law, states cannot claim that their attacks on civilians and civilian objects are carried out in an exceptional situation and therefore the non-derogable right against 'arbitrary deprivation of life' should be interpreted in the light of international humanitarian law.⁹⁶ Moreover, the term 'arbitrary' in the right to life also includes 'non-observance of the procedural condition' in Article 4 of the ICCPR, such as, declaration of state of emergency to warrant the conduct of state in the light of an exceptional emergency instead of normal situation.⁹⁷ Contrary interpretation would result in the deaths of civilians being regarded as not arbitrary and thereby provide justification for such collateral loss of lives under international humanitarian law which otherwise could not be justified under international human rights law. According to Pocar, therefore, the existence of an internal armed conflict is not adequate to render the term 'arbitrary' in the right to life to be interpreted in accordance with humanitarian law.⁹⁸

Declaration of emergency or martial law is necessary in internal armed conflicts in the protection of IDPs to reduce the abuse of power by the state in the adoption of measures of derogation from the derogable rights. However, it is not desirable to insist on such a requirement with regard to the right against arbitrary deprivation of life by ignoring the reality of existence of a high intensity internal armed conflict. In a high intensity armed conflicts state tend to use means and methods of combat in the hostilities. Therefore insisting a declaration of emergency or notification would result to

⁹⁵ Advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*, 1996, ICJ, para.25.

⁹⁶ F.Pocar, 'Human Rights,' at pp.735-36; the states have to provide the details of the relevant facts that warranted the declaration of public emergency to the Human Rights Committee of the ICCPR to conclude that 'valid reasons exist to legitimize a departure from the normal legal regime prescribed by the Covenant,' *Landinelli Silva et al. v. Uruguay*, para.8.3.

⁹⁷ F.Pocar, *ibid.*, at p.735, n.13; such a requirement is not explicitly stated in the ICCPR; but Article 15 of the ECHR explicitly provided for such a requirement.

⁹⁸ F. Pocar, *ibid.*, at p.735.

the detriment of IDPs by excluding the application of more direct rules of international humanitarian law.⁹⁹

Moreover, both regimes can be reinforced through each other to maximise the protection of IDPs, despite the differences between the types of standards therein. The rules of humanitarian law concerning the protection of IDPs are prescribed in the form of standards of treatment to be adhered to by persons holding powerful positions rather than in the form of rights of individuals.¹⁰⁰ This is because the normative framework of humanitarian law emphasizes the role of power holders and therefore individuals cannot assert rights against a state or insurgents. In contrast, human rights law bestows rights on individuals, which are derived from the ‘inherent dignity of the human person’.¹⁰¹ An individual right – holder can assert his rights against a state bound by those norms. Even though this is the position with regard to civil and political rights, where economic, social and cultural rights are concerned such assertion of rights against a state is difficult due to the ‘progressive’ nature of the implementation and to their too general nature.¹⁰²

Whilst humanitarian law as a legal regime is designed to reduce the practical difficulties of civilian population in armed conflict situations and therefore pays equal attention to their needs for both protection and assistance, the obligations stated therein can be used to elaborate the obligations of the state in terms of socio-economic rights as *lex specialis*.¹⁰³ Due attention has to be paid, however, to the non-derogable nature of the rights in the International Covenant on Economic, Social and Cultural Rights of 1966

⁹⁹ See below, Chapter 8, Section B, 1, for the requirement of derogation from right to life in Article 15 (2) of the ECHR which is not present in Article 4 of the ICCPR or Article 27 of ACHR.

¹⁰⁰ R. Provost, *International Human Rights*, at pp.32-33.

¹⁰¹ Paras. 2 of the Preambles to the ICCPR and ICESCR of 1966.

¹⁰² T.C.Van Boven, ‘Distinguishing Criteria of Human Rights’ in K. Vasak, (ed.), *The International Dimensions of Human Rights*, vol.I (Connecticut, 1982) p.43, at pp.51-53.

¹⁰³ See L. Doswald-Beck & S. Vite, ‘International Humanitarian Law’ at pp.107-112; T. Jasudowicz, ‘The Legal Character of Social Rights From the Perspective of International Law as a Whole’ in K.Drzewicki *et al.*, *Social Rights As Human Rights: A European Challenge* (Turku, 1994) p. 23, at pp. 34-39; Committee on ICESCR, General Comment No.15, ‘The Right to Water’ E/C.12/2002/11 (20 January 2003) paras. 21 and 22 and nn. 20 and 21; also see below, Ch. 8, Section A,1, for such an approach by Special Rapporteurs on Socio-economic rights; J. Pejic, ‘The Right to Food in Situations of Armed Conflict: The Legal Framework’ (2001) 83, No.844 *IRRC* 1097.

(hereafter ICESCR), in the manner of application of such rights in internal armed conflicts.¹⁰⁴ Therefore, the *lex specialis* nature of international humanitarian law, in particular, the rules of conduct of hostilities, can be considered for application or elaboration of certain aspects of general standards of socioeconomic rights of IDPs in particular, the obligation of the state to *respect* such rights, in internal armed conflicts.¹⁰⁵

Interpreting socioeconomic rights in the light of humanitarian law norms is important for the coherent and consistent application of international law as a system. However, the humanitarian law rules concerning provision of basic needs to IDPs (if there are any) within the control of the parties to the internal armed conflict can be considered in the identification or reinforcement of minimum obligations only a short term or perhaps medium term, as opposed to long term obligations of a state, due to the broader scope of socio-economic rights than the obligations of former.¹⁰⁶ For instance, Article 12 (1) of the ICESCR recognizes the ‘right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’ States are required to take steps to achieve this right by creating ‘conditions which would assure to all medical service and medical attention in the event of sickness.’¹⁰⁷ Certain obligations with regard to right to health of IDPs who are wounded or sick, or shipwrecked, can be reinforced by reference to international humanitarian law applicable to internal armed conflicts, namely, the right to be protected and to be treated humanely and to receive without delay the medical care and attention required by their condition without any distinction on any grounds other than medical ones, as stated in Article 7 of the Additional Protocol II.

Therefore as stated by the International Court of Justice,¹⁰⁸

¹⁰⁴ As ICESCR contains only a limitation clause in Article 4.

¹⁰⁵ Report of the International Law Commission ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,’ 56 th Session, A/59/10 (2004), para.308; also see Article 31(3) (c) of the Vienna Convention on the Law of Treaties 1969 which considers the principle of *lex specialis* as one of the factors in the consideration of ‘any relevant rules of international law applicable in the relations between the parties’ in the interpretation of treaties that includes customary international law as well.

¹⁰⁶ ‘A rule was never “general” or “special” in the abstract but always in relation to some other rule. ...The adoption of a systemic view was important precisely in order to avoid thinking of *lex specialis* in an overly formal or rigid manner. Its operation was always conditioned by its legal-systemic environment.’ Report of the International Law Commission, Supplement No.10(A/59/10) 2004, para.304; See, below, Ch.5, Section E.

¹⁰⁷ Article 12(2) of the ICESCR.

¹⁰⁸ The ICJ in the *Legal Consequences of the Construction of a Wall in the Occupied*

[m]ore generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

It follows that humanitarian law as a whole cannot be considered as *lex specialis* to human rights law but only with regard to the third possible situation referred to by the Court. A more specific and effective rule of international humanitarian law in relation to the subject matter can therefore be used to interpret the scope of the socio-economic rights as to their specific application in internal armed conflicts but not to replace or restrict the scope. For instance, the prohibition of destruction of civilian objects indispensable for the survival of civilians in international humanitarian law can be considered as a specific obligation to respect of the right to food in internal armed conflicts.

Reinforcement and interpretation of humanitarian law through human rights law would also improve the protection of IDPs in an internal armed conflict. For example, the importance of the obligations stated in Article 7 of Additional Protocol II is fully understandable only by resorting to the right to health as stated in Article 12 of the ICESCR. Similarly, torture is not defined in humanitarian law and therefore can be interpreted by resorting to the definition of torture in the United Nations Convention Against Torture of 1984.¹⁰⁹

The normative convergence of the two systems is beneficial to the implementation of international humanitarian law, through the human rights enforcement mechanisms as alternative methods of enforcement.¹¹⁰ This can

Palestinian Territory, considered international humanitarian law as *lex specialis* to human rights law in the context of ICCPR and ICESCR, para. 107.

¹⁰⁹ *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No: IT-96-23-T & IT-96-23/1-T, Judgment of 22 February 2001, para. 467 the ICTY adopted the definition of torture in Article 1 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT).

¹¹⁰ L.Moir, *Law of Internal Armed Conflict*, at p.197; C. Greenwood, 'International Humanitarian Law (Laws of War) in F. Kalshoven (ed.), *The Centennial of the First International Peace*

occur by using humanitarian law in an indirect way as an authoritative interpretational guide of human rights law. The general criticisms with regard to such use of humanitarian law through human rights law by the human rights mechanisms are that they cannot improve the monitoring of compliance with humanitarian law and it is an 'inadequate way' to attain this objective; and that the one-sided implementation of the humanitarian law, i.e., only with states, would undermine the system of humanitarian law as a whole, by transforming it into a law applicable to states alone.¹¹¹ However, given that there does not exist a separate monitoring body with the competence to receive individual communications, or a reporting procedure for violations of humanitarian law, it is desirable to have the human rights mechanisms to interpret human rights violations in the context of humanitarian law, even if this approach is 'inadequate.' Moreover, the second criticism is an overstatement because the law cannot be transformed into a regime only applicable to states, as humanitarian law would have other enforcement mechanisms such as the ICC or the national courts by the assertion of universal jurisdiction against both parties to an internal armed conflict.

Such application of international humanitarian law through human rights law would be useful firstly, to clarify and determine the normative contents of human rights applicable in internal armed conflicts to IDPs; and secondly, to ensure compliance with humanitarian law applicable in internal armed conflicts in an 'indirect way.'¹¹² This would be beneficial for the protection of IDPs, despite the fact that the human rights mechanisms only have the competence to decide on the violations of human rights.

The above examination indicates that although the two systems are different in many aspects, they are markedly similar in their objective of affording protection to civilians in internal armed conflicts. A normative convergence is

Conference: Reports and Conclusions (Hague, 2000) p.161, at p.240; Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection,' at p.799.

¹¹¹ J.K. Kleffner and L. Zegveld, 'Establishing an Individual Complaints Procedure for Violations of International Humanitarian law' (2000) 3 *YIHL* 384, at p.389; Hans-Joachim Heintze, *ibid.*, at pp.798-99.

¹¹² C. Greenwood, 'International Humanitarian Law, (Laws of War)' at p.240 states that investigating an alleged violation of right to life in internal armed conflicts would thus necessarily result in the investigation of the conduct that involve alleged violation of the laws of armed conflict.

F. J.Hampson, 'Using International Human Rights Machinery', at p.121.

possible between these two regimes when there is an overlap of substantive norms in an internal armed conflict situation. The convergence between them is useful in the protection of IDPs, as they can strengthen each other by filling the gaps in both systems, in particular to improve the human rights standards specific to IDPs. However, this process should not fail to take into consideration the independent existence of each system, which is necessary in providing the benefit of dual protection to IDPs.

Conclusion to Part I

Despite the conceptual similarities between the IDPs and refugees, their international legal protection is different due to the important element of alienation in the legal definition of refugee. This element is an inevitable condition of the present world order which is based on the territorial sovereignty of states.

IDPs are protected by international human rights and humanitarian law. These two regimes mutually converge with each other in personal, material and territorial field of application in internal armed conflicts. Therefore, examination of these regimes as mutually exclusive for the protection of IDPs is not convincing. Because it does not elicit the actual status of the existing protection to IDPs in international law against causes and consequences of displacement.

Part II

Protection From the Causes of Displacement

Introduction

Any analysis of a protection regime for IDPs is obviously concerned with their specific protection needs during displacement. However providing an effective protection to IDPs means that at least they should be protected from forced or otherwise involuntary (by effects of hostilities and other human rights violations as an element of conflict) displacement to reduce or to prevent displacement at the primary level. The ideal way to prevent displacement altogether, whether forced or otherwise involuntary, is the prohibition of the proximate cause of displacement, namely, internal armed conflicts. However, internal armed conflicts are not prohibited by international law, as are international armed conflicts.¹ Therefore, to deal effectively with the problems of displacement, it is axiomatic that the issues that cause displacement in an internal armed conflict must be prevented or minimized by law. The vulnerability of IDPs to physical harm and economic marginalisation during displacement, whether by force or otherwise involuntary, necessitates protection to IDPs during such displacement, which would be palliative in nature as opposed to preventive, as it is not concerned with the causes of displacement, but rather with the needs of the consequences of displacement. Therefore, the task of providing effective protection for civilians as potential IDPs from forced and other involuntary displacement should concentrate on preventing the displacement itself, in addition to dealing with its consequences.

Displacement is a 'cause of harm in itself' not only because it often results in multiple violations of human rights at the point of departure and during displacement, but because if extensively carried out it may amount to genocide or crimes against humanity.² The latter situation arises in conflicts fought on discriminatory grounds, where the displacement is used as a method of combat or as an objective of conflict. For the purposes of identifying protection needs, it is therefore necessary to deal with the causes of displacement. Thus, a

¹ P. Malanczuk(ed.), *Akehurst's, Modern Introduction to International Law*, 7th rev. ed.(London, 1997) at pp.318-19; M.N. Shaw, *International Law*, 4th ed. (Cambridge, 1997) at p.798.

² M. Stavropoulou, 'The Right Not to be Displaced', (1994)9, *American University Journal of International Law and Policy* 689, at pp. 744-45; M. Stavropoulou, 'The Question of a Right not to be Displaced' (1996) 90 *ASIL Proceedings* 549, at pp.553-4; see above, Chapter 1.

distinction must be made with regard to forced displacement and the displacement resulting as a by-product of armed conflicts and human rights violations.

The focus of this part is therefore on the examination of the scope of international human rights and humanitarian treaty and customary law as well as international criminal law concerning the specific protection of conflict induced IDPs from the causes of displacement.

3. Protection Against Arbitrary Displacement

Forced displacement constitutes a multiple violation of human rights because it is carried out on the basis of policies that have the purpose or effect of compelling people to displace from their places of origin or habitual residence against their will and depriving them of their material necessities. For instance, forced eviction constitutes a gross violation of the 'right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to security of the home, the right to security of tenure, the right to food and a variety of additional rights.'¹ Forced displacement or transfer of civilians may be carried out either directly as such or by adopting the use of force or threat of force or measures of inducement and against the will of the civilians subjected to such transfer.

Direct acts of forced displacement can be carried out by various methods: forced eviction or expulsion; evacuation or relocation; and the implantation of settlers. Forced eviction occurs when individual civilians or a group of civilians are subjected to coercive and involuntary removal from their homes, lands and other property and prevented from residing or working in such residence or property or place. Forced evacuation or relocation of civilians occur when civilians are moved to designated sites or camps against their will by a party to the conflict for strategic purposes, such as to have control over them. Implantation of settlers is a discriminatory form of settlement in which civilians who are transferred to a place without their consent become IDPs. If the implanted population receive preferential treatment over those civilians already in such areas, this may lead to discrimination and displacement of the latter.² As such displacements are actively carried out by the state or armed opposition groups, coercion is present in such situations to a greater degree than in other non-deliberate displacement and therefore people do not have the choice or cannot reasonably be expected to stay in such situations. Therefore, such forced displacement itself should be viewed as unlawful and people protected from it.

¹ Resolution of the sub-Commission on Prevention of Discrimination and Protection of Minorities, 1995/29, para.1.

² Report of the Representative, *Legal Aspects Relating to the Protection Against Arbitrary Displacement*, paras.14-15.

Forced displacements can also be carried out by systematic use of force or coercive measures or systematic violations of human rights that have the effect of changing the demographic composition in an area. For instance, by destruction of homes and property belonging to an ethnic group. Here, a policy of the state to systematically displace the civilians on the pretext of armed conflict or in a subtle manner can be presumed.

Even in displacement other than the forced or deliberate type, which occurs as a by-product of an internal armed conflict where civilians are obliged to move as a result of or to avoid the dangers of armed conflict or human rights violations that generally threaten their life, health, liberty and security, such displacement may have consequences that adversely affect the enjoyment of other human rights concerning physical and material protection. Except for the displacement by direct act of the state, in fact it is difficult to distinguish at times whether a displacement is a forced one by indirect means or as a consequence or by-product of armed conflicts. The latter displacement is, however, not compelled by the deliberate interference of the state but by the coercive circumstances.

Therefore it is not the cause of the displacement that has to be addressed specifically in such displacements, but the consequences, such as physical vulnerability and material deprivation during displacement. Addressing the causes of such displacement, however, should focus on the risks that compelled such internal displacement. Protection from such displacement can be provided indirectly by effective legal protection of human rights and humanitarian law norms that protect civilians, civilian objects and their survival from indiscriminate attacks.

As far as forced displacement is concerned, since it directly affects the right of civilians to remain in their places of origin or habitual residence, to address protection from displacement, it is important to examine to what extent forced displacements are prohibited in international law as arbitrary.

A. Forced Displacement *Per se* as a Violation of Human Right

In order to consider whether forced displacement is a violation of human rights in itself, the existence of a right to remain in safety and dignity or a

right against arbitrary displacement is a prerequisite.³ The positive aspect of the right to remain in the place of the choice is recognised in Article 12 of the ICCPR, Article 2 of the Protocol No.4 of the ECHR, Article 22 of the ACHR and Article 12 of the ACHPR on the right to freedom of movement and freedom to choose residence.⁴ The negative aspect of it, namely, the right against arbitrary displacement, can be implicitly derived from the general essence of the freedom of movement and residence.⁵ The Human Rights Committee in its general comment has clearly stated that subject to the restrictions in Article 12(3), the right to reside in a place of one's choice within the territory protects from 'all forms of forced internal displacement' persons or groups lawfully present within a state by virtue of nationality.⁶

However, McFadden argues that the freedom of residence 'is an illusive freedom, and only partially protects a right to stay. A 'freedom to choose' clearly covers the *initial* decision to move to a place, but not so clearly the continuing residence in a place.'⁷ Conversely, Roos agrees with the right to remain in a continued sense, but limits the right to 'residence' in the freedom of movement only to the 'current residence,' which need not necessarily be one's homeland or place of origin.⁸ Homeland or place of habitual residence

³ *Ibid.*, para.4.

⁴ See also Article VIII of the American Declaration of the Rights and Duties of Man, 1948 (hereafter American Declaration); Article 2(1) of the Protocol 4 to the ECHR; Article 22(1) of ACHR; and Article 12(1) of the ACHPR; Article 5 (d)I of the CERD; W. Kalin, 'The Guiding Principles on Internal Displacement- Introduction,' (1998) 10 *IJRL* 557, at p.561; G.J.L.Coles, 'The Human Rights Approach to the Solution of the Refugee Problem : A Theoretical and Practical Enquiry', in A. E. Nash(ed.), *Human Rights and the Protection of Refugees Under International Law*, (Nova Scotia, 1988) p.195, at p.222, n.2; C. Beyani, *Internally Displaced Persons*, at p. 56.

⁵ International Law Association, 'London Conference 2000, Committee on IDPs, Report and Draft Declaration,' *Report of the 69th Conference* London, 2000, p. 833, at pp.801-802; R.Higgins, 'Liberty of Movement within the Territory of a State: The Contribution of the Committee on Human Rights' in Y.Dinstein & M.Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Dordrecht, 1989) 325, at p.336; Resolution of the sub-Commission on Prevention of Discrimination and Protection of Minorities, 'The Right to Freedom of Movement' 1996/9, para. 3.

⁶ Human Rights Committee, 'Freedom of Movement (Art.12)' ICCPR General Comment No.27, CCPR/C/21/Rev.1/Add.9 (02/11/99) para.7; M.Scheinin, 'Forced Displacement and the Covenant on Civil and Political Rights' in A. F. Bayefsky and J.Fitzpatrick, (eds.), *Human Rights and Forced Displacement* (Hague,2000) p.66, at p.67.

⁷ P. M. McFadden, 'The Right to Stay' (1996) 29, *Vanderbilt Journal of Transnational Law* 1, at p.35 (emphasis by the author).

⁸ S.R. Roos, 'The 'Right to Live and Remain in One's Place of Origin': A United Nations' Rhetoric or Internationally Recognized Human Right?-Reflections on the Potential of a Controversial Right to be Universally Recognized,' (2001) 44 *German Yearbook of International Law* 517, at p. p.539.

means ‘a distinct geographical location within the territory of a State.’⁹ The claim of a right to remain in one’s home land or place of origin needs the proof of ‘the time factor and the element of being emotionally rooted in a place of residence.’¹⁰ This distinguishes it from the right to freedom of residence, which simply protects the residence of a person for whatever reason that person chooses to stay in that place.¹¹ Such a broader scope of this right is beneficial as it even protects IDPs from secondary forced displacements from the places to which they have been displaced.¹²

The right to choose one’s residence cannot be narrowly interpreted as referring to an initial decision to choose to stay, as it can clearly include the continuing choice to reside as well.¹³ In its general sense, the right to remain in the residence of choice can apply to a place of origin or homeland as long as the civilians habitually reside in such place at the time of displacement,¹⁴ even though such a right does not specifically protect a right to live and remain in one’s homeland or place of origin as such.¹⁵ For the purposes of protection from internal displacement, residing habitually in a place, regardless of whether it is one’s place of origin or not, is a precedent condition. Only persons uprooted from their home, territory, area or region

⁹Final report of the Special Rapporteur Al-Khasawneh, *Human Rights and Population Transfer*, E./CN,4/Sub.2/1997/23 (27 June 1997) para.13.

¹⁰ S.R.Roos, ‘The Right to Live,’ at p.539.

¹¹ S.R. Roos, *ibid.*, at p.539.

¹² Medecins Sans Frontieres, ‘Escalating Attacks in North Darfur, Sudan, Force Civilians to Flee Repeatedly’ (01.12.2004); repeated displacement makes IDPs extremely vulnerable and provision of humanitarian assistance difficult.

(<http://www.msf.org/msfinternational/invoke.cfm?objectid=Dee91B21-93CA-47B8-A7A...>)

¹³ In *Maria Mejia v. Guatemala*, Case 10.533, Report No.32/96, Inter-American Commission on Human Rights 16 October 1996, OEA/Ser.L/V/II.95, Doc.7rev, (14 March 1997) para. 65 stated that, intimidation to prevent the IDPs to return to their original place of residence is a violation of their right to choose residence.

¹⁴ *Miskitos v. Nicaragua*, Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V.II.62, doc.10 rev. 3, (29 November 1983).

¹⁵ Such a right to remain in one’s place of origin or homeland and to return thereto is articulated as an independent right, not based on the right to remain component of the right to freedom of movement and residence or right to arbitrary interference with home; right to one’s homeland also include right to a nationality and the territorial locus of a population within the state; see generally, S.R. Roos, ‘The Right to Live’ in particular, at pp.536-541; A.de Zayas, ‘The Right to One’s Home Land, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia’ (1995) 6 *Criminal Law Forum* 257, at p.258; Final Report of the Special Rapporteur *Human Rights and Population Transfer*, Annex II Draft Declaration on Population Transfer and the Implantation of Settlers, Article 4 (1) states that, [e]very person has the right to remain in peace, security and dignity in one’s home, or on one’s land and in one’s country.’

would be considered as IDPs. Thus, in its general sense, the right to freedom of movement covers in all its aspects the transfer of population in an area of a particular civilian group, whether by forcible relocation or by implantation of settlers, as these practices infringe upon the people's right to remain.¹⁶ In addition, it covers the more specific form of forced displacement, namely the ethnic cleansing of civilians belonging to an ethnic group, as a direct violation of Article 12.¹⁷

Decided cases with regard to the protection from forced displacement of indigenous people who have special ties with the land indicate that protection of the continued right to remain in homes and habitual places of origin is possible within the freedom of movement and right to choose residence. In the case of *Miskito Indians*, approximately 8,5000 Miskitos in Nicaragua were compulsorily relocated from the Coco River to a settlement in another area. The Inter- American Commission on Human Rights observed that the process of forced relocation is a 'traumatic experience, particularly when it concerns Indian populations with strong ties to their land and homes' and decided that once the military emergency was over, the Miskitos should be permitted to return to Coco River region; otherwise, such a prolonged stay would become discriminatory punishment.¹⁸ The Commission came to this reasoning only within the general sense of the right to remain, when it considered the situation of Miskitos who have close ties to their place of origin. The right to remain was further reiterated in the precautionary measure granted by the Inter-American Commission on Human Rights in the case of *Afro-Colombian Communities in 49 Hamlets in the Naya River* in Colombia to protect the Afro-Colombian Communities from forced displacement, when they were threatened by the United Self-Defence Forces of Colombia (AUC) in an attempt to make them leave the area.¹⁹ Similarly, in the *case of Peace Community of San Jose De*

¹⁶C. Meindersma, 'Legal Issues Surrounding Population Transfers in Conflict Situations' (1994) *XLI Netherlands International Law Review* 31, at p.67.

¹⁷ See Special Decisions by the Human Rights Committee Concerning Reports of Particular States: Bosnia and Herzegovina, Croatia, Yugoslavia. (7/10/93) A/48/40, Annex VII (decision) A. Bosnia and Herzegovina para.1(a); C. Meindersma, *ibid.*, at p.67.

¹⁸ *Miskitos*, para.31.

¹⁹ *Annual Report of the Inter-American Commission on Human Rights 2002*, OEA/Ser.L/V/II.117, Doc.1 rev.1 (7 March 2003) Ch.III, para.21; *515 families of Afro-Colombian descent (2,125), members of the Jiguamiando Basin Community Council. Annual Report of the Inter-American Commission on Human Rights, 2002*, Ch.III, para.45; Article 7(1) of the Turku Abo Declaration of

Apartado and in the case of the *Communities of the Jiguamiando and the Curbarado* in Colombia, the Inter- American Court granted provisional measures to protect the continued stay of the communities which had cultural ties to those lands, without any kind of coercion or threat.²⁰

Except for Article 16 (1) of the Indigenous and Tribal Peoples Convention of 1989, explicit reference to a right against arbitrary displacement is not provided for in any human rights instrument.²¹ However this Convention is not very helpful in the determination of the existence of a general right to remain as it is only applicable to indigenous or tribal peoples.²²

The right to remain can be implicitly derived from the rights concerning home in Article 17 of the ICCPR, which protects against ‘arbitrary or unlawful interference’ with privacy, family and home, Article 11(1) of ICESCR on right to adequate standard of living including housing,²³ Articles 6(2) and 16 of CRC of 1989 on survival and development of the child and right against arbitrary interference with privacy, family and home; and Article 5 (e) (iii) of the CERD on the right to housing without racial discrimination. The right to remain in the ‘home’ in Article 17 of the ICCPR is not restricted as an aspect of privacy, but an explicit protection in its own right.²⁴ Forced eviction from informal settlements is considered by the Human Rights Committee as a violation of Article 17 of the ICCPR and thus emphasizes its right to remain component against forced eviction.²⁵

Minimum Humanitarian Standards, UN Doc.E/CN.4/Sub.2/1991/55 (2 December 1990) reprinted in M. Sassoli and A.A. Bouvier, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva, 1999) 519 ; Resolution of the sub-Commission on Prevention of Discrimination and Protection of Minorities 1995/13 (18 August 1995) para.1, ‘[a]ffirms the right of persons to remain in peace in their own homes, on their own lands and in their own countries.’

²⁰ *Peace Community of San Jose De Apartado*, Order of the Inter-American Court of Human Rights, 18 June 2002, ‘Decides’ section, para.4; *Communities of the Jiguamiando and the Curbarado*, Order of the Inter-American Court of Human Rights, 6 March 2003, paras.1-2, ‘Decides’ section para.3; in the latter case in para.6 of his concurring opinion Judge Cancado Trindade, observed that such measures have already protected the ‘right to circulation and residence of numerous human beings.’

²¹ Article 16(1) states that ‘[s]ubject to the following paragraphs of this Article, the peoples concerned shall not be removed from the land which they occupy.’

²² Article 1(2) states that, ‘[s]elf –identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.’

²³ Articles IX and XI of the American Declaration; Article 8 of the ECHR; Article 11 of the ACHR.

²⁴ F. Volio, ‘Legal Personality, Privacy, and the Family’ in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, 1981) p.185, at p.196.

²⁵ Human Rights Committee, Concluding Observations : Kenya, CCPR/CO/83/Ken (29

The right of everyone to an adequate standard of living for himself and his family, including housing, expressed in the ICESCR, can be interpreted as implying a right to remain, as this is important for the enjoyment of all economic, social and cultural rights. The Committee on ICESCR viewed the right to adequate housing as a 'right to live somewhere in security, peace and dignity.'²⁶ Thus the right to adequate housing in the ICESCR can be violated by forced eviction in internal armed conflicts.²⁷ Similarly, the African Commission has also observed that,²⁸

[a]lthough the right to housing or shelter is not explicitly provided for under the African Charter, the corollary of the combination of the provisions protecting the right to enjoy the best attainable state of mental and physical health, cited under Article 16 above, the right to property, and the protection accorded to the family forbids the wanton destruction of shelter because when housing is destroyed, property, health and family life are adversely affected.

In this regard the Commission has noted that this implicit right to adequate housing protected in the Charter also 'encompasses the right to protection against forced eviction.'²⁹ Moreover, such a right can also be implicitly derived from the right to peaceful enjoyment of property in the CERD, ECHR, ACHR and ACHPR.³⁰ Therefore, *a contrario* interpretation of these rights to housing, privacy, family, survival and property emphasises the right against arbitrary eviction.³¹

It is to be noted however that forced eviction of people from their homes, whether by destruction of homes or otherwise, cannot necessarily be considered forced internal displacement unless such a purpose or effect is indicated by

April 2005) para.22.

²⁶ Committee on ICESCR, General Comment No.4: 'The Right to Adequate Housing (Article 11.1)' (13/12/91) para.7.

²⁷ Committee on ICESCR, General Comment No.7, 'The Right to Adequate Housing (Art.11.1) : Forced Eviction' (20/05.97) para.5; Analytical Report compiled by the Secretary – General on Forced Evictions, E/CN.4/1994/20 (7 December 1993) paras. 73 and 76 state that practice of forced evictions is mainly a serious violation of the right to adequate housing.

²⁸ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, para.60.

²⁹ *Ibid.*, para. 63.

³⁰ Article XXIII of the American Declaration 1948; Article 5(d)(v) of the CERD; Article 1 of the Protocol No. I to the ECHR; Article 21 of the ACHR; Article 14 of the ACHPR.

³¹ Violations of Articles 8 and Article 1 of Protocol No. I to the ECHR,: *Selcuk and Asker v. Turkey*, Application No. 12/1997/769/998-999, Judgment of 24 April 1998, paras.86-87; *Bilgin v. Turkey*, Application No. 23819/94, Judgment of 16 November 2000, paras.108-109.

discriminatory and systematic practice of forced evictions.³² In cases against Turkey the destruction of houses, property and crops of Kurds in South-East Turkey which compelled consequent displacement of civilians from villages was not, however, considered as an act of forced displacement, even though such acts were considered inhumane treatment, violations of private and family life, home and peaceful enjoyment of property.³³ Such acts can be considered as a violation of the right to remain or the right against arbitrary displacement if carried out systematically against a particular ethnic groups in association with other violent acts or threats which might lead from the overall context to a reasonable conclusion of a policy of forced displacement on the part of State. In other words, forced displacement contains elements of movement and coercion which are only present in forced eviction when it is carried out as a systematic practice against a particular ethnic group with other acts of violence or threats.³⁴

Forced eviction may constitute one of the causes or methods of internal displacement. Therefore, the right to remain component in the right to privacy, family and home and the right to adequate housing are necessarily rights against arbitrary eviction or right against homelessness.³⁵ They do not protect persons from arbitrary displacement *per se*, even if the arbitrary eviction in some situations may result in internal displacement. Conversely, forced displacement may affect these two rights, in addition to other rights such as the right to peaceful enjoyment of property. Therefore, the protection against arbitrary

³² Analytical Report compiled by the Secretary – General on Forced Evictions, para.18 states that, ‘not every case of forced eviction leads to internal displacement and not all internally displaced persons are displaced due to the practice of forced evictions.’

³³ In *Akdivar and Others v. Turkey*, 21893/93 (16/09/96), para.81, the European Court of Human Rights Stated that forcible expulsion on the part of security forces was not established in: *Selcuk and Asker v. Turkey*, (24 April 1998) paras. 79, 86, *Dulas v. Turkey* 25801/94, Judgment, (30 January 2001) para.54 and *Altun v. Turkey* Application No.24561/94 (1 June 2004) para.52, as the Court stated that the applicants were *obliged* to leave the village as a result of destruction of their houses; but in *Orhan v. Turkey* Application No.25659/94, Judgment (18 June 2002) para.379, forced evacuation was found by the Court but it was not decided whether such an evacuation *per se* is a violation of Arts. 8 and 1 respectively of European Convention on Human Rights and its Protocol No. I.

³⁴ Analytical Report compiled by the Secretary – General on Forced Evictions, paras.18. Because the practice of forced evictions violates the right to freedom of movement and residence in such situations, Analytical Report, *ibid.*, para.65.

³⁵ Committee on ICESCR, ‘The Right to adequate Housing: Forced Evictions’ para.5; Resolution of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, ‘Forced Eviction’ 1995/29 (24 August 1995) recognises the component of right to remain as the right to a secure place to live in peace and dignity.’

displacement provided by the right to freedom of movement and residence on the one hand by and on the other by the right to adequate housing and the right against arbitrary interference with home is not one and the same, albeit the latter two can provide indirect and preliminary protection against displacement by providing protection against arbitrary eviction.³⁶

A human right is criminalized due to the importance of the ‘social or human interest protected by this right in the common shared values of the international community’ and of the apparent need to protect this right through international criminalization.³⁷ Such international criminalization of the violation of right to freedom of movement and residence has led to claims of crimes against humanity and genocide being invoked against forced displacement.³⁸ The categorisation of persecution (through forced displacement) as a crime against humanity is an explicit recognition of this fact as it is defined as ‘intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.’³⁹

This is further evident from the observations of International Criminal Tribunal for Former Yugoslavia (hereafter ICTY) where the values protected by the prohibitions against forcible displacements were identified. It was stated that the prohibition ‘aims at safeguarding the right and aspiration of individuals to live in their communities and homes without outside interference.’⁴⁰ In *Prosecutor v. Simic, Tadic and Zaric*, the Trial Chamber identified the underlying value protected by the crime against humanity of forcible transfer as the ‘right of the victim to stay in his or her home and community and the right not to be deprived of his or her property by being forcibly displaced to another location.’⁴¹

³⁶ See for such an approach, Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva, 25 January 2005, para.330.

³⁷ M.C.Bassiouni, ‘Enforcing Human Rights,’ at p.349.

³⁸ Provost, *Human Rights*, at p.107; Human Rights Committee, ‘States of Emergency,’ at p.8,n.7; the General Comment of the Human Rights Committee, on ‘States of Emergency’ generally states the connection between crimes against humanity and the violation of corresponding human rights and in particular by illustration the connection with regard to the right to freedom of movement, paras.12,13(d); K. Ambos and S. Wirth, ‘The Current Law of Crimes Against Humanity : An Analysis of UNTAET Regulation 15/2000, (2002)’ 13 *Criminal Law Forum* 1, at p.30.

³⁹ Article 7(2) (g) of the Statute of the ICC.

⁴⁰ *Prosecutor v. Krnojelac*, Case No.IT-97-25-A, Appeals Chamber, Judgement, (17 September 2003) para.218.

⁴¹ *Prosecutor v. Simic, Tadic and Zaric*, Case No.IT-95-9-T, Judgement, (17 October 2003) para.130.

Thus, it is the right to remain which is protected by the prohibition against forcible displacement.⁴²

Though population transfer *per se* is not prohibited as genocide except in Article 6(e) of the Statute of the ICC, and only with regard to forcible transfer of children of the group to another group, the value of the right to remain can be derived from other prohibitions concerning the right to physical existence in the crime of genocide which can be affected by forced displacement.⁴³

That forced displacement is prohibited by international humanitarian treaty and customary law applicable in internal conflicts and prohibited as a war crime in the Statute of the ICC further strengthens the notion of right against arbitrary displacement during internal armed conflicts.⁴⁴ However, the value of this humanitarian law prohibition is of limited help to support the right to remain, as human rights are applicable in peace time and to everyone including armed forces and groups within the jurisdiction of a state, unlike humanitarian law.

The UN Guiding Principles on Internal Displacement and the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons articulate a 'right to be protected against being arbitrarily displaced' from his or her home, or place of habitual residence.⁴⁵ Such a formulation of a right against arbitrary displacement was implicitly derived not only from the right to freedom of movement and residence but also from the right to home and housing.⁴⁶

⁴² *Prosecutor v. Milosevic*, Decision on Motion for Judgment of Acquittal, Case No.IT-02-54-T (16 June 2004) para.69.

⁴³ Y. Dinstein, 'Crimes Against Humanity' in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzysztof Skubiszewski*, (Hague, 1996) 891, at p. 905 observes the link between crimes against humanity and genocide as '[s]ince the crux of the crime of genocide is the extermination or persecution of a civilian population, it can be subsumed under the heading of crimes against humanity. Indeed, genocide may be looked upon as the most paradigmatic crimes against humanity.' See below, Section, C, 1, a.

⁴⁴ Article 17 of the Additional Protocol II.

⁴⁵ Principle 6 of the UN Guiding Principles on Internal Displacement; Principle 5 of the Principles on Housing and Property Restitution for Refugees and Displaced Persons, Final Report of the Special Rapporteur, Paulo Sergio Pinheiro, *Housing and Property Restitution in the Context of Return of Refugees and Internally Displaced Persons*, E/CN.4/Sub.2/2005/17 (28 June 2005) Annex, (endorsed by the Sub-Commission on the Promotion and Protection of Human Rights by resolution 2005/21, E/CN.4/Sub.2/2005/L.II/Add.2 (11 August 2005).

⁴⁶ Report of the Representative, *Legal Aspects Relating to the Protection Against Arbitrary Displacement*, at para. 4 ; M.Stavropoulou, 'The Question of a Right not to be Displaced,' at pp.549-550; W. Kalin, 'The Guiding Principles on Internal Displacement-Introduction,' at p. 561; but the Article 4 of the ILA Declaration on IDPs on the right not to be arbitrarily displaced is based on the freedom of movement and residence. see ILA, *Report of the 69th Conference*, London, 2000, at pp.801-803; the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, in Resolution 1996/9 'The Right to Freedom of Movement' (23 August 1996) where it affirmed the right to remain of IDPs in

Such an articulation of a right is unwarranted as it has been based on rights that protect a different but to some extent related values, namely, the right to be free from forced eviction. Such an approach would weaken the right to freedom of movement and residence which is broad enough to deal with forced displacement from home and habitual place of residence. Therefore a right against arbitrary displacement as *de lege lata* based on the freedom of movement and residence would certainly receive wide recognition to strengthen the protection of persons from forced displacement.

The expression of a right to be ‘protected’ against arbitrary displacement in the UN Guiding Principles is, better one than the ‘right not to be arbitrarily displaced,’ as the former can be interpreted to some extent as emphasizing positive measures to be adopted with regard to arbitrary displacement. The ILA Declaration on Internally Displaced Persons which requires respect for the right not to be arbitrarily displaced to the ‘fullest extent possible in accordance with international law’ cannot be justified, as the right against arbitrary displacement is absolute.⁴⁷ It should be respected without any qualifications.

Explicit provision of a right to remain will have the effect of directly imposing obligations on the state to take positive measures to prevent or to minimize displacement of persons. In a similar vein, Principle 5 of the UN Guiding Principles on Internal Displacement requires all authorities to ‘respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.’⁴⁸ Even though this Principle sets out positive and negative measures to be taken by the authorities in terms of human rights and humanitarian law obligations generally, it is not based on a specific legal obligation concerning displacement. Without an explicit right to remain it does not add anything significantly to the protection of IDPs from displacement but merely restates the obligations already existing in all the human rights and humanitarian law which provides indirect protection from displacement.

terms of the freedom of movement and in Resolution 1998/27 ‘Forced Population Transfer’ (26 August 1998) considered practice of forced population transfer, eviction, relocation, ethnic cleansing and other forms of forced displacement as deprivation of right to freedom movement.

⁴⁷ Article 4(1).

⁴⁸ Principle 5.

Since right to remain is a non-absolute right only against arbitrary displacement, non-arbitrary displacements such as those caused as a by-product of armed conflict are not violations of such a right. Nor does it require to take positive measures to prevent displacement as a by-product of armed conflicts. States are however obliged to ensure the right to remain in safety and dignity by taking positive measures to prevent widespread or systematic violations of human rights that inspire terror among civilians and have the reasonable foreseeable effect of displacement. Deliberate systematic or widespread targeting of civilians (intention to displace is not clear in such situations) is the criterion that distinguishes the latter category from the former since occasional targeting of civilians cannot be considered as violating positive obligations of the right to remain that would lead to displacement.

As such, it can be stated that Article 12(1) of the ICCPR 'is established as an integrated right containing a general principle to which restrictions are the exceptions and not the rule.'⁴⁹ Thus, from this perspective, except for the restrictions justified on grounds stated in Article 12(3) of the ICCPR relevant to the state of emergency in internal armed conflict namely, 'national security' and 'rights and freedoms of others,' any relocation should be based on the consent of the civilians concerned.⁵⁰ Even such restrictions should be provided by law and be 'consistent with the other rights recognized' in the ICCPR, including the right against arbitrary interference with family and home.⁵¹ With regard to derogations from the right to remain during internal armed conflicts, displacements should not be inconsistent with other international

⁴⁹ Progress Report of the Special Rapporteur Awn Shawhat Al-Khasawneh, *The Human Rights Dimensions of Population Transfer Including the Implantation of Settlers*, E/CN.4/Sub.2/1994/18 (30 June 1994), para.36; Human Rights Committee, General Comment No.27, 'Freedom of Movement' para.13; C. Beyani, *Internally Displaced Persons*, at p.56.

⁵⁰ Beyani, *ibid.*, at p.57; Art.16(2) of the 1989 Indigenous and Tribal Peoples Convention; in *Miskitos* case, *Report on the Situation of Human Rights*, Section. Right to Residence and Movement, para.27, n.32, Inter-American Commission referred to the 1952 resolution of Institute of International Law as a general principle of international law which states that '[w]here the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.' This resolution was cited as an authority by C.Beyani, *ibid.*, at p.52 and Progress Report of Special Rapporteur, *The Human Rights Dimensions*, para.25; but J. Oraa, *Human Rights* at p.199 expresses doubts about the relevance of the Inter-American Commission's application of 1952 resolution in the *Miskitos* case as it was concerned with internal transfer and this resolution is concerned with the issue of 'international transfer of populations through agreements between States, and usually linked to situations of war.'

⁵¹ Article 12(3) of the ICCPR.

obligations including human rights, humanitarian law and international criminal law obligations.⁵² Therefore, except for the permitted grounds for restriction or derogation, in the absence of consent for the transfer or displacement on the part of the civilians, such movement could be considered as caused by coercion and thus forced and arbitrary.

The right to remain in safety and dignity should be explicitly stated, in addition to its negative articulation, namely, the right against arbitrary displacement as a component of freedom of movement and residence. This will provide a clear legal basis for stating the formal positive obligations to be adopted by the state and strengthen the value to be protected and thereby avoiding or minimizing conditions that would lead to displacement in situations where such a result is reasonably foreseeable. In other words, such a formulation will provide a legal basis for broader interpretation to protect the value of peoples to remain in their habitual places of residence.⁵³

B. Commentary on the Right to Remain

Those who oppose the right to remain state that ‘it is no more than a consequentialist concern arising from the failure to respect already existing human rights.’⁵⁴ According to this view, civilians flee if they are in danger and if there is no danger there is no need for them to flee; therefore there is no need for a right to ‘prevent them from fleeing’, as that can be achieved by the enforcement of the other rights.⁵⁵ Goodwin-Gill goes further and extends beyond the basic rights of personal security and livelihood to ‘social, cultural and political rights that are part and parcel of community building, stability and community development, including political rights (the right to vote, to stand for election, to participate in government), and perhaps also the entitlement, actual, potential or putative, of

⁵² Article 4 of the ICCPR; see below, Section C.

⁵³ See for similar construction, the right to life in Article 6 of the ICCPR .

⁵⁴ J.C.Hathaway, in Panel Discussion, ‘Forced Movement of Peoples’ (1996) 90 *ASIL Proceedings* 545 at p.562; J. M. Henckaerts, *ibid.*, at p.563, states similarly that, ‘[i]f we enforced all other human rights effectively, we would not have to deal with it. ...The consequence is also illegal and is based on other illegalities.’

⁵⁵ J.Hathaway, *ibid.*

peoples within nation States to a measure of recognition, autonomy or self-government.’⁵⁶

This opposition basically forms part of the reaction against the discourse that concentrates on the protection of internally displaced persons.⁵⁷ On that basis, it is argued that displacement is a symptom of harm and that focus on the protection of IDPs (on the basis of the right to remain) would undermine efforts to address the root causes. According to such opponents, giving prominence to the right to remain would lead to another problem of undermining the right to leave one’s country and the right to seek asylum.⁵⁸ Such criticisms were mainly expressed based on the experience of UN safety zones or safe havens in former Yugoslavia and Rwanda, where IDPs were compelled to stay in unsafe conditions and thereby seeking asylum in a foreign country was delayed by such measures.⁵⁹ For instance, in July 1995 the UN sanctioned safe area of Srebrenica in Bosnia and Herzegovina was subjected to attack and capture by the Bosnian Serb Army. Around 25,000 Bosnian Muslim civilians were transferred across Bosnian - Muslim held territory and the middle-aged Bosnian Muslim men were separated from their families and executed.⁶⁰ According to such opponents, the right to remain has been relied on in the creation of safe havens in Northern Iraq, in Bosnia-Herzegovina and South western Rwanda, only for the purpose of implementing the non- entry policies of Turkey, the European states and Zaire respectively.⁶¹

To deal with the problems of forced displacement under the respective provisions of violated rights in the exclusion of right to remain in safety and dignity could not be an effective method to protect civilians fleeing from systematic human rights violations, given the high degree of coercion involved and

⁵⁶ G. Goodwin-Gill, ‘The Right to Leave, the Right to Return and the Question of a Right to Remain’ in V. Gowlland-Debbas (ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues* (Hague, 1996) p.93, at p.94.

⁵⁷ J. Hathaway, ‘Forced Movement of Peoples,’ at p.562.

⁵⁸ M. Stavropoulou ‘Question of a Right Not to be Displaced’, at p.553; B.S. Chimini, ‘The Incarceration of Victims :Deconstructing Safety Zones’ in N. Al-Nauimi, R. Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (Hague, 1995) p.823, at pp.824-5; see below, Ch.5 section B. 2. for the discussion of safety zones; G. S. Goodwin-Gill, ‘Right to Leave’, at p.102.

⁵⁹ B.S. Chimini, *ibid.*, at p.851.

⁶⁰ *Prosecutor v. Krstic*, Case No.IT-98-33-T, Judgement (02 August 2001) para.1

⁶¹ J.C. Hathaway, and R.A. Neve, ‘Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution – Oriented Protection’ (1997) 10 *Harvard Human Rights Journal* 117, at p.135; B.S. Chimni, ‘Incarceration of Victims’ at pp.835-841 ; B. Frelick, *Safe Havens, Broken Promises*, (1998) http://www.refugees.org/world/articles/safehavens_98.htm.

the ensuing mental suffering and the traumatic conditions. In such instances the other rights merely serve as 'defensive right against encroachments on particular aspects of freedom' and do not guarantee against the loss of one's place of origin by violations of human rights.⁶²

Moreover, people would not be forced to move in the instance of a mere violation of a human right, even if it is a non-derogable one, unless the particular individual were persistently targeted or threatened with such a consequence in an environment of systematic violations of human rights against his or her ethnic group. Likewise, people are not forced to move for violation of every type of human rights as opposed to non-derogable norms, unless there is systematic oppression which makes their lives difficult.

The fact that remaining in safety and dignity is consequential on the adherence to some fundamental human rights does not mean that the forced displacement resulting from the violation of such human rights could be prevented merely by enforcing the violated right, without giving regard to the unlawful or arbitrary consequence. There needs to be a right against arbitrary displacement, to protect the fundamental value to remain in home, land or place of habitual residence which can be invoked by the individuals when it is threatened.⁶³

Moreover, in a forced displacement actively carried out by the government to transfer people to an assigned area or settlement, it is the right to remain or the right against arbitrary displacement that is directly at stake and not other human rights violations.⁶⁴ Hathaway even maintains that it is crucially important to preserve the distinction between the right to remain and the right not to be displaced.⁶⁵ Such a contention is flawed, as the underlying value of the right not to be displaced is the right to remain.

Moreover, the right to remain is not absolute in the sense that the opponents of the right to remain argue. The right to remain is a protection against arbitrary displacement. In that sense, displacements which occur due to the effects of armed conflicts and human rights violations as inherent elements of

⁶² S.R. Roos, 'Right to live' at p.524.

⁶³ M. Stavropoulou 'Question of a Right Not to be Displaced', at p.553.

⁶⁴ Committee on CRC, Concluding Observations: Burundi, CRC/C/15/Add.133 (16 October 2000) para.38 expressed concern at severe violations of right to freedom movement and Residence in the context of the state party's regroupment policy.

⁶⁵ J. Hathaway, 'Forced Movement of Peoples,' at p.562.

violence are not arbitrary.⁶⁶ However, states have positive obligations under the right to remain to specifically take measures against incidents of human rights violations that can be reasonably expected to result in displacement which is different from taking positive measures generally under other human rights provisions.

As discussed earlier in this study, displacement is not only a symptom of harm but a harm in itself in certain situations. The fact that it is a symptom of harm, such as underlying socio-economic problems or minority problems, cannot be a reason why such a problem should not receive legal protection. After all, external displacement of persons protected by refugee law is a symptom of harm that exists in the state of origin. Arguing that if the existing human rights were protected within the state of origin, people would not have to seek asylum is not a satisfactory answer to the problems relating to the protection of refugees. The existence of refugee law is not an answer to all the problems of IDPs, as not all IDPs are in a position to seek asylum and not all of them are protected by the 1951 Refugee Convention. On the other hand, a right to remain in safety and dignity would lend an opportunity to address the causes of displacement. In particular to human rights mechanisms can address the causes of displacement that are in violate right to remain in their impartial analysis of the facts, so that the situation may be remedied accordingly. This would create a sharp awareness and attention to address the problem of displacement effectively.

Any forced displacement, whether internal or external, is a traumatic condition and civilians tend to avoid or delay the most extreme form of displacement, namely, the external one, if there is an alternative safe area. Safety zones as a form of protection for providing personal safety and material assistance may effectively ensure the right to remain and thereby also have the incidental effect of reducing further internal displacement or external displacement to another country.

In fact, declaring a certain part of the territory, such as a village, as a safe area can be seen as an *in situ* protective measure to be taken by the state party to ensure respect for the right to remain in safety and dignity or right

⁶⁶ See below, Section C. 1.

against arbitrary displacement.⁶⁷ This can be useful for both civilians who have not already been displaced and for IDPs from other areas of the territory who seek shelter from shelling and aerial bombardment. But these are unilateral declarations by a state party and are a form of assurance of safety to civilians and IDPs from any attacks in its conduct of hostilities in such areas.

One specific form of such protection is requesting civilians or IDPs to take shelter in a specific place of worship before launching an attack. Whether it provides a genuine protection or not depends on the nature of the conflict. If the state party is the violator of the right to remain by persecutory acts against minorities such declarations cannot be relied on as those IDPs might be used as human shields against military operations. For instance, in the Russian Federation, the village of Katyr-Yurt, declared by the government as a 'safe zone,' was later subjected to indiscriminate attack by Russian federal military forces, which resulted in killing of people, many of whom were IDPs from other districts in Chechnya where fighting was taking place.⁶⁸ However, such declarations can offer genuine protection of the right to remain where the threatened displacement is a by-product of armed conflicts.

Apart from these, humanitarian law provides for protective zones in such as hospital and safety zones that can be 'established by the parties to the conflict, outside the combat zone in order to shelter certain categories of the civilian population, which, owing to their weakness, require special protection (children, old people, expectant mothers, etc.) from long-range weapons, especially from aerial bombardment.'⁶⁹ Such zones can also protect civilians from indirect effects of armed conflicts such as shortage of food, clothing and medicine. The concept of protective zones to reduce the human suffering from the effects of hostilities is only provided in international armed conflicts.⁷⁰ However, the obligations to provide protection and respect for wounded and sick civilians, 'care and aid' for children and the 'general protection' of civilians against dangers arising from military operations, can necessitate the creation of such

⁶⁷ Article 2(1) of the ICCPR; the other protective measure concerning the right to remain is to respect the human rights of the ethnic groups to prevent their displacement.

⁶⁸ *Isayeva v. Russia*, Application No.57950/00, Judgment of 24 February 2005, paras.16, and 19

⁶⁹ Art. 14 of IV Geneva Convention of 1949; J.S. Pictet, *Commentary IV*, at pp.120 and 127.

⁷⁰ Y.Sandoz, 'The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin,' in N. Al-Nauimi & R. Meese (eds.) *International Legal Issues Arising Under the United Nations Decade of International Law* (Hague, 1995) p.899, at p.920.

zones, at least with regard to such vulnerable categories of civilians by the party which has the control over such civilians or which is defending against the attack in non-international armed conflicts.⁷¹ The main features of such protective zones created in terms of humanitarian law are: the consent of the parties involved in the armed conflict; defined parameter of the protective zone; demilitarised nature; temporary nature; and absence of protection by military means.

However, by analogy, in internal armed conflicts such protective zones may be established at the initiation of ICRC and notified to the parties to the conflict.⁷² For instance, to protect the wounded and sick, a combined hospital and safety zone was established in 1990 in the premises of Jaffna hospital and around the hospital (including the hospital compound) under the initiation and protection of the ICRC in northern Sri Lanka. A number of rules applicable to such zones in international armed conflicts by analogy were reiterated, in order to be respected by all parties to the conflict. Such protective zones are not an obstruction of the free movement of IDPs to another part of the state or to seek asylum.

The safe areas created by the United Nations Security Council resolution under Chapter VII in cases of humanitarian necessity when the territorial state is unwilling or unable to provide protection against abuse of human rights⁷³ were proved to be unsafe to IDPs due to their non-consensual formation and militarised activities within those areas.⁷⁴ In such situations, the IDPs within the safe area would be trapped as it would be subject to siege by hostile forces.⁷⁵ It is therefore unlikely that an IDP would be able to exercise the right to freedom of movement in order to move to another part of the state or right to seek asylum.⁷⁶

⁷¹ Articles 7(1), 4(3) and 13(1) of Additional Protocol II.

⁷² See ICRC press release, Delegation in Sri Lanka, Nov, 6 1990; also see M.H. Hoffmann, 'The Application of International Humanitarian Law in Sri Lanka: A compliance Based Case Study on the Rules of War,' (2001)30 *IYHR* 209, at pp.215-16; Common Art.3(3).

⁷³ See generally, S.P. Subedi, 'The Legal Competence of the International Community to Create 'Safe Havens' in 'Zones of Turmoil' ' (1999)12 *Journal of Refugee Studies* 23.

⁷⁴ The northern Iraq safe havens were attacked by Turkey; attacks and massacres of civilians took place in the Srebrinica safe haven in Bosnia; and massacre of civilians occurred in Kibeho safe haven in Rwanda. See generally, B. Frelick, *Safe Havens, Broken Promises*.

⁷⁵ B. Frelick, *ibid*.

⁷⁶ K. Landgren, 'Safety Zones and International Protection: A Dark Grey Area' (1995) 7 *IJRL* 436, at p.456.

Chimni describes the safe havens in the context of Iraq and former Yugoslavia, as ‘a vast prison house in whose confines individuals stay or “voluntarily” go, for it protects them from the outside world. It is a prison because escape into the world “outside” is not a serious possibility;... .’⁷⁷ Though the original purpose of creating the safe areas in Bosnia was the containment of refugee flow to other European countries so as not to facilitate the ethnic cleansing, it turned out unwittingly to have very same outcome. In a situation of persecution and ethnic cleansing which violates the right to remain in safety and dignity, creation of safe areas without consensus of the parties to the conflict is not a feasible method.

This does not mean that in-country protection of IDPs is not possible. Forms of in-country protection closer to protective zones in humanitarian law, like the Open Relief Centres (ORC) in Sri Lanka, which were created in 1990 with the informal agreement of the parties to the conflict and strictly demilitarised, can be useful.⁷⁸ The fact that they were established in an area controlled by both Government and the LTTE discouraged any territorial claims.⁷⁹ The movement of IDPs to and from the centres was not restricted, although their arrival at the ORCs was registered.⁸⁰ The ORC did not compromise the right to seek asylum and provided a ‘relatively safe environment’ to IDPs caught in the conflict who could not avail themselves of the protection of the government or rebels and were practically not in a position to flee as refugees or who wished to stay close to their land and property in a conflict that varies in its intensity.⁸¹

However, it is uncertain whether such ORCs can be repeated in conflicts in other states. The main reasons for their continued existence are that both parties to the conflict are aware of the impact of the international opinion on human rights and civilian casualties; the conflict in Sri Lanka so far cannot be compared to the situations that existed in Rwanda or Bosnia, as in the former

⁷⁷ B. S. Chimni, ‘Incarceration of Victims,’ at p.851; B.S. Chimni, *ibid.*, at p.840 states that, ‘UN peacekeeping forces were ordered to prevent people from fleeing Sarajevo.’

⁷⁸ *UNHCR 's Operational Experience with Internally Displaced Persons*, (Geneva, 1994) para.151; W.D. Clarence, ‘Open Relief Centres: A Pragmatic Approach to Emergency Relief and Monitoring During Conflict in a Country of Origin’ (1991)3 *IJRL* 320, at p.325.

⁷⁹ K. Landgren, ‘Safety Zones’, at p.452.

⁸⁰ *Ibid.*, at pp.452-53.

⁸¹ Nonetheless, after the establishment of ORCs in Sri Lanka, Indian Naval Forces, blockaded the Palk Strait, *UNHCR 's Operational Experience*, 1994, at p.49.

the different communities still live and work together.⁸² Moreover, the ORC was established at the location of an existing Catholic shrine and sanctuary at Madhu, in Mannar island, the identity of which has developed over centuries as a sacred place and a pilgrimage site.⁸³ In addition, the 'small size and the transitory nature' of the safe area also limited its political or military significance.⁸⁴

During 1992, 1993 and 1999, however, even the ORC at Madhu Church premises was subjected to measures amounting to militarization by the armed opposition group, cutting off of food rations to IDPs originated from rebel held areas by the government, and occupation by the military. The IDPs therein were forcibly relocated elsewhere and became the target of attack by both parties to the conflict, resulting in civilian casualties. This indicates the unstable protection offered to IDPs by these safe areas.⁸⁵ As there was no military presence or other enforcement measure against any attack by the government forces or armed opposition group, the IDPs in ORCs cannot ultimately be protected against such attacks.⁸⁶ It can be derived from these experience that any protection provided by safe areas to IDPs would be of a lower quality than asylum.

Safe areas created under humanitarian law provisions by the ICRC or similar to ORCs by the UNHCR may be preferable.⁸⁷ However, in an armed conflict fought on a policy of ethnic cleansing, the creation of safe areas may not be useful as it would further the policies of a party to the conflict. Such a concentration of IDPs in one place would facilitate ethnic cleansing and the use of IDPs as human shields, as opposed to its protective purposes. For instance, Human Rights Watch warned that the plan to create 'safe areas' in Darfur concluded between the United Nations special envoy and the Sudanese government on August 5, 2004, for displaced and resident civilians, may

⁸² K. Landgren, 'Safety Zones' at p.453.

⁸³ *UNHCR's Operational Experience*, para.152; J.Hyndman, 'Preventive, Palliative, or Punitive? Safe Spaces in Bosnia- Herzegovina, Somalia, and Sri Lanka' (2003)16 *Journal of Refugee Studies* 167, at p.180.

⁸⁴ J. Hyndman, *ibid.*, at p.181; K. Landgren, 'Safety Zones,' at p.452.

⁸⁵ J.Hyndman, *ibid.* , at pp.180-81.

⁸⁶ K. Landgren, 'Safety Zones' at p.453.

⁸⁷ J. Hyndman, 'Preventive, Palliative, or Punitive?' at p.182 states that 'every effort to develop appropriate measures that have the consent of the warring parties should be made, leaving the UN Security Council as the last and least desirable venue for decisions on the establishment of safe space. The Security Council has always been a venue for the debate and negotiation of state security; the protection of internally displaced persons is a secondary consideration in this context.'

consolidate ethnic cleansing that has already taken place in Darfur.⁸⁸ According to the terms of agreement, the Sudanese government would identify the sites of safe areas and Sudanese security forces would protect the IDPs in such areas. Since the forced displacement of these people was perpetrated by the very same forces, and in the light of the previous practice of 'peace villages' in the Nuba Mountains in Southern Sudan by the Sudanese government where IDPs are forcibly confined and abused, as well as the government policy of resettling nomads in the lands left by the IDPs from Darfur, such an effort of 'forced resettlement or consolidation of ethnic cleansing' in the name of 'safe areas' was objected to by Human Rights Watch.⁸⁹ Therefore, creation of safe areas should be on a case by case basis according to the needs of the IDPs and the nature of the conflict. It should also be based on the consensus of the parties and strictly demilitarised.

In-country protection by the creation of safe havens can be useful in the situation of civilians fleeing from the general effects of armed conflict, as their vulnerability to attack may be less than in the situations of persecution. If civilians fleeing persecution in an ethnic cleansing situation are required to take shelter first in safety zones, may amount to denial of the right to leave their country and seek asylum in a foreign country.⁹⁰ Different forms of safe havens such as less formalised Open Relief Centres operated by the UNHCR in Sri Lanka illustrate the situation where IDPs on the move can 'freely enter or leave and obtain essential relief assistance in a relatively safe environment.'⁹¹

In this sense, it cannot be stated that emphasizing the right to remain excludes or substitutes the right to seek and enjoy asylum or freedom of movement, since the right to remain can still be ensured by different forms of in-country protection without compromising the right to seek asylum. Here they have

⁸⁸ Human Rights Watch, 'Darfur: U.N 'Safe Areas' Offer No Real Security : U.N Security Council Should Reject Plan that Would Undermine Return of Civilians' (1 September 2004) (http://hrw.org/english/docs/2004/09/01/darfur9286_txt.htm).

⁸⁹ It lacked the consent of the armed opposition group and the duration was not specified.

⁹⁰ L. Franco, 'An Examination of Safety Zones for Internally Displaced Persons as a Contribution Toward Prevention and Solution of Refugee Problems', in N. Al-Nauimi, R.Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (Hague,1995) p. 871, at p.883.

⁹¹ W.D.Clarance, 'Open Relief Centres', at p.325; B. Clarence, 'Protective Structure, Strategy and Tactics: International Protection in Ethnic Conflicts' (1993)5, *IJRL* 585, at pp. 589-590 states that, 'the open nature of the centre meant that the surrounding population could seek safety there whenever they felt threatened, and leave when the situation improved.'

the choice to exercise their right to remain in safety and dignity, along with their freedom of movement elsewhere within or out of the country.

The right to remain cannot be ensured at the expense of IDPs safety and dignity by denying the other aspects of the right to freedom of movement such as right to move freely within the country or to leave the country to seek such safety. As the human rights are derived from the attributes of the human personality, whether to seek in-country protection such as in safe havens and to remain in the country of origin or to seek asylum is a matter to be decided ultimately by the IDPs themselves. The decision cannot be imposed on them by the state, or by the international community, at the cost of the danger to their lives. Such practices of containment without protection is an abuse of the obligation of the states imposed by the objectives of refugee and human rights law to not to frustrate the exercise of the right to leave to seek and to enjoy asylum.⁹²

Criticisms of the right to remain as a reason for creation of safe areas and thereby denying the right to seek asylum is based on misconception of the scope of the right to remain, due to the failure to delineate the aspects related to it. The freedom of movement and residence from which the right to remain in safety and dignity is derived also guarantees 'against compulsory residence in an area designated by the State.'⁹³ The integrated effect of the right to residence and the freedom of movement implies the right to remain in safety and dignity and, in the absence of safety in a place, subject to the restrictions in Article 12(3), the freedom to move to a safer place within the territory. This would provide protection against IDPs being prevented from moving to another safer part of the state, in particular by keeping them within a safe area or safe havens created to protect them from abuses of human rights and effects of armed conflicts.

This right to free movement can concern the initial movement to become internally displaced, or secondary movement during a displaced situation, for further protection. For instance, safe areas can either be established in places

⁹² Guy S. Goodwin-Gill, 'Right to Leave' at p.99; also see below, Ch. 5, Section B. 2.

⁹³ R. Higgins, 'Liberty of Movement' at p.336; see Human Rights Committee, 'Freedom of Movement, para.5; Principle 9.1 of the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons states '[n]o one shall be arbitrarily or unlawfully forced to remain within a certain territory, area or region.'

where the civilians have not yet become IDPs or in areas where they have become IDPs or where such a declaration would attract IDPs to such areas.⁹⁴

Creation of UN safe areas as a measure to contain the IDPs affected by persecution and other human rights violations and therefore endeavour to seek asylum is incompatible with refugee law and human rights law as it creates a threat to the well established principles of the right to seek asylum and freedom of movement.⁹⁵ Restricting the movement of IDPs already affected by ethnic cleansing and other human rights violations by creating safe areas ‘may lead to the forcible transfer of population to the zone’ and therefore is a violation of the right to freedom of movement of IDPs.⁹⁶ Therefore, creation of safe areas should not be regulated as a method of protection to IDPs, as stated explicitly in the ILA Declaration of the International Law Principles on Internally Displaced Persons, but may be established on an *ad hoc* basis according to the needs of the situation on the ground.⁹⁷

C. Derogations

Given the fact of the non-absolute and derogable nature of the right to remain as derived from the freedom of movement and residence, an articulation of a right against arbitrary displacement from a person’s home or place of habitual residence is important. Equally important is to determine the extent of derogation from this right. This can be done by identifying specific instances of arbitrary displacement that violates the right against arbitrary displacement.

Arbitrary interference contains ‘elements of inappropriateness, injustice, lack of predictability and due process of law.’⁹⁸ Unlawful interference means

⁹⁴ A different form of restriction of internal movement occurs if either party to the conflict besieges the community of civilians in their places of habitual residence; for instance, in Columbia, civilians in La Gabarra zone were besieged and prevented from fleeing by paramilitaries and guerrilla groups to use them to cultivate coca, Global IDP Survey, ‘Besieged and Embargoed Communities Trapped in War and Hunger (2005),’ www.idpproject.org ; moreover civilians in Columbia, in particular, indigenous and Afro-Colombian people are forced to stay in their places for to be used as human shields, military purposes, Project Counselling Service, (PCS) Internal, *Confined Communities in Columbia* (29 November 2004) at p.3.

⁹⁵ B.S. Chimni, ‘Incarceration of Victims’ at p.832.

⁹⁶ *Ibid.*, at p. 832.

⁹⁷ Principle 14(3) of the ILA Declaration on IDPs states, that, ‘Safe areas may be established where appropriate.’

⁹⁸ *Gorji-Dinka v. Cameroon*, CCPR/C/83/D/1134/2002 (10 May 2005) para.5.1; M. Nowak, *U.N. Covenant*, at p.292.

interference on grounds not permitted by national or international law.⁹⁹ Arbitrary interference with a right is not to be considered as the same as unlawful interference, as the former is broader and includes the latter as well.¹⁰⁰ Therefore interference provided by the law which is not in compliance with the provisions, aim and objectives of the ICCPR and not reasonable in specific circumstances is arbitrary.¹⁰¹ In other words, regardless of the lawfulness of the measure, it should be reasonable (proportionate) and necessary to the purpose to be achieved.¹⁰²

As such, even a displacement carried out on legal grounds can become arbitrary if it is carried out in a manner far worse than necessary, such as without providing necessary survival needs.¹⁰³ However, except for those interferences that are prohibited in international law as forced displacements, the instances that constitute arbitrary displacement cannot be explicitly stated for the reason that ‘arbitrarily’ ‘aims at the specific circumstances of an individual case and their reasonableness (proportionality), making it difficult to comprehend in *abstracto*.’¹⁰⁴ It is therefore appropriate to adopt the term arbitrary rather than unlawful to define the circumstances in which the legality of displacement is affected.

Therefore the grounds of legitimate derogation and a clear delineation of the extent of obligations of the State party for the protection of IDPs against arbitrary displacement must be derived from the requirements of the derogation clause in Article 4 (1) of the ICCPR.

1. Legality of Displacement

To begin with, ‘[a]ny form of forced population transfer from a chosen place of residence, whether by displacement, settlement,... or evacuation, directly affects the enjoyment or exercise of the right to free movement and choice of residence

⁹⁹ C. Meindersma, ‘Legal Issues Surrounding Population Transfers’ at p.81, points out, that ‘[a]lthough most population transfers violate established principles of fundamental rights, no single legal instrument currently exists prohibiting population transfer in its various forms.’ But see the UN Guiding principles on Internal Displacement, Principle 6(1),(2)(a),(b)(e).

¹⁰⁰ *Gorji-Dinka v. Cameroon*, para.5.1.

¹⁰¹ Human Rights Committee, General Comment No.16, ‘The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art.17) ’ (08/04/88) para.4.

¹⁰² M. Nowak, *U.N. Covenant*, at pp.292-93.

¹⁰³ K. Ambos and S. Wirth, ‘The Current Law of Crimes Against Humanity’ at p.60.

¹⁰⁴ M. Nowak, *U.N. Covenant*, at p.111.

within states'¹⁰⁵ However, what constitutes forced movement, or in other words the legitimate grounds for derogation from freedom of movement and residence, can be derived by reference to the principle of consistency in Article 4 of the ICCPR, which in turn refers to the human rights and humanitarian standards that are part of customary norms or peremptory norms. Such norms are useful in identifying the grounds of legality of a displacement as they are binding on all states regardless of their treaty obligations and non-derogable even in times of internal armed conflict.¹⁰⁶

Forced displacement is an involuntary displacement carried out for reasons not permitted under international law with the intention of permanently displacing the civilians.¹⁰⁷ Forced displacement is generally carried out by the policies which have the purpose or the effect of altering demographic composition. Thus for the purposes of the right to remain or right not to be arbitrarily displaced, forced displacement means forced removal of the ' persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.'¹⁰⁸ If the displacement is not based on the grounds permitted in international law, the legality of such displacement can be determined from the voluntary nature of the movement. If the movement is based on the individual's free will to leave, then it is lawful. This means that if a genuine choice exists for the person concerned as to whether to stay or not, such movement is voluntary.¹⁰⁹

Another difficulty arises in certain situations due to the passive role of the state, when considering whether the displacement is a forced one or otherwise involuntary as result of violence as an element of conflict. In situations where State may tolerate or condone the displacement policies then it may be difficult to determine its involvement. For instance, toleration of 'threatening and intimidating acts that are calculated to deprive the civilian population of exercising its free will, such as the shelling of civilian objects,

¹⁰⁵ Progress Report of the Special Rapporteur, *The Human Rights Dimensions*, 30 June 1994, para.37.

¹⁰⁶ See Report of the Representative, *Legal Aspects Relating to the Protection Against Arbitrary Displacement*, para.4.

¹⁰⁷ *Simic, Tadic and Zaric*, para.134.

¹⁰⁸ Article 7 (2)(d) of the Statute of the ICC.

¹⁰⁹ Report of the Representative, *Legal Aspects Relating to the Protection Against Arbitrary Displacement*, para.3.

the burning of civilian property, and the commission of—or the threat to commit—other crimes “calculated to terrify the population and make them flee the area with no hope of return”¹¹⁰ by its armed forces, paramilitary or other armed elements. Such acts would make a person’s real choice to remain not possible due to adverse effects and consequences for the enjoyment of human rights and prompt the civilian to flee. These effects and consequences can be sufficient to determine the illegality of the displacement and the obligations of the State concerned with regard to those persons displaced in circumstances where the role of the state with regard to displacement is not clear.¹¹¹ In sum, either the state must have actively caused the displacement of civilians or have tolerated such policies and that displacement is a ‘reasonably foreseeable’ consequence.¹¹² In either situation, forced displacement is a deliberate act or inaction of the state.¹¹³

In *Vaca v. Colombia*, the author was forced into exile to another country due to numerous instances of harassment, death threats, some of which were from the military and police authority, harassment with phone calls and messages telling him to leave the area, attempts on his life by agents of the State and the failure of the state to ensure his personal safety despite repeated complaints.¹¹⁴ Attempted murder left the author with permanent damage to his body. The Human Rights Committee considered that since there had been violation of the right to security of the person under Article 9 of the ICCPR and no effective remedies were in place, the State had failed to ensure his right to remain under Article 12(1) of the ICCPR and thereby violated this provision.¹¹⁵ In this case, although the Committee noted the argument of the State that the right to remain is indirectly affected by other violent acts, the specific threat to the personal security of the author and the lack of effective remedies led the Committee to come to this

¹¹⁰ *Simic, Tadic and Zaric*, para.126.

¹¹¹ Report of the Representative, *Legal Aspects Relating to the Protection Against Arbitrary Displacement*, para.5.

¹¹² See *Prosecutor v. Milosevic*, para.78.

¹¹³ See *ibid*; see below, Section, C. 1. a for policy of tolerance that constitutes crimes against humanity.

¹¹⁴ *Vaca v. Colombia*, CCPR/C/74/D/859/1999 (15 April 2002) paras.2.5, 3.4 and 7.3; *Maria Mejia v. Guatemala*, paras.64-65.

¹¹⁵ *Vaca v. Colombia*, para.7.4.

conclusion on the basis of the failure of the State to adhere to its positive obligations.¹¹⁶

Here, the author had been repeatedly targeted and not randomly, like any other civilians in internal armed conflicts. Moreover he was threatened to leave the area. No action was taken to investigate or to prosecute the state officials involved. The effects of such acts of state officials objectively point to the conclusion that displacement was the reasonably foreseeable consequence of the same, in the light of the professional activities of the author, including his membership of various commissions set up by the government to resolve violence in the region.

Conversely, in a case against El Salvador, the author was subjected to arrest, torture, interrogation threats and imprisonment and specifically threatened with disappearance if he returned home. These reasons forced the author to move from his home town. After his departure, his house was broken into and searched.¹¹⁷ The Inter-American Commission on Human Rights decided that there had been a violation *inter alia.*, of Article 22 of the ACHR on freedom of movement. In this case, the intention of the state authorities to displace the author by threat was clearly discerned.¹¹⁸

Thus, the above cases indicate that whenever persons are targeted with actual violations or threats of violations of human rights in a systematic manner coupled with the threats to displace, the intention to displace can be objectively derived from such acts. Failure to refrain from such acts against civilians or to repress or prevent such acts will result in violation of right against arbitrary displacement. In such circumstances, displacement can be regarded as a violation of Article 12(1) of the ICCPR, due to the failure of the state to *respect* or *ensure respect* the freedom of movement and residence. Failure to take positive repressive as well as preventive measures to 'ensure the necessary conditions for unimpeded enjoyment' of the right to remain under

¹¹⁶ *Ibid.*

¹¹⁷ Report No.5/94, Case 10.574 (1 February 1994) Annual Report of the Inter-American Commission on Human Rights 1993, OEA/Ser.L/V.85, Doc.9 rev. (11 February 1994) para.1.

¹¹⁸ *Ibid.*, 'Conclusions' Section, para.3.

Article 12(1) would be a violation of the same in conjunction with Articles 2(1) and (2) of the ICCPR.¹¹⁹

Forced displacement by the deliberate action or inaction of the authorities of a state has to be distinguished from displacement by non-intentional actions of the authorities.¹²⁰ There may be displacement in any armed conflict due to collateral effects of armed conflicts and general human rights violations as a constituent aspect of violence. Such a situation can be explained as an inevitable consequence of an armed conflict, as without abolishing the internal armed conflicts in international law, it is difficult to avoid displacement altogether. Such displacement, although involuntary and coercive (but to a lesser degree than in the forced displacement) is not a violation of the right against arbitrary displacement. As such instances are not based on persecution and targeting to displace the civilians, they do not involve the element of coercion which is unlawful. The state is not actively involved in the displacement of civilians but the choice of civilians to remain is reduced and there is a possibility of their return to their homes once the intensity of the conflict has decreased. Thus, such displacements cannot be regarded as engaging the obligation of the state under Article 12(1) of the ICCPR. However, terror tactics by systematic targeting of civilians that would lead to displacement even without the intention to displace can violate the right to remain for failure to take positive obligations to prevent displacement.¹²¹ Therefore whenever it is difficult to discern whether a displacement is due to the deliberate inaction of the state to prevent the acts calculated to displace the civilians so as to constitute a violation of right against arbitrary displacement, the positive obligations of the right to remain may be engaged if the displacement of civilians is the reasonably foreseeable outcome.

Against this background, it is pertinent to discuss the legality of forced displacement. Since the right to remain in safety and dignity or right against arbitrary displacement aspect of freedom of movement is a general principle or rule, any permissible transfers of civilians should be seen as an exception and

¹¹⁹M. Nowak, *UN Covenant*, at pp.55-56; Art.2(2) of the ICCPR provides for 'legislative or other measures' to give effect to the rights; see for similar obligations: Articles 1 of the ECHR, 1 of the ACHR and 1 of the ACHPR.

¹²⁰ G.J.L.Coles, 'The Human Rights Approach,' at p. 198.

¹²¹ See above, section, A

therefore should be narrowly construed. Even in an internal armed conflict where a state of emergency has not been declared, carrying out such exceptional measures of transfer or relocation made on the ground of 'national security,' should be in accordance with the requirements of necessity and proportionality.

As far as the principle of consistency is concerned, Art 17(1) of Additional Protocol II permits relocation or transfer of civilians only on the grounds of imperative military necessity and for their own protection. Any internal displacement other than for these two purposes in internal armed conflicts cannot be justifiable in terms of Article 4 *vis-a-vis* Article 12 of the ICCPR on the right to remain.¹²² However, the practical problem with this is that in internal armed conflicts, any forcible displacement may be justified on the basis of military necessity or for the safety of civilians. For instance, the regroupment policy as implemented in Burundi in 1999 by the Tutsi-dominated government against Hutu civilians was claimed by the government to be a security measure for the protection of civilians from attack by Hutu armed opposition groups.¹²³ However, it seems to have had the purpose of exercising greater control over a 'suspect population.'¹²⁴ Relocation of civilians for the latter purpose by singling out an ethnic group cannot, however, be justified.

Even if the regroupment was justifiable within Article 17 (1) of Additional Protocol II, such a measure should only be a temporary one.¹²⁵ This is because Article 4 (1) of the ICCPR stipulates that such measures should be proportionate to the aim pursued and therefore they cannot last beyond the necessity of such an aim.¹²⁶ Moreover, collective punishment of civilians for their perceived support for insurgents is a violation of the right against arbitrary displacement, since it does not fall within the two purposes permitted by Article 17 of Additional Protocol II. In addition, such a punitive displacement is explicitly prohibited by Article 4 (2) (b) of Additional Protocol II and customary

¹²² See below, Section E.

¹²³ Amnesty International, 'Conditions in "Regroupment" (Forced Relocation) Camps: Burundi,' AI Index: AFR 16/13/00 (29 June 2000) at p.1; Report of the Representative of the Secretary-General, *Profiles in Displacement: Forced Relocation in Burundi*, E/CN.4/2001/5/Add.1 (6 March 2000) paras.11-12.

¹²⁴ Amnesty International, *Ibid.*

¹²⁵ Report of the Representative, *Profiles in Displacement: Burundi*, para.14

¹²⁶ See below, Section, C. 1.b. for the application of the principle of proportionality.

international humanitarian law and may also constitute torture, cruel or inhuman and degrading treatment it is therefore an unlawful displacement in terms of human rights law.¹²⁷

Similarly, the Human Rights Committee observed in its general Comment on Article 4 of the ICCPR that crimes against humanity which must not be committed at any time can also be used as a criterion to decide the legitimate scope of derogation of human rights, including the right to freedom of movement and residence.¹²⁸ A displacement carried out by a State is unlawful if the purpose or effect of such displacement constitutes a crime against humanity.¹²⁹ Accordingly, if an action of forced displacement carried out under the authority of the state entails individual criminal responsibility for persons involved in such action for a crime against humanity, the state is responsible for such action, without the excuse of the existence of a public emergency which also constitutes an internal armed conflict.¹³⁰ Therefore any transfer of civilian population without grounds permitted under international law by direct acts or indirectly by other coercive means constituting crimes against humanity, is a violation of the right against arbitrary displacement. However it should be noted that to consider such a prohibition within the non-derogable scope of the right to freedom of movement, it has to satisfy the stringent elements of the crimes against humanity.

a. Protection Under International Criminal law

The examination of the scope of the crimes against humanity and genocide that prohibits forced displacements is important as they are relevant in the protection of IDPs in two ways. The first is in order to determine the legality of displacement which is adopted as a derogatory measure under the derogation provision of human rights treaties. If the purpose or the effect or consequence of displacement constitutes a crime prohibiting displacement under crimes against

¹²⁷ Progress Report of the Special Rapporteur, *Human Rights Dimensions*, paras.18,21; ethnic cleansing of civilians on the basis of racial discrimination also violates peremptory human rights norms. para.20 *ibid*; see Special Decisions by the Human Rights Committee Concerning Reports of Particular States: Bosnia and Herzegovina, Croatia, Yugoslavia.

¹²⁸ Human Rights Committee, 'States of Emergency,' para. 12; Human Rights Committee extends the non-derogable norms beyond the list included in Art. 4(2) and observes that '[s]tates parties in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law... ' *ibid.*, para.11.

¹²⁹ Progress Report of the Special Rapporteur, *Human Rights Dimensions*, paras.19-21.

¹³⁰ Human Rights Committee, 'States of Emergency,' n.7.

humanity or genocide, it would then be regarded as a violation of the right to remain, as such a measure is inconsistent with the international obligations of the state.

This unlawful objective of displacement has to be distinguished from the unlawful method used in carrying out displacement that constitutes a crime against humanity or genocide. However, both have the effect of affecting the legality of displacement.¹³¹ The second is to determine the elements which make certain activities international crimes giving rise to individual criminal responsibility for forced displacement.¹³² To begin with, generally, intentional or deliberate displacement can constitute genocide and crimes against humanity *per se* and crimes against humanity in the form of persecution, apartheid and other inhumane acts through forced displacement.

‘Systematic expulsion from homes,’ of a national, ethnical, racial or religious civilian group ‘with intent to destroy, in whole or part’ can constitute an act of genocide under Article 6 (c) of the Statute of the ICC which prohibits ‘deliberately inflicting conditions of life calculated to bring about its physical destruction in whole or in part.’¹³³ However if the civilians are compelled to move from their houses due to the imposition of difficult conditions of life, it would be regarded merely as a consequence of genocide.¹³⁴ Therefore, for forced expulsion of civilians in itself to be regarded as constituting genocide under Article 6(c) of the Statute of the ICC, it must be established that it has been carried out in order to physically destroy the group as a ‘slow death measure’ and in addition with the ‘intent to destroy the group in whole or in part.’¹³⁵ The forced expulsion of civilians with ‘special ties’ to the land ‘has proved to be a most effective expedient to their physical destruction.’¹³⁶

It should be noted, however, that except under Article 6(e) of the Statute of the ICC which specifically prohibits genocide by ‘forcibly transferring

¹³¹ Progress Report of the Special Rapporteur, *The Human Rights Dimensions*, para.22.

¹³² See below, Ch. 7, Section, A.1.a.

¹³³ *Akayesu*, Trial Chamber I, para.506; Report of the Preparatory Commission for the International Criminal Court, *Elements of Crimes*, PCNICC/200/1/Add.2 (2 November 2000), p.7, n.4; see *Prosecutor v. Karadzic and Mladic* (Rule 61) ICTY Trial Chamber I, 11 July 1996, IT-95-5-R61 and IT-95-18-R61, (1998)108, *ILR*, paras.94 and 95 for ethnic cleansing as a form of genocide.

¹³⁴ See M. Boot, *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Oxford, 2002) at p.448.

¹³⁵ See *ibid.*, at pp.448-49.

¹³⁶ C. Meindersma, ‘Legal Issues Surrounding Population Transfers’ at p. 62.

children of the group to another group,' there is no other indication in reference to the crime of genocide that it can be committed generally by forced transfer of civilians. In terms of Elements of Crimes, Article 6(e) of the Statute of the ICC prohibits not only physical transfer by a direct act but also transfers by indirect acts of threats or other coercive measures.¹³⁷ Forcible transfer of children would have an impact on the future cultural existence of the group, as such transfer would destroy the cultural identity of such displaced children. Article 6(e) of the Statute of the ICC seems to refer to something more akin to cultural genocide, as opposed to physical genocide, as the aim of the transfer is not the physical destruction of such transferred children of the specific group.

Such an outcome can occur in the guise of a lawfully permitted situation of transfer. For instance, Additional Protocol II requires the consent of parents in evacuation of children from areas of hostilities for safety reasons, but such consent could have been obtained under a coercive environment.¹³⁸

Forced transfer of civilians may be brought within the scope of Article 6 (b) of the Statute of the ICC as 'causing serious bodily or mental harm to members of the group' in order to constitute genocide. Since this category is not confined to 'permanent and irremediable'¹³⁹ harm, it may include forced transfer in itself as a form of inhuman treatment.¹⁴⁰ Therefore, forced removal of civilians in itself is sufficient to constitute genocide by causing serious bodily and mental harm to them. Not only is it often carried out under inhumane conditions which forces them to leave everything behind, it may lead to serious bodily and mental harm and cause the death of large number of civilians.¹⁴¹ For instance, in the case of *Molosevic et al.*, the second amended indictment described a fate that often befalls displaced civilians (though not in the context of genocide) as follows:

¹³⁷ 'The term "forcibly" is not restricted to physical force, but may include threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment', *Elements of Crimes*, at p.7, n.5.

¹³⁸ Art.4(3)(e) of Additional Protocol II.

¹³⁹ *Akayesu*, Trial Chamber, paras.502-504.

¹⁴⁰ In terms of *Elements of Crimes*, '[t]his conduct may include, but is not necessarily restricted to, acts of torture ,rape, sexual violence or inhuman or degrading treatment.' at p.6, n.3; M. Boot, *Genocide, Crimes Against Humanity , War Crimes*, at p. 444; see below for discussion of forced displacement as an inhuman treatment.

¹⁴¹ C. Meindersma, 'Legal Issues Surrounding Population Transfers', at p. 62.

thousands of Kosovo Albanians who fled their homes and were forcibly transferred as a result of the conduct of the forces of the FRY and Serbia and the deliberate climate of terror that pervaded the territory of Kosovo, were forced to seek shelter for days, weeks or months in other towns and villages, and/or on forests and mountains throughout the province. Some of these internally displaced persons remained inside the province of Kosovo throughout the time period relevant to this indictment and many persons died as a consequence of the harsh weather conditions, insufficient food, inadequate medical attention and exhaustion.¹⁴²

Invoking protection under this section is therefore much easier than under Article 6(c) of the Statute of the ICC, since there is no need that the harm be ‘serious’ enough to threaten the ‘physical destruction’ of the group as in the latter.¹⁴³

The prohibited nature of massive violations of human rights as crimes against humanity in treaty and customary international law is evident by the requirement that they be ‘committed as part of a widespread or systematic attack directed against any civilian population.’¹⁴⁴ The requirement that the attacks be either widespread or systematic in nature excludes isolated attacks and necessitates the existence of a planning or policy element. The ‘widespread or systematic’ requirements in the Statute of the ICC are alternative in nature.¹⁴⁵ However, the meaning provided for ‘attack directed against any civilian population’ in Article 7(2) (a) seems to have introduced a conjunctive approach requiring widespread and systematic attack for the purposes of ICC Statute. The ‘attack directed against any civilian population’ means, ‘a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.’¹⁴⁶ The words ‘multiple commission of acts’ imply a widespread element and ‘pursuant to or in furtherance of a ...policy’ requires a systematic attack, but involving a lower threshold than the requirement of ‘widespread or systematic’ attack in Article 7(1).¹⁴⁷ Even in the absence of the

¹⁴² *The Prosecutor of the Tribunal Against Slobodan Milosevic et al.*, Case No.IT-99-37-PT (29 October 2001) Second Amended Indictment, para.59.

¹⁴³ W. A. Schabas, ‘Article 6: Genocide’ in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers’ Notes, Article by Article* (Baden,1999) p.107, at p.113.

¹⁴⁴ Art. 7(1) of the ICC Statute.

¹⁴⁵ H. Von Habel, ‘Crimes Against Humanity Under the Rome Statute,’ in P. J. Van Krieken, (ed.), *Refugee Law in Context: The Exclusion Clause*, (Hague, 1999)p. 105, at p.109.

¹⁴⁶ Article 7(2) (a) of the Statute of the ICC.

¹⁴⁷D. Robinson, ‘Defining “Crimes Against Humanity” at the Rome Conference,’ (1999)93 *AJIL* 43, at p.48; H. Von Habel, ‘Crimes Against Humanity’ at p.109.

requirement of a widespread or systematic attack' in the Statute of the ICTY, the ICTY has interpreted that this requirement was implicit in the requirement that the attacks be committed against 'any civilian population.'¹⁴⁸ Thus, a mere widespread attack which is not systematic cannot be considered as a crime against humanity without the involvement of an element of policy on the part of the state or a *de facto* authority.

The policy with regard to crimes against humanity need not be implemented through deliberate attack on civilians, but can be implemented 'by a deliberate failure to take action, which is consciously aimed at encouraging such attack.'¹⁴⁹ This is the situation in the case, for example, of the policy of tolerance attributed to the government of Sudan, reflected in the deliberate failure to stop the crimes of forced displacement and wanton destruction of villages committed in Darfur by Janjaweed, a government-supported militia.

Such a policy of tolerance can be imputed on a government even in a situation where there is no governmental support or instruction to the militia but violations can be said to be encouraged through government inaction. This can occur, for instance, if the government has the intention to destroy the armed opposition group and for that purpose to destroy the villages and forcibly displace civilians who are perceived to be providing support for that group, and when a militia commits such crimes, the government can encourage it to carry out such crimes in impunity by its inaction.¹⁵⁰ An 'explicit or implicit approval or endorsement' is necessary to consider that such crimes have been tolerated by governmental authorities.¹⁵¹ However, such a policy can be imputable if only the entity concerned is capable and legally obligated to stop such crimes.¹⁵² It should be noted in this regard, that, even though a government is responsible to

¹⁴⁸ *Prosecutor v. Tadic* Case No.IT-94-1-T, Trial Chamber, Opinion and Judgment (7 May 1997) para.648; *Prosecutor v. Blaskic*, Case No.IT-95-14-T, Judgment, (3 March 2000) para.202

¹⁴⁹ *Elements of Crimes*, at p.9,n. 6; see K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity,' at pp.30-34.

¹⁵⁰ In the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 Sept 2004, (25 January 2005),(Chair person, Antonio Cassese) para.126, the Commission stated that, 'if it is established that the government used the militias as a 'tactic of war,' even in instances where the Janjaweed may have acted without evidence of government support, government officials may incur criminal responsibility for joint criminal enterprise to engage in indiscriminate attacks against civilians and murder of civilians.'

¹⁵¹ *Prosecutor v. Kupreskic et al.*, Case No.IT-95-16-T, Trial Chamber, Judgment, (14 January 2000) para.555.

¹⁵² K. Ambos and S. Wirth, 'The Current Law of Crimes Against Humanity', at p.34.

take positive actions with due diligence to protect the human rights of all the civilians within its territorial jurisdiction, it cannot be reasonably expected to take measures to prevent all the crimes committed by non-state entities, especially armed opposition groups, against civilians within an area or part of the territory controlled by the latter.

As indicated by these elements of crimes, the invocation of crimes against humanity for the protection of IDPs is relatively more difficult than for war crimes, because of the policy element involved in the former. In crimes against humanity, an individual is not protected for his individual attributes but rather because of his membership of a targeted civilian population.¹⁵³

To protect civilians through crimes against humanity, a broad definition of the term of civilian population is required. Otherwise, the presence of combatants among displaced civilians, which is common in internal armed conflict, would exclude the acts from the protection of crimes against humanity, for the reason that they are not ‘directed against any civilian population.’¹⁵⁴ The broad humanitarian scope of crimes against humanity, similar to common Article 3 and Protocol II, makes the relevant rules applicable to ‘any’ civilian population within the jurisdiction of a State, regardless of their nationality. The requirement that attacks should be directed against any civilian population obviously excludes attacks directed against combatants as victims of crimes against humanity, ‘unless such persons form part of a group predominantly civilian.’¹⁵⁵ To be included in such a ‘predominantly civilian’ group, individuals who should be present among such civilian population are those who at one time engaged in resistance activities and are *hors de combat*.¹⁵⁶ The presence of such persons does not modify the civilian nature of such a civilian population so as to exclude them from protection against attack, due to its predominantly civilian nature.¹⁵⁷ This aspect would protect IDP camps against attacks perpetrated merely for the reason of the presence therein of some former combatants.

¹⁵³ *Tadic*, Trial Chamber, para.644.

¹⁵⁴ Article 7 (1) of the Statute of the ICC.

¹⁵⁵ W.J. Fenrick, ‘Should Crimes Against Humanity Replace War Crimes,’ (1999) 37 *Columbia Journal of Transnational Law* 767, at p.779; *Prosecutor v. Kupreskic et al.*, para.549.

¹⁵⁶ *Tadic*, Trial Chamber, para.643; *Prosecutor v. Kordic and Cerkez*, Judgment, Trial Chamber, Case No.IT-95-14/2-T, (26 February 2001) para.180.

¹⁵⁷ *Prosecutor v. Kordic and Cerkez*, para.180 ; *Blaskic*, para.214.

Despite the limitation in the invocation of the protection of crimes against humanity due to the policy or planning element involved, several positive factors can be identified in the protection of IDPs. Crimes against humanity can be committed in situations both peace times and in internal and international armed conflict situations.¹⁵⁸ Therefore, the applicability of such protection in armed conflict situations does not necessarily involve the difficulties of the characterization of an internal armed conflict. Moreover, crimes against humanity may be committed in pursuance of a state or ‘organisational policy’ of an armed opposition group though such policy need not be explicitly formulated.¹⁵⁹ It follows that the lack of protection in human rights law for violations committed other than by government armed forces, is rectified to some extent by holding armed opposition groups equally responsible for crimes against humanity.

Deliberate displacement of civilians on a massive scale in pursuance of a policy of ‘ethnic cleansing’ would fall within the element of crimes against humanity to constitute persecution.¹⁶⁰ Since the crime against humanity of persecution alone requires a discriminatory intent, it would specifically cover acts committed by the policy of ethnic cleansing.¹⁶¹ ‘Ethnic cleansing’ is described by the UN Commission of experts in its final report as ‘...a purposeful policy designed by one ethnic or religious group to remove by violent and terror-inspiring means the civilian population of another ethnic or religious group from certain geographic areas. To a large extent, it is carried out in the name of misguided nationalism, historic grievances and a powerful driving sense of revenge. This purpose appears to be the occupation of territory to the exclusion of the purged group or groups.’¹⁶² In other words, it describes a ‘set of human rights and humanitarian law violations,’ committed against a religious or ethnic group as a matter of policy to remove them from their native places.¹⁶³ For instance, to achieve a ‘Greater Serbia,’ Serbians adopted the

¹⁵⁸ But see Art.5 of the Statute of the ICTY.

¹⁵⁹ *Kupreskic et al.*, Trial Chamber, para.551; *Kordic and Cerkez*, para.181.

¹⁶⁰ *Kupreskic et al.*, para.705.

¹⁶¹ Art 7(1) (h) of the Statute of the ICC.

¹⁶² Final Report of the Commission of Experts established pursuant to Security Council Resolution 780(1992), S/1994/674, 27 May 1994, p.33, para.130.

¹⁶³ D. Petrovic, ‘Ethnic Cleansing-An Attempt at Methodology’(1994)5 *EJIL* 342, at p.342; ‘Those methods of “ethnic cleansing” include, in particular, murder, sexual assault, intimidation, harassment and the destruction of sacred and cultural buildings.’ *Prosecutor v. Karadzic and Mladic* (Rule 61), para 62; ‘Sexual assaults occurred in several regions of Bosnia and

policy of 'ethnic cleansing' in Bosnia and Herzegovina against the civilian population and in that course committed many violations of humanitarian law, such as shelling and burning of Bosnian Muslim houses, mass executions of Bosnian Muslim men, torture and mistreatment of civilians in an organised manner within and outside detention camps to terrorise the civilian population to coerce them to flee from their places and prevent their return.¹⁶⁴

As far as persecution committed through unlawful attacks on civilians is concerned, the international humanitarian law rules applicable in the conduct of hostilities become important. Persecution through forced displacement can be committed such as by shelling or bombing of civilian population and burning of houses and livestock in pursuance of a general policy of an armed opposition group or a governmental policy to spread terror among civilians of a specific group so as to deter them from returning to their homes.¹⁶⁵ In persecution, the purpose behind the killing of civilians is to expel the group from the village, rather than annihilation of the group as such, as in genocide.¹⁶⁶

Persecution is defined as an 'intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity.'¹⁶⁷ The first limitation on invoking the protection of this crime concerns the requirement of severe deprivation of fundamental rights, which means a 'gross and blatant denial' of such rights on the 'same level of gravity' as the other acts of crimes against humanity, and therefore not every attack is included within its ambit.¹⁶⁸ The second limitation is that it is only restricted to those rights recognised as fundamental rights, which would certainly include the non-derogable rights in Article 4 of the ICCPR and other rights recognised as general principles of international law. Persecution is, therefore, basically gross or

Herzegovina, in a systematic fashion and using recurring methods (e.g. gang rape, sexual assault in camps, use of brutal means, together with other violations of International Humanitarian Law). They were performed together with an effort to *displace* civilians such as to increase the shame and humiliation of the civilians and of the community they belonged to in order to force them to leave.' (emphasis added) *Karadzic and Mladic*, para 64.

¹⁶⁴ *Prosecutor v. Krstic*, paras. 41,43,66-69,122,123,125,145-49.

¹⁶⁵ *Kupreskic et al.*, para.749.

¹⁶⁶ *Ibid.*, para.751; the Trial Chamber described the difference between them as, [p]ersecution is only one step away from genocide-the most abhorrent crime against humanity-for in genocide the persecutory intent is pushed to its uttermost limits through the pursuit of the physical annihilation of the group or of members of the group. ...in the crime of persecution the criminal intent is instead to forcibly discriminate against a group or members thereof by grossly and systematically violating their human rights.' *Ibid.*

¹⁶⁷ Art.7(2)(g) of the Statute of the ICC.

¹⁶⁸ *Kupreskic et al.*, para.621.

systematic violation of the fundamental rights of a group which share common bonds of race, religion, ethnicity etc.

The Statute of the ICC limits the acts which grossly deprive civilians of fundamental rights to any act enumerated as crimes against humanity or to any war crimes or genocide within the jurisdiction of the Court.¹⁶⁹ Deliberate and systematic killings of civilians, their organised detention, expulsion, attacks on property which constitute destruction of livelihood for certain civilians and burning of residential property committed with disregard for the lives of civilians can constitute persecution.¹⁷⁰ Therefore any widespread or systematic commitment of war crimes against a group of civilians who share common bonds, in order to remove them from an area, can constitute persecution.

However, the restrictive scope of persecution which is connected only to the crimes stated in the Statute of the ICC is not useful to cover forced displacement through persecution committed through a variety of acts in internal armed conflicts. It does not cover persecution caused by disproportionate attack or starvation of civilians, which are prohibited by customary international humanitarian law in internal armed conflicts but are not included in the Statute of the ICC as war crimes in internal armed conflicts.

A forced transfer of civilian population can also constitute apartheid under crimes against humanity, if committed ‘in the context of an institutionalised regime of systematic oppression and domination by one racial group over any other racial group or groups’ and ‘committed with the intention of maintaining that regime.’¹⁷¹ Implantation of settlers or establishment of settlements in a region inhabited by a minority population and providing preferential treatment to the former over the already existing minorities, if results in institutionalised systematic discrimination against such civilians and forces them to displace, can constitute apartheid. However, apart from the general threshold for the crimes against humanity, that they should be either widespread or systematic, a similar requirement of systematicity in the crime of apartheid itself and the requirement of

¹⁶⁹ Art.7(1)(h) of the Statute of the ICC.

¹⁷⁰ *Kupreskic, et al.*, paras.628-631.

¹⁷¹ Arts. 7 (1) (j), (2)(h) of the Statute of the ICC.

both oppression and domination would impose a heavy burden when trying to invoke the protection of such crime for the IDPs.¹⁷²

The crime against humanity of ‘forcible transfer of population’ covers the unlawful forms of such displacement as exemplified by the phrase, ‘without grounds permitted under international law.’ In determining the grounds not permitted under international law during internal armed conflict, the war crime concerning direct forced displacement in Article 8 (2)(d)(viii) can be of guidance, but to a limited extent, as it covers only relocation carried out by direct acts.¹⁷³ However this particular crime against humanity is wider in scope as it prohibits deportation or forcible transfer not only by direct acts but also by indirect coercive means, in internal armed conflicts.¹⁷⁴ Thus, ‘expulsion or other coercive acts’ include ‘the full range of coercive pressures on people to flee their homes, including death threats, destruction of their homes, and other acts of persecution, such as depriving members of a group of employment, denying them access to schools and forcing them to wear a symbol of their religious identity.’¹⁷⁵ As civilians are forced to displace on their own as a result of such indirect coercive means, as opposed to a direct act of forced transfer by a party to the conflict, the phrase ‘deported or forcibly transferred’ is used interchangeably with ‘forcibly displaced.’¹⁷⁶ It should be noted, however, that these acts need not be committed with a discriminatory intent, as in the case of crimes of persecution committed through deportation or forced transfer.

Deliberate displacement could occur under the pretext of unavoidable consequences of armed conflict. Though it is difficult at times to verify whether a displacement has occurred as a consequence of armed conflict or as an ‘objective’ of armed conflict or as a method of combat, in widespread or systematic activities rather than in individualised, scattered acts of hostilities, it is relatively

¹⁷² According to Article 7(2)(h) of the Statute of the ICC crime of apartheid means, ‘inhumane acts of a character similar to those referred to in paragraph 1, committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime’; C. K. Hall, ‘“The Crime of Apartheid”’ in O. Triffterer(ed.), *Commentary on the Rome Statute*, p. 167, at pp.168-9.

¹⁷³ See below, Section, E for detailed discussion.

¹⁷⁴ *Elements of crimes*, at p.11, n.12

¹⁷⁵ C.K.Hall, ‘“Prohibited Movements Population,”’ in O.Triffterer, (ed.), *Commentary on the Rome Statute*, p. 161, at p.162.

¹⁷⁶ *Elements of crimes*, at p.11, n.13.

easier to establish a forced displacement.¹⁷⁷ A single or scattered occurrence of such damage during an attack on a military objective can be justifiable in terms of collateral damage to civilians and their property. But if it occurs in a widespread manner and results in displacement of civilians of a particular ethnic or religious group, it raises doubts not only as to the legality of such collateral damage but also as to the objective of such attacks. The International Commission of Inquiry on Darfur, Sudan indicated that,¹⁷⁸

[w]ith regard to specific patterns in the displacement, ... it appears that one of the objectives of the displacement was linked to counter-insurgency policy of the government, namely to remove the actual or potential support base of the rebels. The displaced population belongs predominantly to the three tribes known to make up the majority in the rebel movements, namely the Masaalit, the Zaghawa and the Fur, who appear to have been systematically targeted and forced off their lands. The areas of origin of the displaced coincide with the traditional homelands of the three tribes, while it is also apparent that other tribes have practically not been affected at all.

This description of events clearly reflects a situation of a crime against humanity of forcible transfer or even a particular crime of persecution through forced displacement.¹⁷⁹

Forced displacement of civilians was considered as constituting ‘other inhumane acts’ in crimes against humanity by the ICTY. Since Article 5 of the crimes against humanity does not refer to forcible transfer as a crime, this was considered under ‘other inhumane acts’ under Article 5(i) of the crimes against humanity. Inhumane treatment can be stated as an intentional act or omission that ‘causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity’¹⁸⁰ The Trial Chamber in *Prosecutor v. Kupreskic* considered that forcible transfer of groups of civilians as expressed in Article 17 (1) of Additional Protocol II is a form of other inhumane act under crimes against humanity.¹⁸¹ Apart from the requirement that such displacement should contain the elements of crimes against humanity, rendering it as serious as other crimes covered in Article 5 of the Statute of the ICTY, the ICTY seems to have added a

¹⁷⁷ See UNHCR, *The State of the World's Refugees: A Humanitarian Agenda* (Oxford, 1997) at p.102 .

¹⁷⁸ Report of the International Commission of Inquiry on Darfur, , at p.86, para.328.

¹⁷⁹ See *ibid.*, at pp.86-87, paras.331-332.

¹⁸⁰ *Celebici*, Trial Chamber , para.543.

¹⁸¹ *Ibid.*, para.566.

discriminatory element, so that forcible displacement carried out against ‘persons belonging to a particular ethnic, religious, political or racial group, or serious widespread or systematic manifestations of cruel or humiliating or degrading treatment with discriminatory or persecutory intent’ would be considered as adequate to constitute an inhumane act.¹⁸² The vulnerability of the civilian belonging to ethnic, religious, racial groups subjected to forced displacement is much greater than in cases of forced displacement carried out for instance on the basis of wealth or resources to render such treatment inhuman.

b. Legality of Displacement in Human Rights Law

If the principles of non-derogability, proportionality and non-discrimination in the derogation clause are not complied with regard to displacement of civilians, such a measure cannot be considered as in compliance with international law and therefore would be in violation of the right against arbitrary displacement.

In addition to the above discussed customary standards that prohibit displacement under humanitarian law and international criminal law, the non-derogable human rights form the basis of standards of international law that prohibit displacement of civilians. Some of these non-derogable norms have the status of peremptory norms or *jus cogens*. Articles 6 and 7 of the ICCPR on right to life and the prohibition of torture and inhuman or degrading treatment can be stated in this category. Identifying the peremptory norms which cannot be derogable at any time, can be useful in limiting the conduct of states which have not become parties to the ICCPR.¹⁸³ These standards would determine the legality of forced displacement and therefore render the displacement unlawful in its strict sense.

Even if the displacement of civilians is on legitimate grounds, the legality of the transfer of civilians can be affected by the manner in which such displacement is carried out. They may not be forced displacements in the strict sense as they are carried out on grounds permitted by international law, but are clearly arbitrary. There are ‘standards which provide safeguards against abuse

¹⁸² *Kordic and Cerkez*, para.270, n.372.

¹⁸³ The human rights which could be considered as peremptory norms cannot be subject to reservations as well, Human Rights Committee, General Comment No.24, ‘Issues Relating to Reservations made Upon Ratification or Accession to the Covenant or the Optional Protocols Thereto, or in Relation to Declarations under Article 41 of the Covenant,’ (04/11/94) para.8.

of emergency powers and which relate to the manner of derogation and therefore, to the manner of displacement or transfer.’¹⁸⁴ These are concerned with the regulatory standards such as principle of proportionality of the derogation provisions. The regulatory standards would render a seemingly lawful population displacement as arbitrary. For instance, the relocation carried out for a permitted ground in internal armed conflict may not be proportionate due to the non-compliance with the provision of survival needs. However, the consequence of displacement not based on legitimate grounds or based on legitimate grounds but not adhered to regulatory standards is the same as they affect the validity of a displacement measure.

Since the derogatory measures are of an ‘exceptional and temporary nature,’¹⁸⁵ even if a displacement is carried out by the organs of a State, on the legitimate grounds of Article 17(1) of Additional Protocol II, it can become a violation of freedom of movement and residence, unless the measure is ‘necessary and reasonable in the circumstances and proportionate to the emergency.’¹⁸⁶ The proportionality of the relocation measure to an emergency, can be evaluated in terms of its severity, duration and geographic scope.¹⁸⁷

The adoption of derogatory measures of displacement for the reasons stated in Article 17 (1) of Additional Protocol II can be considered as proportionate to the exigencies of the situation, only if such derogatory measures are proved to be strictly necessary to respond to the gravity of the threat. Therefore, any displacement which is ‘manifestly disproportionate’ to the exception of military necessity in humanitarian law is unlawful.¹⁸⁸ Despite the existence of an internal armed conflict that warrants a declaration of a state of emergency, each derogatory measure must be justified as necessary in the exigencies of the situation.¹⁸⁹ If an alternative measure other than displacement, can be adopted to achieve the same end, for instance, by resort to limitation clauses, a derogatory

¹⁸⁴ Progress Report of Special Rapporteur, *Human Rights Dimensions*, para.16 (c) .

¹⁸⁵ Human Rights Committee, General Comment No.5, ‘Derogation of Rights’ (31/07/81), para.3.

¹⁸⁶ J. Oraa, *Human Rights*, at pp.175, 151; this requirement is not explicitly stated in the ICCPR and ECHR but ACHR Art.27(1) explicitly incorporates this principle.

¹⁸⁷ ‘Siracusa Principles,’ Principle 51; Progress Report of the Special Rapporteur, *Human Rights Dimensions*, para.61.

¹⁸⁸ Progress Report of Special Rapporteur, *Human Rights Dimensions of Population Transfer*, para, 19.

¹⁸⁹ Human Rights Committee, ‘States of Emergency,’ para.4.

measure cannot be regarded as strictly necessary.¹⁹⁰ Any such derogation which is not strictly necessary to the threat may become arbitrary as it contains ‘elements of ... unreasonableness,’ which are not proportionate to the threat.¹⁹¹

The scope of removal of civilians carried out as a derogatory measure, whether due to military necessity or safety of civilians in internal armed conflicts, should be proportionate to the aim pursued. As such removal of civilians would result in the loss of homes, lands and property that generate income for their basic survival needs, it is important that such relocated civilians be provided with shelter and other basic survival needs for the duration of such relocation. Article 17(1) of the Additional Protocol II stipulates that in such situations, the ‘civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.’¹⁹² Non-adherence to the provision of survival needs and conditions of safety makes such displacement clearly illegal under international humanitarian law. In addition the customary international humanitarian law that requires family members not to be separated must be respected in such transfers carried out by the State.¹⁹³

Such measures can be derived from human rights standards as well, because Articles 9 and 17 of the ICCPR and Articles 10 and 11 of the ICESCR guarantees personal security, non-arbitrary interference with family and adequate food, clothing and shelter.¹⁹⁴ Otherwise a fair balance between the rights derogated, namely, right to remain in *safety and dignity* and the aim pursued cannot be struck and the displacement would become a disproportionate measure. The UN Guiding Principles on Internal Displacement do not include this requirement in Principle 6(2) on prohibition of arbitrary displacement, but in Principle 7 as standards to be adhered in carrying out of displacement. Failure to adhere to such standards should be included as an instance of arbitrary displacement to effectively strengthen the scope of the right against arbitrary displacement. Non-adherence to the provision of survival needs and

¹⁹⁰ ‘Sircusa Principles’, Principle 53.

¹⁹¹ M. Nowak, *UN Covenant*, at p.292.

¹⁹² See for this aspect in determining the lawfulness of relocation, below, section E.

¹⁹³ Article 4(3)(b) of the Additional Protocol II ; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, at p.463.

¹⁹⁴ See W. Kalin, *Guiding Principles on Internal Displacement: Annotations* (Washington, D.C, 2000) at p.21.

conditions of safety makes such displacement clearly illegal under international humanitarian law.

Moreover enforced displacement of substantial portion of civilians of an ethnic group cannot be proportionate in its scope to the aim pursued by the State. Such a measure aimed at a particular ethnic group may be branded as violating the principle of non-discrimination. For instance, the Burundian government in 1999 forcibly relocated 80% of the population living around the capital, Bujumbura, in 53 regroupment camps throughout the province; the majority of them were from the Hutu ethnic population.¹⁹⁵

In addition, derogatory measures should be proportionate in their duration to the aim pursued as ‘once the emergency has ended, or its gravity has diminished, the derogation measures have no justification.’¹⁹⁶ It is not necessary that the return of displaced civilians take place only when the proclaimed public emergency is over or on the cessation of an internal armed conflict. Return of civilians can take place during such situations depending on the variation of the intensity of the threat and accordingly the measures should be made lenient.¹⁹⁷ This means, the measure of displacement should not last longer than that is necessary to the exigencies of the situation and therefore, when the military necessity or insecurity of civilians ceases to exist, or the intensity of threat is reduced, IDPs who wish to return must be permitted to do so. Otherwise, a displacement would be regarded as disproportionate to the emergency. Therefore any displacement which is disproportionate to the exceptions of military necessity and the security of civilians would be unlawful.

In the *Miskitos* case, the Inter-American Commission on Human Rights, considered the legality of the measure of relocation adopted with regard to Miskitos, an indigenous racial and ethnic group in Nicaragua. This was considered in terms of the right to freedom of residence and movement in Article 27 of the IACHR in the context of public emergency situation. It upheld the government’s contention that it was carried out for the reasons of military

¹⁹⁵ Human Rights Watch, ‘Emptying the Hills: Regroupment in Burundi’, June 2000, vol.12, no.4 (A).

¹⁹⁶ J. Oraa, *Human Rights*, at p.168.

¹⁹⁷ J. Oraa, *ibid.*, at p.149.

necessity and not on any discriminatory grounds.¹⁹⁸ The Commission reached such a conclusion on the basis that in such circumstances the forced movement was proportionate in addressing the threat posed by the emergency.¹⁹⁹ However the Commission opined that the Miskitos who choose to return to their original places should be permitted to do so once the emergency was over, otherwise measures of relocation may become a 'form of discriminatory punishment.'²⁰⁰

It further stated that to impede the return of those wishing to do so would imply that the compulsory transfer was permanent and in violation of the right to movement and residence.²⁰¹ This is because, forced displacements are made with the intention to displace the civilians, and not to allow them to return to their places of origin. They are therefore permanent in nature and thereby result in the destruction of the right to remain.²⁰² This is in contrast to the temporary nature of lawful displacements and the temporary suspension of the right to remain. According to the principle of proportionality, displacement should be proportionate to the duration of the emergency. This aspect emphasizes the temporary nature of the displacement and the right of internally displaced civilians to return to their original places once the danger which justified the displacement ceases to exist, if they wish to do so.

As the Human Rights Committee pointed out, 'Article 4 may not be resorted to in a way that would result in derogation from non-derogable rights.'²⁰³

¹⁹⁸ In this case the Commission proceeded on the basis of a *de facto* emergency that existed at the time of this compulsory relocation, even though the official declaration of emergency was subsequent to the relocation. But see J. Oraa, *Human Rights*, pp.197-199 observes that this case is not strictly decided under the principle of consistency of the derogation. Since the reference of the Commission to the consent of civilians as a requirement for a valid massive relocation is not in line with the requirements of the laws of war, which does not require such consent in relocation for military reasons or safety of civilians.

¹⁹⁹ *Ibid.*

²⁰⁰ *Miskito Case*, para.31.

²⁰¹ *Ibid.*, para.24.

²⁰² In *Prosecutor v. Simic, Tadic, and Zaric*, para.134 the Trial Chamber of the ICTY with regard to forcible transfer as a crimes against humanity stated that, it 'requires an element of permanency in relation to the intention of the accused. An important consideration in this context will be the intended goal of the relocation. ...whether persons forcibly displaced were able to return to their former place of residence at a later time has no bearing on the assessment of the legality of the original displacement; thus, the duration of the displacement has no impact on its illegality. Otherwise, the perpetrator who had the intent to permanently displace the victim would unjustifiably benefit from such return.'

²⁰³ Human Rights Committee, 'States of Emergency' para.15; 'Siracusa Principles,' emphasizes, that the states have an affirmative duty to take precautions to prevent the *de facto* violations of non-derogable rights in carrying out a derogatory measure, Principle 59, at p.28.

The non-derogable nature of these rights is useful in internal armed conflicts to determine the legality of displacement. These rights can affect the legality of displacement in two ways. Firstly, a displacement is unlawful if the *purpose or the effect* of such displacement violates the non-derogable norms.²⁰⁴ For instance, the purpose of displacement of civilians is unlawful if it is punitive, to subject the civilians to torture and inhuman treatment.²⁰⁵ In such an event, displacement would be unlawful and constitute a violation of the right against arbitrary displacement and relevant non-derogable norms. Secondly, a displacement that is carried out in a *manner* that violates non-derogable norms such as the right to life, or the right to be free from inhuman treatment for instance, by direct and indiscriminate killings of civilians or without basic survival requisites or by destruction of houses and property, is not legal and is therefore arbitrary.²⁰⁶ In such a context, the State party could become responsible not only for the violation of the right to freedom of movement and residence but also for violations of other non-derogable norms concerned.²⁰⁷

Ethnic groups or minorities are often exposed to the risk of being subjected to deliberate relocation measures in internal armed conflicts. In this case, the principle of non-discrimination under Article 4 of the ICCPR serves an important purpose. The non-discrimination clause in Article 4 of the ICCPR prohibits derogatory measures if only they are taken ‘solely’ on discriminatory grounds. Therefore, it is possible to carry out displacement of civilians of a specific ethnic group in internal armed conflicts, such as for military necessity.²⁰⁸

This may cause a serious lapse in the protection of IDPs in internal armed conflicts in the light of the fact that the other prohibitions of discrimination in the

²⁰⁴ Progress Report of Special Rapporteur, *The Human Rights Dimensions*, para.19.

²⁰⁵ *Ibid.*, para.21.

²⁰⁶ Human Rights Committee considered that the enforced resettlement of Tajiks citizens carried out in violation of non-derogable human rights by the government of Uzbekistan was a forced displacement in violation of Article 12 of the ICCPR, Concluding Observations: Uzbekistan, CCPR /CO/71/UZB (26 April 2001) at para. (16); see for detailed discussion of the manner of displacement, Global IDP Project, ‘Uzbekistan: Authorities Deny Return of Several Thousand Villagers Displaced From Tajik Borders’ (18 October 2005) (www.idpproject.org).

²⁰⁷ In *Dzemajl et al. v. Yugoslavia*, para.9.2 the Committee of the CAT considered burning and destruction of houses as acts of inhuman treatment; however, in individual opinions, two members of the Committee considered that forced eviction and forced displacement were not merely inhuman treatment but constitute torture; *Dulas v. Turkey* paras.54-55; *Bilgin v. Turkey*, paras101-103; *Selcuk and Asker v. Turkey*, paras.75-80; however such destruction of houses which was considered as inhuman, was not carried out during forced displacement.

²⁰⁸ J. Oraa, *Human Rights*, at p.172.

ICCPR are derogable.²⁰⁹ However race as a ground of discrimination even during a public emergency is strengthened by the International Covenant on the Elimination All Forms of Racial Discrimination without the requirement of 'solely' as opposed to Article 4 of the ICCPR. This can be considered as another international obligation and a higher standard of protection respectively under Articles 4(1) and 5(2) of the ICCPR to remove any concerns posed by the term 'solely' in Article 4 of the ICCPR.²¹⁰

The absence of the word 'solely' in the derogation clause of the ACHR containing the non-discrimination requirement, however, does not prevent states from taking derogatory measures of relocation against a particular group of civilians. Such measures were taken by the Nicaraguan government against Miskito Indians, on the grounds of military necessity and the safety of civilians. This measure was decided by the Inter-American Commission to be non-discriminatory.

Thus, inclusion of the word 'solely' does not make any practical difference, as governments always justify their measures on other reasons necessary for the situation.²¹¹ Protection against such measures can be provided by the principle of non-discrimination in association with other principles in the derogation clause which provide protection against disproportionate and unreasonable measures.²¹² Such displacement of ethnic minorities would become discriminatory 'either if the differentiation of treatment lacks an objective and reasonable justification, or if there is no proportion between the means used and the legitimate end pursued.'²¹³ The principle of notification is provided for the facilitation of international scrutiny, so the legitimacy and the non-discriminatory nature of the measure of displacement can be determined even within this clause by an effective human rights monitoring body.

²⁰⁹ Arts.3,14(1), 24(1),25 and 26.

²¹⁰ Art.5(d)(i)(ii) of the CERD; similarly, Art. II (c) of the Convention on the Suppression and Punishment of the Crime of Apartheid 1973; and Art. II of the 1948 Convention on the Prevention and Punishment of Genocide.

²¹¹ M. Nowak, *UN Covenant*, at p.86; J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, (Philadelphia, 1994) at p.63 states that '[e]ven without this term, however, the reference to discrimination in Article 4 conveys the implication that only arbitrary and unjustifiable distinctions in the application of emergency measures would be outlawed.'; Oraa, *Human Rights*, at p.176 states that the absence of 'solely' in IACHR or absence of non-discrimination clause in ECHR do not make any practical difference.

²¹² According to Oraa, *ibid.*, the situation of ECHR can be overcome by the principles of proportionality and necessity, *ibid.*, at pp.176-77.

²¹³ Oraa, *ibid.*, at p.141.

D. Protection of Minorities Against Arbitrary Displacement

As discussed above, except for the principle of non-discrimination in the derogatory provisions, the protection against a displacement provided in the right to freedom of movement and residence does not provide a specific protection to minorities or indigenous people.²¹⁴ Specific protection against arbitrary displacement for them is important, as in many internal armed conflicts, minorities and indigenous people are the victims of forced displacement, for instance, Kurds in Iraq and Turkey, the Miskito Indians in Nicaragua, the Tamils in Sri Lanka.²¹⁵

Forced displacement is often used to destroy the right to existence of minorities. The right to existence includes the physical existence, the subsistence as well as the cultural existence or identity of minorities.²¹⁶ Minorities can be forced to flee from their homes and places of habitual residence or origin in order to cause their systematic deaths and thereby destruction of their physical existence. Similarly, in terms of a policy of ethnic cleansing, they can be forced to displace from their territories where they have religious and cultural heritage such as temples, mosques, churches and other buildings, in order to destroy their distinct identity. Therefore, minorities need special protection from forced displacement, in addition to the general protection provided in the freedom of movement and residence. The principle of non-discrimination in the derogation provision and Article 26 of the ICCPR is useful in the protection of certain minorities against removal from their land on discriminatory grounds, although it does not recognise or protect the existence of minorities as such. A specific protection as minorities beyond the discriminatory grounds is essential to give them an enhanced protection against measures that lead to arbitrary displacement.

Article 27 of the ICCPR protects the rights of ethnic, religious or linguistic minorities in a state to 'enjoy their own culture, to profess and practice their own religion, or to use their own language' as distinct from and additional

²¹⁴ Certain elements of non-discrimination are non-derogable, see Arts 2, 4 of the ICCPR and CERD.

²¹⁵ See P. Thornberry, *International Law and the Rights of Minorities* (Oxford, 1991) at pp.1-2.

²¹⁶ See *Ibid.*, at p.141.

to their other rights in the covenant.²¹⁷ This is the only provision in the universal human rights conventions that recognises the right to identity of minorities.²¹⁸ Though it does not explicitly protect minorities from arbitrary displacement from places of their habitual residence, an indirect protection from such displacement can be derived in the obligation of states to respect enjoyment of culture, religion or language. Generally, the enjoyment of cultural life rather than the practising of religion and language of minorities would be affected by arbitrary displacement. Culture, in one of its manifestations, includes ‘a particular way of life associated with the use of land resources,’ in particular by indigenous communities and includes the traditional activities of fishing or hunting.²¹⁹ Enjoyment of cultural life in a land can go beyond such livelihood aspects and can include enjoyment of ‘customs, morals, traditions, rituals, types of housing, eating habits etc., that are characteristic of the minority’ associated with their lands.²²⁰ Since a broad approach to culture is adopted by the Human Rights Committee, it would be possible to include within the scope of Article 27 of the ICCPR, the protection against arbitrary displacement which threatens the way of life and cultural identity of ethnic minorities and forces them to displace from their lands.²²¹ This is evident from the observation of the Human Rights Committee with regard to forced resettlement of Tajiks (ethnic minorities) citizens of Uzbekistan.²²²

It is to be noted that Article 16 of the Indigenous and Tribal Peoples Convention of 1989 explicitly prohibits arbitrary displacement of indigenous

²¹⁷ ECHR, ACHR or ACHPR do not contain minorities provision corresponding to Article 27 of the ICCPR.

²¹⁸ P. Thornberry, *International Law and the Rights of Minorities*, at p.142

²¹⁹ Human Rights Committee, General Comment No.23, ‘The Rights of Minorities (Art.27)’, CCPR/21/Rev.1/Add.5, (08/04/94) paras. 3.2 and 7.

²²⁰ M. Nowak, *UN Covenant*, , at p.501.

²²¹ As stated by the Human Rights Committee, ‘ one or other aspect of the rights of individuals protected under that article-for example, to enjoy a particular culture-may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority.’ ‘The Rights of Minorities (Art.27)’ at para. 3.2; M. Nowak, *ibid*; but Li-Ann Thio, states that it is doubtful whether civilians belonging to minorities other than indigenous groups enjoy such rights related to lands under Article 27, Li-Ann Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Leiden, 2005) at pp. 229-30.

²²² Committee considered that such action of expulsion from homes was in violation of Articles 12, 17 and in certain situations Article 27 of the ICCPR, Concluding Observations: Uzbekistan, CCPR /CO/71/UZB (26 April 2001) at para. (16).

peoples from their lands. Article 27 is, however, derogable during a public emergency. But in terms of Article 5 (1) of the ICCPR derogatory measures of arbitrary displacement cannot be carried out in such a way as to destroy the right to identity of minorities.

The 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities which recognises the right to enjoy culture, religion and language of persons belonging to minorities, unlike Article 27 of the ICCPR, in addition, explicitly protects the 'existence and the national or ethnic, cultural, religious and linguistic identity of minorities.'²²³ Protection of the existence of minorities by states requires 'ensuring adequate conditions for the existence and identity of the group as a whole.'²²⁴ This provision merely contains the obligation of the state towards the minority as a group and should not be considered as recognising a group right as 1992 UN Declaration only states the rights of individuals belonging to minorities.

The other differentiating aspect of the 1992 UN Declaration is, it additionally recognises 'national minorities,' in the sense that those who have been established on a territory for long time have stronger rights than those who have recently settled.²²⁵ Such an addition does not have the effect of extending the scope of application beyond that stated in Article 27 of the ICCPR, because, national minorities are always related to one of the grounds stated therein. However, the advantage conferred by this addition is that, when a national minority is an ethnic minority which is broadly defined by a conception of culture including livelihood aspects, the people in question would have stronger rights regarding their culture and for the protection of their national identity.²²⁶

The 1992 UN Declaration does not contain a specific provision that prohibits arbitrary displacement similar to the Indigenous and Tribal Peoples

²²³ Articles 2 and 1 respectively of the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, General Assembly Resolution 47/135 (1993).

²²⁴ Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/AC.5/2005/2 (4 April 2005) para.14.

²²⁵ *Ibid.*, para. 11

²²⁶ *Ibid.*, para.6

Convention of 1989 or measures that change the demographic composition in areas inhabited by national minorities or measures of coerced assimilation which cause otherwise involuntary displacement, as in the European Framework Convention for the Protection of National Minorities of 1995.²²⁷ Therefore protection against arbitrary displacement from their territories has to be derived implicitly from the protection of existence and cultural identity of minorities.²²⁸ According to the Commentary to the UN Declaration, the protection of the existence of minorities includes their 'physical existence and their continued existence on the territories on which they live and their continued access to the material resources required to continue their existence on those territories.'²²⁹ In this sense, the right to existence of minorities is broadened to include physical, economic and cultural existence. Therefore, the right to continued existence of a minority group in terms of Article 1 of the 1992 UN Declaration can be violated by policies of ethnic cleansing or forced transfer, which have the purpose or effect of displacing population belonging to minorities from the territory they live in so as to physically remove them from the territory and policies which exclude minorities from access to subsistence resources in order deliberately to weaken their continued existence in the territory and force them to displace. Similarly, the return of the displaced minorities to their territories should not be obstructed as to do so would exclude their physical existence in the territory and access to resources required for their livelihood in those territories.²³⁰

Similarly, respect for the cultural existence of a minority group in their territory under Article 1 of the 1992 UN Declaration requires protection of its religious and cultural heritage, including churches, mosques, temple sites and buildings in their territory.²³¹ Cultural heritage reflect the 'collective memory of

²²⁷ Article 5(2) and Article 16 of the European Framework Convention for the Protection of National Minorities of 1995; see generally, J. Jackson - Preece, 'Article 16' in M. Weller (ed.), *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford, 2005) p.463; Article 16 of the Indigenous and Tribal Peoples Convention of 1989.

²²⁸ Commentary of the Working Group on Minorities, para.24.

²²⁹ *Ibid.*, para.24

²³⁰ *Ibid.*, para.24

²³¹ *Ibid.*

humanity, examples of its greatest achievements ...symbolize human life itself²³² and their destruction may cause displacement of population belonging to minority groups. For instance, in Bosnia, mosques such as the Ferhad Pasha Mosque, built in 1583, were destroyed by the Serbs in the belief that destroying the 'spiritual heart of their community' would make the Muslims leave their homes for ever.²³³

Notwithstanding the non-binding nature of the 1992 UN Declaration, it can be viewed as international minimum standards in the protection of minorities, since it received the broad support of states from all regions of the world before the General Assembly.²³⁴

Apart from the above discussed, the other instruments only provide an indirect protection against arbitrary displacement of civilians belonging to minority groups. The Convention on the Elimination of Racial Discrimination of 1966 prohibits arbitrary displacement of racial and ethnic groups, but not necessarily as minorities because its main objective is to protect and promote racial and ethnic equality.²³⁵ The Convention on the Prevention and Punishment of the Crime of Genocide, 1948, provides protection for the physical existence of 'national, ethnical, racial or religious group' whether they are minorities or majority and therefore to some extent against forced displacement if carried out for the eventual physical destruction of minority groups.²³⁶ This protection has become meaningful by the inclusion of genocide as a crime in the Statute of the ICC.²³⁷ The major deficiency in the protection is that it does not protect linguistic and political groups as such. In internal armed conflicts,

²³² J.M. Henckaerts, 'New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict' (1999) 81, No.835 *IRRC* 593, at pp.619-20; Y. Sandoz 'Competing Priorities: Placing Cultural Property on the Humanitarian Law Agenda' in M.T. Dulti *et al* (ed.), *Protection of Cultural Property in the Event of Armed Conflict*, Report on the Meeting of Experts Geneva, 5-6 October 2000 (Geneva, 2002) p. 21, at p.22 states that '[t]o defend all cultures is to defend all of humanity.' Failure to do so may constitute the crimes against humanity of persecution and genocide.

²³³ See P. Maass, 'Cultural Property and Historical Monuments,' in R. Gutman and D. Rieff (eds.), *Crimes of War: What the Public Should Know* (London, 1999) at pp.110-111.

²³⁴ Li-Ann Thio, *Managing Babel: The International Legal Protection of Minorities*, at pp.172-73 and 196.

²³⁵ Article 5 (d) (i) of the CERD.

²³⁶ Article II (b), (c) and (e) of the Convention on the Prevention and Punishment of the Crime of Genocide, 1948; see above, Protection Under International Criminal law.

²³⁷ Article 6(b), (c) and (e) of the Statute of the ICC; see generally, P.Thornberry, *International Law and the Rights of Minorities* at pp.67-73 for the relationship between Cultural genocide and protection of minorities.

these two groups are vulnerable to displacement. In the absence of protection for political groups, governments can persecute and displace racial, religious or ethnic groups on the ostensible grounds of their political opinions, without incurring international liability under the Genocide Convention. This has the effect of rendering the protection of the whole Convention less effective, as political opinion can provide a pretext in internal armed conflicts to suppress ethnic groups in the name of preservation of territorial integrity.²³⁸

Similarly, specific protection against arbitrary displacement on the basis of discriminatory grounds is provided in the Statute of the ICC, which prohibits the crimes against humanity of persecution and apartheid against any group on political, racial, national, ethnic, cultural and religious grounds including minority.²³⁹ Inclusion of political grounds in the crime of persecution, which is a common ground of persecution to eliminate civilians with opposing political views in internal armed conflicts, offers an added protection. Even though provisions that prohibit genocide and crimes against humanity do not specifically protect minority groups as such, they are most affected in internal armed conflicts and therefore virtually protected against systematic or large scale measures of forced displacement.

International humanitarian law does not contain a specific protection against forced displacement of minorities as such, above and beyond the non-discrimination provision. The non-discrimination clause in Common Article 3 and Article 4 of Protocol II on humane treatment can cover forced displacement of minorities as cruel treatment to the extent they fall within the category of civilians affected by armed conflicts. In addition, Article 2 of Additional Protocol II specifically provides for non-discrimination in the application including the prohibition of forced displacement in Article 17 of Additional Protocol.

E. Protection Against Forced displacement in International Humanitarian Law

Apart from forced displacement by government armed forces which has been discussed earlier under human rights law, civilians can be forcibly displaced by

²³⁸ P.Thornberry, *International Law and the Rights of Minorities*, at p.70.

²³⁹ Article 7 (1)(h) and (j) of the Statute of the ICC.

opposition armed groups. During the internal armed conflict in Colombia in 1996, FARC, a guerrilla group, forced the displacement of civilians as a military tactic and disregarded the obligations of humanitarian law to provide the requisites for survival to those civilians.²⁴⁰ In the internal armed conflict in Sri Lanka, in late 1990, Muslim civilians were expelled from the north by the armed opposition group, LTTE.²⁴¹

Common Article 3 does not contain an explicit provision against forced displacement or transfer of civilians within or outside the country. The absence of such protection in an internal armed conflict causes a serious gap in the protection of IDPs. However, consideration of forced displacement as a violation of the prohibition against inhuman or degrading treatment in common Article 3, improves their situation.²⁴² Cruel or inhuman treatment should involve ‘an intentional act or omission, that is, an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity ...’²⁴³ As such, forced displacement could be considered as inhuman treatment, as forced displacement is ‘by definition a traumatic experience which involves abandoning one’s home, losing property and being displaced under duress to another location.’²⁴⁴ A residual function can be performed by common Article 3 under the provision of cruel treatment in substance to include forced transfer of civilians within the country. The inhuman treatment provision of common Article 3 does not include an exhaustive list of such acts of cruel behaviour. Such a list was deliberately omitted, to accommodate the various and unpredictable forms of cruel behaviour by parties to the conflict. Forced displacement could therefore be covered by this provision as it

²⁴⁰ Human Rights Watch, ‘War Without Quarter: Colombia and International Humanitarian Law’ (New York, 1998) at pp.205-206.

²⁴¹ J. Hampton (ed.), *Internally Displaced People: A Global Survey* (Oslo, 1998) at p.150.

²⁴² S. Junod, ‘Commentary on Protocol II,’ at p.1472, n.1; As Hanckaerts asserts, ‘...Common Article 3 can be applied to prohibit deportations and transfers as “violence to life and person” and as an “outrage upon personal dignity. It is difficult to imagine an involuntary (mass) deportation that would not violate these standards.’ J.M. Hanckaerts, ‘Deportation and Transfer of Civilians in Time of War,’ (1993)26 *Vanderbilt Journal of Transnational Law* p.469, at p.517; *Kupreskic et al.*, para.566; C.Meindersma, ‘Legal Issues Surrounding Population Transfers,’ at p.54.

²⁴³ *Prosecutor v. Krstic*, para.516; *Celebici*, Trial Chamber, 552; *Prosecutor v. Blaskic*, para.186; in *Celebici*, the Trial Chamber considered inhuman treatment in Article 2 (b) on grave breaches of the ICTY as corresponding to the cruel treatment in Article 3 of the statute that includes common Article 3, para.550.

²⁴⁴ *Krstic*, paras. 523, 532; *Kupreskic et al.*, para.566; see Arts..5(d) and 5(i) of the Statute of the ICTY.

is prohibited in Article 17 (1) of Additional Protocol II of 1977 which develops and supplements common Article 3.²⁴⁵

However, such protection against displacement of civilians under common Article 3 is restricted with regard to civilians within the control of the party to the conflict. Therefore forced displacement carried out by indirect coercive means such as indiscriminate attacks and terror tactics such as shelling by an adverse party against civilians not within its control cannot be protected by such provision.²⁴⁶

It is to be noted that displacement *per se* is not prohibited in international humanitarian law, as Article 17(1) of Additional Protocol II permits displacement for military necessity and safety of civilians.²⁴⁷ However because of the resulting traumatic consequences, it requires the parties that carry out the displacement to provide basic survival needs for those displaced civilians. Any such direct displacement carried out for purposes other than military necessity and safety of civilians, without the consent of such civilians and without providing any basic survival needs, which renders the civilians impoverished, is a violation of Article 17 (1) of Additional Protocol II and can constitute inhuman treatment under specific circumstances. A displacement carried out for legitimate purposes, but without providing basic necessities, can also be considered as inhumane treatment, depending on the circumstances of a specific case, including whether it creates serious mental or physical suffering or constitutes a serious attack on human dignity. If a displacement is carried out indirectly under coercive circumstances in a manner violating humanitarian law norms, such as severe beatings, rape, killings and cruel separation from male family members, such forced displacement in such intimidating circumstances can be subject to protection as cruel treatment.²⁴⁸ Therefore in terms of inhuman treatment, protection against forced displacement of civilians in its broad sense, including direct and indirect forced displacement is possible.

The noteworthy feature of Article 17(1) of Additional Protocol II, which in its entirety is considered as a customary international law, is that it prohibits forced displacement of both individuals and groups of civilians within the

²⁴⁵ J.S. Pictet, *Commentary IV*, at p.598.

²⁴⁶ See G. Abi-saab, 'Non-International Armed Conflicts,' at p.235.

²⁴⁷ *Krstic*, paras, 524-30.

²⁴⁸ *Krstic*, paras.517-18, 530.

territory.²⁴⁹ Such an individualised protection against forced displacement in Additional Protocol II is significant in its application to limit the freedom of movement in human rights law. This can be contrasted with the corresponding war crime in Article 8(2)(e)(viii) of the Statute of the ICC, which refers to ‘civilian population.’ Therefore it seems that forced displacement is only prohibited when it is carried out against a minimum number of civilians.²⁵⁰

Article 17 (1) of Additional Protocol II explicitly protects against forced displacement of civilians within the country. However, the use of the term ‘ordering,’ similar to the provision related to the corresponding war crime in the ICC Statute, clearly indicates that only acts which are ‘directly aimed at removing the respective civilian population from a given area are prohibited.’²⁵¹ Therefore, displacement of civilians by indirect acts ‘which do not possess such a character but which lead to the same result, such as the intentional starvation of the population in order to force them to leave from a certain area’ is not covered.²⁵² This can occur in situations where displacement of civilians is pursued as an ‘objective’ of the armed conflict, by a party to the conflict to pursue its objective of forced movement indirectly by conducting the hostilities or misusing its power in such a manner as to leave the civilians with no option but to flee.²⁵³ The former means of displacement of civilians not within the control of the parties to the conflict is not covered however within the ambit of Article 17(1) of Additional Protocol II as it is clearly concerned with the prohibition of forced displacement of civilians within their control.²⁵⁴ Those violations of conduct of

²⁴⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, at pp.457 and 463; Report of the International Commission of Inquiry on Darfur, at p.49, para.166; Art.8(2)(e)(viii) of the Statute of the ICC.

²⁵⁰ A. Zimmermann, ‘Prohibition of Forced Movement of Civilians’ in O.Triffterer(ed.), *Commentary on the Rome Statute*, p. 280, at p.281.

²⁵¹ *Ibid.*, at p.281 in the context of Art.8(2)(e) (viii) of the ICC Statute; H. Spieker, ‘Twenty –Five Years After the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?’ (2001) 4 *YIHL* 129, at pp151-53.

²⁵² A.Zimmermann, *ibid*; Article 17(2) of Additional Protocol II refers to ‘compelling’ the civilians to leave from their territory seems to be broader than ‘ordering’ to cover such indirect acts, M. Stavropoulou, ‘The Right Not to be Displaced,’ at p.727; see the definition of the term ‘forcible’ transfer in crimes against humanity. *Elements of crimes*, at p.11, n.12.

²⁵³ P.Kourula, *Broadening the Edges, Refugee Definition and International Protection Revisited*, (Hague, 1997) at p.4; H. McCoubrey & N.D.White, *International Organizations and Civil War*, (England,1995) at p.115; *Krstic*, para.147.

²⁵⁴ See G. Abi-saab, ‘Non-International Armed Conflicts,’ at p.235.

hostilities carried out for indirect forced displacement can be protected by other provisions of Additional Protocol II such as Articles 13 and 14.²⁵⁵

Article 17(1) exceptionally permits displacement for the security of civilians and for ‘imperative’ military reasons.²⁵⁶ Thus, any displacement is *prima facie* unlawful and the party that carries out such displacement has the burden of justifying its action on either of these grounds. Express provision as to displacement for security of civilians can be subjected to abuse by the parties to the conflict to serve their own interests. However, the ground of military necessity has been formulated in a relatively strengthened manner by the requirement of ‘imperative’ military necessity. This may reduce the chances of deliberate displacement, as it necessitates ‘the most meticulous assessment of the circumstances.’²⁵⁷ Therefore ‘imperative’ military reasons based on political motives such as moving hostile ethnic groups to keep them under effective control or to weaken the support of civilians for the armed opposition group²⁵⁸ or to change the demographic composition or to implant another ethnic group in such places, are not warranted. In sum, ordering the displacement or expulsion of civilians within the power of a party for ‘racial, cultural or religious’ reasons related to the conflict, to ‘ethnically cleanse’ them from the area is prohibited as a method of combat by Article 17(1) as they do not fall within the two exceptions.²⁵⁹ Since the Protocol should be applied to all persons affected by an armed conflict ‘without any adverse distinction’ based on race, colour,

²⁵⁵ These can also constitute independent war crimes on their own terms.

²⁵⁶ Article 4(3)(e) of Additional Protocol II permits temporary removal of children, with the consent of their parents or guardians, to safe areas within the country to protect them from the imminent dangers of armed conflict.

²⁵⁷ C.Meindersma, ‘Legal Issues Surrounding Population Transfers’, at p. 49; B. Rutinwa, ‘Refugee Claims Based on Violation of International Humanitarian Law: The “Victim’s” Perspective,’ in International Association of Refugee Law Judges 4th Conference, *The Changing Nature of Persecution*, (Switzerland, 2000) p.251, atp.254. http://www.arkcra.ch/iarlj/EN/Nature_PDF/title.pdf

²⁵⁸ S.Junod, ‘Commentary on Protocol II,’ at p.1473, para.4854; W. Hayden, ‘The Kosovo Conflict and Forced Migration: The Strategic Use of Displacement and the Obstacles to International Protection,’ *Journal of Humanitarian Assistance*, <http://www-jha.sps.cam.ac.uk/b/b597.htm> Document posted : 3 June 2000 .

²⁵⁹ H. McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd ed., (Dartmouth, 1998), at p.267; *Krstic*, para.527; in *Karadzic and Mladic*, at pp.115 *et seq.*, the Trial Chamber of the ICTY discussed ‘ethnic cleansing’ as an unlawful method of displacement; the policy of ethnic may amount to genocide as well as crime against humanity ; principle 6(2)(a) of the UN Guiding Principles on Internal Displacement.

language, religion, or social origin and so on, such a measure in pursuance of an ethnic cleansing policy is certainly prohibited.²⁶⁰

Despite these safeguards, Article 17(1) can be manipulated by parties to the conflict for their ulterior motives, even within the exceptions of the same such as collective punishment for civilians for their perceived support for insurgents.²⁶¹ The policy of forcible regroupment implemented by Burundi in September 1999 is a clear reflection of the such situation.

In the course of ethnic armed conflict in Burundi between the Tutsi-dominated government and the rebel National Liberation forces (FNL) composed of the Hutu majority ethnic group, in September 1999, the government carried out a forced 'regroupment' of (mainly Hutu) civilians living in the area close to the capital, into camps. Human Rights Watch reported that about 350,000 civilians from the areas around the capital were forcibly relocated into 53 camps.²⁶² Though this measure was adopted in the pretext of extending protection to civilians from attacks of the rebel forces (FNL), the underlying intention was to deprive the rebels of the perceived support of Hutu civilians, so as to reduce the risks of attacks by rebels on the capital.²⁶³ Notwithstanding the fact that Burundi is a party to the 1949 Geneva Conventions and Additional Protocol II, there was a failure on the part of the government to prepare the sites of relocation or make provision for basic survival needs-water, hygiene, shelter, food and safety for the civilians in those camps as stated in Article 17 of Additional Protocol II.²⁶⁴ 'Enforced residence in the camps exposed the displaced people to a number of other abuses by members of the Burundian armed forces, as well as to a greater likelihood of death by disease and malnutrition than they would have

²⁶⁰ Art.2(1) of Additional Protocol II.

²⁶¹ F. J.Hampson, *Legal Protection Afforded to Children Under International Humanitarian Law*, Report for the Study on the Impact of Armed Conflict on Children, (May 1996) para.7.4, (<http://www2.essex.ac.uk/c&acu/papers&reports/fh.htm>).

²⁶² Human Rights Watch, 'Emptying the Hills'.

²⁶³ IASC, 'Statement on Forced Relocation (Regroupment) in Burundi', press release- IHA/694-20000119, (10/07/01) <http://www.reliefweb.int/w/rwb.../c05ae9e8db89197b8525686boo7a5e28?OpenDocument>.

²⁶⁴ 'They[civilians] were directed to sites, many of them on barren hilltops, far from any source of water. They were ordered to build shelters out of whatever branches and leaves they could find. Authorities provided no food, no water, and no building materials for them and said nothing about how long they would be required to live there. ...People slept on the open air until they were able to finish constructing their shelters.' Human Rights Watch, 'Emptying the Hills'.

suffered had they remained at home.’²⁶⁵ The forced relocation measures adopted by the Burundian government could not be justified in terms of Article 17 of Additional Protocol II.²⁶⁶ However, the problem is not the lacunae in the law, but the implementation of law in good faith by the parties. These problems can only be confronted by effective enforcement mechanisms.

The enforced displacement under Additional Protocol II obliges the authorities to take ‘all possible’ measures to receive those displaced civilians in ‘satisfactory’ conditions where basic survival needs are provided. It follows that if the displacement has to be continued due to military operations, and therefore the return of these displaced civilians to their homes is not possible within a relatively short period, the displaced civilians must be provided with relatively stable accommodation, proper feeding and sanitary arrangements suitable for long term survival, by the displacing party.²⁶⁷ The mention of the safety of civilians requires that the displaced civilians’ shelter be located away from the vicinity of military camps,²⁶⁸ as such situations would make IDP camps vulnerable to attack and lead to IDPs being used as human shields. The importance of this obligation is that the provision of survival requisites is limited to situations of deliberate displacement of civilians as opposed to incidental displacement of civilians, as a consequence of armed conflict.²⁶⁹ Thus, the legality of the order of removal of civilians depends not only on two specific exceptions but also on the provision of the means of survival to those civilians.²⁷⁰ However, parties to the conflict can avoid this responsibility

²⁶⁵ *Ibid.*

²⁶⁶ See IASC, ‘Statement on Forced Relocation’.

²⁶⁷ Though the expression ‘all possible measures’ is intended to cover the practical difficulties that arise in urgent situations, this does not in any way reduce the ‘effect of the obligation,’ S.Junod, ‘Commentary on Protocol II,’ at p. 1473.

²⁶⁸ *Ibid.*, at p.1473, para.4856; similar obligation concerning interned displaced civilians see Art.5(2) (c) of Additional Protocol II.

²⁶⁹ But if these displaced civilians are subsequently interned in any relocation camps, they should be provided with such needs, Art.5(1)(b) of Additional Protocol II.

²⁷⁰ K. Dormann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge, 2002) at p. 475; in Uganda, Rwanda and Burundi, governments forcibly relocated the IDPs to permanent or semi-permanent sites without fulfilling the pre-conditions of survival for a legitimate displacement, but depending mostly on external humanitarian aid. Such relocations are not legitimate in terms of Article 17(1) of Additional Protocol II, see J. Bennett, ‘Forced Relocation in Uganda, Rwanda and Burundi: Emerging Policy’, (2000)7 *Forced Migration Review* pp.27-30.

altogether by displacing the civilians by indirect means so as to avoid the obligation under Article 17(1) of Additional Protocol II.

Article 17(1) does not state explicitly about the temporary nature of such relocation or the return of the displaced civilians. This is in contrast to the protection provided in international armed conflicts, where it is required that '[p]ersons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.'²⁷¹ However, given the exceptional nature of relocations under Article 17 (1) it can be implied that such measures last as long as the necessity of the situation. Otherwise, it would become a forced displacement which has a permanent nature, as the parties that carry out such displacements do not intend the return of the IDPs.²⁷² Whatever the case may be, this lapse can be complemented by human rights law, as the principle of proportionality requires that any such displacement should be temporary, and its duration cannot last longer than the aim pursued by such displacement. As far as armed opposition groups are concerned, they are not bound by the human rights law standard.

²⁷¹ Article 49 of the IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War 1949.

²⁷² *Simic, Tadic and Zaric*, para.134 (in the context of crimes against humanity).

4. Protection Against Displacement As a By-Product of Armed Conflict

As discussed above, otherwise involuntary displacement of civilians as a by-product of armed conflict or due to prevailing insecurity is not a violation of the right to remain. Such displacements are the result of violations of humanitarian law and human rights law. It is the consequences created by such displacement that give the impetus for the international legal protection of such IDPs who are obliged to leave to avoid the effects of conflicts, similarly to those subjected to forced displacement.

International humanitarian law does not contain any rules of hostilities that prohibit displacement resulting as a consequence of attacks. The principle of proportionality that provides protection against disproportionate incidental deaths and injuries to civilians and damage to civilian objects does not include disproportionate displacements. As Gardam and Charlesworth state, the principle of proportionality as stated in Art.51(5) of Additional Protocol I

‘does not require that factors such as long-term civilian casualties, either from injuries at the time of attack or from resulting starvation and disease, be taken into account in determining what is a proportionate attack. Neither are commanders required to assess to what extent attacks will lead to displacement of the civilian population and the creation of refugee problem. ...As things stand, however, long-term effects of attacks and the potential dislocation of civilians are not limiting factors in IHL.’¹

Therefore, displacements by effects of armed conflicts or violations of human rights cannot become violations of the right against arbitrary displacement. Such displacements can be prevented or reduced if the state parties respect and ensure respect for their human rights obligations, and government armed forces and armed opposition groups respect and ensure respect for humanitarian law obligations. Civilians are often compelled to displace by the direct and

¹ J.Gardam & H.Charlesworth, ‘Protection of Women in Armed Conflict’ (2000)22 *HRQ* 148, at p.161; Art. 51 (5) of the Protocol Additional to the Geneva Conventions of 12 August 1949, And Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977 (hereafter Additional Protocol I), reprinted in (1977) 16 *ILM* 1391.

indiscriminate attacks on them and their objects, which destabilise their lives.² Allegiance of civilians to a party to the conflict in internal armed conflict is derived from the lines of ethnicity or language or religion rather than their nationality. Civilians become vulnerable to attack and abuse in such situations. Therefore, adherence is required to the rules of humanitarian law that directly affect the civilians, such as rules prohibiting indiscriminate attack. As stated by Pictet, the objective of international humanitarian law is ‘... to regulate hostilities in order to attenuate their [civilians] hardship.’³ Moreover, compliance with human rights norms in particular, the right to security of the person, the right to life and the right to be free from torture and inhuman treatment are important to prevent displacement. Adherence to these rules can have the effect of reducing but not totally avoiding displacement during internal armed conflicts.

However, widespread displacements of an ethnic or linguistic or religious group might engage the responsibility of the states to take positive measures to minimize such displacements by taking measures to reduce systematic human rights and humanitarian law violations against them, as in such situations it is difficult to draw a fine line between forced displacement by coercive measures and otherwise involuntary displacement.

A. Spreading Terror Among IDPS

Acts which are designed to spread terror among civilians cause them to flee the area. For instance, not only ‘indiscriminate and widespread shelling and regular bombardment of cities, but also assault, rape, abuse and torture of women and children and mass killing’ can inflict terror among civilians.⁴ These acts can be dealt with separately as specific violations of human rights, such as the right to life, or the right to be free from torture and inhuman treatment, or terrorising civilians by various acts as a whole can be regarded in itself as a violation of right to be free from inhumane treatment.

² ‘The Shelling of Srebrenica, particularly on 10 and 11 July 1995, and the burning of Bosnian Muslim homes was calculated to terrify the population and make them flee the area with no hope of return.’ *Krstic*, para.147.

³ J.Pictet, *Development and Principles of International Humanitarian Law* (Dordrecht,1985)at p.1.

⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, at p.11(footnotes not cited).

Indiscriminate shelling cannot be regarded as a violation of the right to life without resulting in the deaths of civilians. It can, however, 'constitute violations of the right to humane treatment and respect for emotional integrity' in terms of Article 7 of the ICCPR, Article 3 of ECHR and Article 5 of IACHR.⁵ Conversely, injuries caused by assault or ill-treatment by the police or soldiers short of death can fall within Article 6 of the ICCPR if the 'unequivocal intention or aim behind the use of force' among other factors, is incompatible with the object and purpose of Article 6 of the ICCPR.⁶ As the European Court mentioned, in 'exceptional circumstances' physical ill-treatment can be covered by Article 2 of the ECHR.⁷ This means, then, that indiscriminate attacks for example, by air against civilians, that do not result in death can also be regarded as an infringement of right to life, since they are similar to attempted murder, due to the foreseeable nature of deaths involved in such attacks.

Similarly death threats by security forces or persons who have connections with the government are not covered by the right to life but can fall within the scope of the right to security of persons under Article 9 (1) of the ICCPR. According to the Human Rights Committee, although the right to security is referred to only in Article 9, the Covenant does not intend to narrow this concept to situations of formal deprivation of liberty.⁸ As States have undertaken to take appropriate measures to protect the rights enshrined in the Covenant, an interpretation that excluded such threats to the personal security of civilians (as non-detained persons) would render such an obligation ineffective to provide protection from displacement. Conversely, the right to security in Article 5(1) ECHR does not have any independent meaning apart from the right to liberty, to include protection from threats to life.⁹ However, the Inter-American Commission on Human Rights considered threats (including by assault) that forced civilians to

⁵ See *Third Report on Colombia*, 1999, Ch.IVf, para.308; in *Maria Mejia v. Guatemala*, paras.59-61 stated that causing wounds and attacks to intimidate civilians constitute inhumane treatment in terms of Article 5(1) of the ACHR.

⁶ *Ilhan v. Turkey*, Judgment, Application No. 22277/93 (27 June 2000) para.76.

⁷ *Ibid.*

⁸ *Delgado Paez v. Colombia*, (195/1985) ICCPR, A/45/40 vol. II (12 July 1990) at para. 5.5; *Jayawardena v. Sri Lanka* 916/2000, CCPR/C/75/D/916/2000 (26 July 2002).

⁹ S.Trechsel, 'Liberty and Security of Person,' in J. Macdonald *et al.*, (eds.), *The European System for the Protection of Human Rights* (Dordrecht, 1993) p.277, at pp.284-85; M.Nowak, *UN Covenant*, at p.162.

leave their community and prevented their return as inhuman treatment in terms of Article 5 of the ACHR.¹⁰

Civilians are protected by Article 13(2) of Additional Protocol II and customary humanitarian law from intentional terror attacks such as air raids, shelling and sniping on civilians if the primary object of such is to spread terror among civilians and to cause their displacement from an area.¹¹ Such a terror attack is a specific form of the general prohibition of Article 13 on attack on civilians and therefore limited to acts of or threats of violence that cause death or serious injury to body or health of civilians.¹² As spreading is limited to the primary effect, bombing of a military objective which causes the incidental effect of terror among civilians is therefore excluded.¹³

This has to be, however, distinguished from Article 4(2) (d) of Additional Protocol II, which also prohibits acts of terrorism against the civilians *within the power* of a party to the conflict and therefore would not include the above mentioned attacks but may include *inter alia.*, assault, rape, indiscriminate mass arrests and torture.¹⁴ Such acts of violence against a particular ethnic, linguistic or religious group of civilians might spread extreme fear and force them to displace to another relatively safe area within the state.

B. Indiscriminate Attacks

Apart from the specific physical impact, an attack can have other severe consequences, such as vulnerability to certain weapons, disruption of medical services, starvation, disease and cause displacement. Since the impact on civilians

¹⁰ *Maria Mejia v. Guatemala*, paras.59-61.

¹¹ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Rule 2, at pp.9-11; in *Prosecutor v. Galic*, IT-98-29-T, Judgment of 5 December 2003, paras.97 and 138 the Trial Chamber I of the ICTY had not decided the customary nature of the crime of terror but on the basis of treaty law as violation of laws and customs of war under Article 3 of the statute of the ICTY.

¹² *Prosecutor v. Galic*, para.138.

¹³ Pictet, J., and Pilloud, C., 'Article 51-Protection of the Civilian Population' in Y.Sandoz, C. Swinarski, and B.Zimmermann (eds.), *Commentary on the Additional Protocols*, p.613, at p.618, para.1940; to the corresponding Article 51 (2) of Protocol I states that, it 'is intended to prohibit acts of violence the primary purpose of which is to spread terror among the civilian population without offering substantial military advantage.' In *Prosecutor v. Martić* (Rule 61) Case IT-95-11-R61, ICTY Trial Chamber (8 March 1996) (1998) 108 *ILR* 40, para.31 it was held that, the use of Orkan rockets which cannot be guided towards the target and of low striking force indicate that it was not to hit military targets but to terrorize civilians.

¹⁴ See below, Chapter 5, Section, F for the scope of Article 4 and 13 of Additional Protocol II.

of such attacks is assessed in terms of immediate physical injury to or death of civilians, the long term effects and their (indirect) consequences on civilian population are not taken into account.

Article 14 of Additional Protocol II which prohibits direct destruction of objects indispensable for the survival of civilians to avoid starvation, does not specifically prohibit the collateral destruction of such objects, although this is covered by the general prohibition of disproportionate damage to civilian property.¹⁵ As the principle of proportionality does not cover starvation, it is quite legitimate to cause starvation in an attack as a collateral effect. In other words, an attack does not become disproportionate due to resulting starvation or displacement. Therefore, starvation caused within a proportionate collateral damage can aggravate the existing malnutrition and mass displacement in developing countries which have already been affected by such problems caused by economic factors and natural disasters.

Further, attacks on objects which are of 'dual uses' to civilians and the military, such as 'electric towers and oil and gas pipelines'¹⁶ during conflicts, would cause severe indirect impact on civilians and cause displacement. Even in the case of legitimate attacks on such objects as military objectives, their indirect impact on civilian population is not considered as a factor to be considered for the purposes of assessing proportionality.¹⁷ As Greenwood points out in the context of coalition attacks in Iraq in the Gulf war, on electrical power plants as a legitimate target and their indirect impact on civilians:

[T]he majority of Iraqi electrical production facilities, however, were part of an integrated national power grid, which provided electrical power for both civilian and military use. Although the coalition attacks on power stations appear to have killed or injured few civilians and the immediate damage to civilian objects from these raids could not be said to have been excessive was that the infrastructure of civilian life ground to a halt as hospitals, sewerage plants water purification facilities and the like ceased to be able to operate. The resulting collapse of infrastructure vital to civilian life caused far greater civilian loss and damage than the bombing itself.¹⁸

¹⁵ See below, Ch.5, *ibid*.

¹⁶ IACHR, *Third Report on Colombia*, 1999, Ch.Ivc, para.141.

¹⁷ F.Hampson, 'Means and Methods of Warfare in the Conflict in the Gulf' in P.Rowe(ed.), *The Gulf War 1990-91 in International and English Law*, (London,1993) p. 89, at pp.99-100.

¹⁸ C.Greenwood, 'A Critique of the Additional Protocols to the Geneva Conventions of 1949' in H.Durham, and T. McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Hague, 1999) p. 3, at p.12.

There is no such provision in Article 52 of Additional Protocol I for ‘dual use objects,’ an object is either military or it is not.¹⁹ Therefore such ‘dual use’ objects would not be subjected to the presumption of civilian objects.²⁰ To be attacked lawfully however, these dual use objects must meet the dual criteria in the definition of military objective, which can be satisfied even with an indirect use of such objects by the military.²¹

Other options would be to include these ‘dual use’ objects into either Article 15 or 14 of Additional Protocol II, to provide protection against attack.²² Electrical power plants do not fall within the prohibition of Article 15 of Additional Protocol II on works and installations containing dangerous forces, as they do not release ‘dangerous forces’ that result in direct civilian losses, but rather an ‘indirect effect of loss of power’ on civilian population.²³

However, attacks on electrical power plants which have dual uses may fall within Article 14 of Additional Protocol II, that prohibits attacks against objects indispensable for the subsistence of civilians, as the objects therein are non-exhaustive to allow inclusion of objects other than those enumerated therein, according to the context.²⁴ Because Article 14 does not contain a requirement similar to that in the corresponding Article 54 of Additional Protocol I which requires that attack should be made ‘for the specific purpose of denying them for their sustenance value to the civilian population,’ the objects within the sphere of Article 14 cannot be attacked for any reason whatsoever.²⁵ In the context of contemporary internal conflicts, in order to protect the civilian population and to avoid their displacement, it is therefore highly desirable to provide specifically that certain dual use objects should be treated as civilian objects and protected from attack.

The non-consideration of displacement of civilians as a factor in determining collateral injuries to civilians in hostilities makes even the mass displacement of civilians beyond the protection of humanitarian law. If the

¹⁹ C.Greenwood, *ibid.*, at p.13; see below, Ch.5, Section F. 2. a. for detailed discussion.

²⁰ M. Bothe, K.J. Partsch and W.A. Solf, *Commentary*, at p.326.

²¹ See below, Chapter 5, Section, F.2.a.

²² These prohibitions are part of customary humanitarian law applicable to internal armed conflicts. J.M.Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, Rule 42, pp.139-142; Rule 54 pp.189-193 respectively.

²³ F.Hampson, , ‘Means and Methods of Warfare in the Conflict in the Gulf ‘ at p.99.

²⁴ S.Junod, ‘Commentary on Protocol II’, at p.1458.

²⁵ See below, Ch.5, Section. E. 2. c.

foreseeable incidental displacement of civilians were considered as part of the principle of proportionality, it would be an alternative protection to civilians in the light of the gap of protection in Article 17(1) of Additional Protocol II concerning deliberate displacement by coercive measures. Further, this would ease the determination as to whether the displacement occurred as a consequence of hostilities, of a lawful attack, or as a method of combat or as an objective of armed conflict, namely, ethnic cleansing. Another way to determine whether an attack is in accordance with humanitarian law is to take into consideration the cumulative effect of repeated attacks on military objectives resulting in civilian casualties, which would fall within the grey area between the 'indisputable legality and unlawfulness of the principle of proportionality.'²⁶

²⁶ *Kupreskic et al.*, para.526.

Conclusion to Part II

The above discussion indicates that both human rights and humanitarian law provide protection against forced displacement. There is a right to remain or right against arbitrary displacement in human rights law and displacement is therefore exceptional. In internal armed conflict situations, international humanitarian law and international criminal law define the scope of derogation from the right to remain. However, the protection provided by international humanitarian law is limited to direct acts of forced displacement committed against civilians within the control of the parties to the conflict. The protection provided by human rights law is much broader, as it includes forced displacement by coercive measures, in addition to direct acts of displacement. Its regulatory standards provide protection from the abuse of emergency power by governments in carrying out arbitrary displacements in the pretext of lawful grounds of military necessity and safety of civilians.

As other involuntary displacements occur without the active interference of the state to displace civilians, violation of the right to remain or the right against arbitrary displacement of civilians is not engaged. In that sense, such displacements are not arbitrary displacements. However, States have the obligation to take positive preventive measures in systematic human rights and humanitarian law violations when displacement is a reasonably foreseeable consequence of such violations. Moreover, violations which prompted such displacement could engage the responsibility of states under other provisions of human rights and humanitarian law, and of armed opposition groups under humanitarian law. Therefore general compliance with human rights and humanitarian law would indirectly prevent or minimize the displacement of civilians.

As it is the consequences of displacement that makes involuntary displacement to be viewed very much as a harm, the next Part examines the position of legal protection in relation to the needs that arise from such displacement in the light of possible convergence between human rights and humanitarian law.

Part III

Protection from the Consequences of Displacement

Introduction

As discussed earlier, protection against forced displacement is crucial not so much because of the coercion involved in it but because of the consequential multiple violations of human rights. Similarly, even in other involuntary displacement in which the IDPs are obliged to move by the effects of armed conflicts, physical and material vulnerability as a consequence is often inevitable. This necessitates the protection of their specific needs during displacement.

The needs of IDPs include: non-discriminatory treatment on the basis of displaced status; movement related needs, needs of family reunification; needs of documentation; survival needs and other basic needs such as food, water, medical facilities, shelter, housing, assistance in return, and continued education of children ; and protection from violence or threat to life by attack against IDP camps; compensation or restoration of property; and return or reintegration or resettlement.

Apart from the above protection needs, IDPs are vulnerable to arbitrary arrest and detention, disappearances, torture and inhuman treatment, sexual assault and recruitment of children into armed forces and groups during displacement. Since these violations can be a cause for initial displacement as well and are not specific to IDPs alone but also affect non-displaced civilians, such violations cannot be considered as protection needs specific to IDPs alone. Notwithstanding, a broad international protection against such violations has already been provided in human rights and humanitarian law.¹

¹ See generally, Report of the Representative of Secretary –General, Francis Deng, *Compilation and Analysis of Legal Norms, Part I*, E/CN.4/1996/52/Add.2 (5 December 1995); for specific legal protection, J. Pejic, ‘Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence’ (2005)87 *IRRC* 375; for forced disappearances (2001) No. 62-63 of the *International Commission of Jurists Review* ; N.S. Rodley, *The Treatment of Prisoners Under International Law* 2nd ed. (Oxford, 1999); Kelly D.Askin, ‘Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles’ (2003)21 *Berkeley Journal of International Law* 288; G. Goodwin-Gill and I. Cohen, *Child Soldiers: the Role of the Children in Armed Conflict* (Oxford, 1994); M. Happold, ‘The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict’ (2003)3 *YBIHL* 226.

5. Protection During Displacement

A. Protection Against Discriminatory Treatment

Often in internal armed conflict situations IDPs are discriminated against on the basis of their displaced status, despite the fact that they are entitled to equal rights with non-displaced nationals. They can be discriminated against with regard to access to social services, educational facilities, unemployment assistance and adequate housing, access to personal documentation, medical care and exercising the right to vote especially in the place of displacement.¹ For instance, the Muslim IDPs who were expelled by the armed opposition group (LTTE) from the northern part of Sri Lanka were treated as a category who were discriminated against, as they were not registered as local residents in the Puttalam district to which they had displaced.² Registration in the place of destination depended on obtaining a letter of confirmation from the north where they were earlier registered. This was simply not possible due to their forced displacement from that area. Moreover, the attitude of the government to avoid emergence of a 'pure' Tamil northern province without any other ethnic groups, made registration of IDPs in Puttalam difficult.³ As a result, IDPs were not able to get government jobs or to pursue other work such as fishing (which requires formal registration with local administrative bodies), or to obtain the services of government institutions, as they were not granted to people not registered in that administrative region.⁴ At the same time, voluntary movement of other people to another administrative region and their registration was much easier than the Muslim IDPs.⁵

Similarly, in the Russian Federation, since 1999 generally IDPs from Chechnya and in particular, ethnic Chechens who were displaced to other regions of the Russian federation, have been denied or found it more difficult than other Russian citizens to obtain the residence registration, necessary to

¹ Human Rights Committee, Concluding Observations: Serbia and Montenegro, CCPR/CO/81/SEMO (12/08/2004) para.18; Human Rights Committee, Concluding Observations: Colombia, CCPR/CO/80/COL (26 May 2004) para.19.

² C.Brun, 'Local Citizens or Internally Displaced Persons? Dilemmas of Long Term Displacement in Sri Lanka' (2003)16 *Journal of Refugee Studies* 376, at p.377.

³ *Ibid.*, at pp.386-87.

⁴ *Ibid.*, at pp.383, 390-91.

⁵ *Ibid.*, at p.384.

exercise their rights as citizens such as the right to education, employment, social security, and health services.⁶ By withholding registration of IDPs registered in Chechnya including ‘even those of the majority, the government’s ‘own’ people, Slavic Russians’, the government was pragmatic in its efforts to keep them within Chechnya to suppress the evidence of the prolonged and brutal armed conflict.⁷ However ethnic Chechens who are not IDPs and are permanently residing in regions of Russian Federation other than Chechnya have residence registration and are treated like other residents.⁸ These instances indicate the possibility of discrimination on the ground of displacement for various reasons in internal armed conflicts fought on ethnic lines.

To avoid such discriminatory treatment of IDPs, in addition to discriminatory grounds, the discrimination clause should include the status of ‘being displaced’ as well. Such a status cannot be included as a ground in the non-derogable elements of non-discrimination in Article 4(1) of the ICCPR, as it contains an exhaustive list of grounds.⁹ The status of ‘being displaced’ of IDPs can be included in the residuary term ‘other status’ of Articles 2(1) of the ICCPR and 2(2) of the ICESCR which provides for non-discriminatory treatment on the grounds of ‘race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.’¹⁰ Although these Articles are of subordinate nature and that they do not have an independent existence, they complement the rights and freedoms in the respective covenants.¹¹ Therefore, any measure despite its conformity with a substantive right, discriminates against the IDPs on the basis of their displaced status would violate the right concerned in conjunction with the provision on non-discrimination.¹²

⁶ Kate Desormeau, ‘The Outside Inside: Chechen IDPs, Identity Documents and the Right to Free Movement in the Russian Federation,’ Refugee Studies Centre Working Paper No.22 (University of Oxford, 2005) at p.7 and 9; UNHCR, ‘UNHCR Paper on Asylum Seekers from the Russian Federation in the Context of the Situation in Chechnya’, Geneva, February 2003, para.53.

⁷ Kate Desormeau, ‘The Outside Inside: Chechen IDPs’, at p.11.

⁸ ‘UNHCR Paper on Asylum Seekers from the Russian Federation’, paras.56-58 and para.82.

⁹ Similarly Article 27(1) of the ACHR; there is no non-discrimination clause in Art.15 of the ECHR.

¹⁰ For similar non-exhaustive non-discrimination clause, Art.14 of the ECHR ‘other status’; Art.1(1) of the ACHR ‘any other social condition’; Art.2 of the ACHPR ‘other status.’; see below, Section E. 1. for the nature of the obligation of non-discrimination in ICESCR.

¹¹ A. F.Bayefsky, ‘The Principle of Equality or Non-Discrimination in International Law’ (1990)11 *Human Rights Law Journal* 1 at p.4.

¹² See *ibid.*

Article 26 of the ICCPR which entitles every one to equal protection of law without discrimination but also prohibits any discrimination under the law or in fact by public authorities and guarantees equal and effective protection against discrimination can also include the status of displaced person in its discriminatory ground of 'other status.'¹³ This principle of discrimination in Article 26 of the ICCPR is applicable in this regard even to rights not provided for in the ICCPR.¹⁴ Despite the broad application of this provision, it is derogable during internal armed conflicts. However, again in terms of Article 5(1) of the ICCPR, the application of Article 26 cannot be derogated to the extent to destroy it.¹⁵

Discrimination as stated by these articles can be understood 'to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.'¹⁶ Restrictions on resident registration in the areas of displacement based on the ground of being displaced which have the effect of impairing the enjoyment of rights in particular of socio economic rights by IDPs on an equal footing with others, are therefore discriminatory. In such instances, requiring IDPs to obtain documents from the areas from which they have displaced is a method of denying registration in the current areas of displacement. The principle of equality requires in such instances affirmative actions to be taken to 'diminish or eliminate' such requirements that render the continuation of discrimination on the basis of being displaced.¹⁷ The enjoyment of socio-economic rights by IDPs on equal terms with other non-displaced civilians does not depend on identity documents or registration because these documents cannot create those rights but merely affirm the rights of IDPs as citizens of a state.¹⁸

¹³ See similarly, Article II of the American Declaration of the Rights and Duties of Man 1948 'any other factor'; Art.24 of the ACHR; Art. 3(2) of the ACHPR.

¹⁴ Human Rights Committee, General Comment 18: 'Non-Discrimination', (10/11/89) para.12.

¹⁵ Similarly, Art. 29(a) of the ACHR.

¹⁶ Human Rights Committee, 'Non-Discrimination,' para.7.

¹⁷ *Ibid.*, para.10.

¹⁸ Committee on ICESCR, Concluding observations on Russian Federation, E/C.12/1/Add.94 (12 December 2003) para.40, requested the government to ensure that 'the lack of residence registration and other personal documents do not become an obstacle to the enjoyment of

Moreover, common Article 3 and Article 2(1) of Additional Protocol II do not contain displaced status as a ground of discrimination in their non-discrimination clause but contain a residual clause. For example, Protocol II provides for humane treatment without any distinction on the basis of ‘race, colour, sex, language, religion, or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.’¹⁹ Therefore there is a possibility to include the ground of displacement within the residual clause, in the light of the prohibition against forced displacement in Additional Protocol II.

B. Movement Related Needs

1. Right to Move to a Safe Part of the Country

In situations where IDPs have to leave or flee from a combat zone to a relatively safer part of the country, the right to freedom of movement and residence become important as they implicitly contain such aspect.²⁰ Freedom of movement is important to the initial movement to become IDPs from their places of habitual residence, as well as for those in IDP camps and settlements.²¹ In the latter instance, such freedom is important, in particular, to seek employment or cultivate paddy lands, or to leave to a safer part of the state when exposed to the risks of indiscriminate attacks on IDP camps or being used as human shields. It is equally applicable even for those within the safe areas or safety zones created by the UN or the ICRC.

There is no explicit provision in this regard in human rights law, but such a right can be derived from the right to freedom of movement and residence. The right to move freely in Article 12(1) of the ICCPR relates ‘to the whole territory of a State, including all parts of Federal States.’²² The right to reside in a place of one’s choice ‘precludes preventing the entry’ of IDPs to a part of the country.²³ The right to remain in safety and dignity, subject to the restrictions stated in Article 12(3) of the ICCPR, implies that in the event of lack of safety in a place,

economic, social and cultural rights.’

¹⁹ M.Bothe, K.J. Partsch and W.A. Solf, *Commentary*, at p.636.

²⁰ W. Kalin, *Guiding Principles on Internal Displacement: Annotations*, at p.36.

²¹ See for the former instance, above, Ch.3, Section B.

²² Human Rights Committee, General Comment No.27, ‘Freedom of Movement (Art.12)’ CCPR/C/21/Rev.1/Add.9 (02/11/99) para.7.

²³ *Ibid.*

there should be freedom to move to a safer place within the country. Freedom of movement of IDPs to any part of the country does not depend on the 'particular purpose or reason for the person wanting to move or stay in a place.'²⁴ Thus, IDPs cannot be arbitrarily forced to remain in an area or part of the territory. This means that IDPs can move to any part of the country for the reason of safety without any obstruction on the part of the state, except for the restrictions in Article 12(3). Again, these restrictions imposed for purposes of national security or public order should be in 'consistent with the other rights' recognised in the ICCPR, including the right to life and prohibition of inhuman treatment and principle of proportionality.²⁵

Some countries impose an internal permit system on those wishing to move to another part of the country, which unduly obstructs free movement of IDPs in internal armed conflict situations. However such restrictive measures must meet the 'test of necessity and the requirements of proportionality.'²⁶ Therefore, the existence of permit system for internal movement would violate Article 12(1) of the ICCPR.²⁷ The requirement of documents which are not necessary for travelling internally, but required for finding residence in other safe areas of a state would also virtually suspend the freedom of movement and residence in that part of the State. For instance, the policy of the Russian Federation that denies internal passes or passports and residence registration to IDPs who are registered as permanent residents in Chechnya, in an area of displacement outside Chechnya, was implemented to contain the Chechens within Chechnya, 'to suppress and internalize evidence of the war.'²⁸ This resulted in denial of socio-economic rights and exposure to dangers of violations of civil and political rights in the area of displacement. It constitutes a general suspension of right to freedom of movement and residence outside Chechnya.²⁹ This fact is underscored by the UNHCR

²⁴ *Ibid.*, para.5; see above, Ch. 3, Section, B.

²⁵ Art.12(3).

²⁶ Human Rights Committee, 'Freedom of Movement', para.16.

²⁷ *Ibid.*; Human Rights Committee, Concluding Observations: Kyrgyzstan CCPR/Co/69/kgz (24 July,2000) para.17 with regard to *propiska system.*(the requirement to obtain permit for internal movement) and the recommendation of to its abolition; Human Rights Committee, Concluding Observations :Russian Federation, CCPR/C/79/Add.54 (26 July 1995), para.20, in para.37 Committee recommended for the abolition of such internal pass system in practice (which constitutes *de facto* discrimination) at regional and at local levels despite its formal abolition by the Federal Law.

²⁸ K. Desormeau, *The Outside Inside: Chechen IDPs* at p.11.

²⁹ *Ibid.*, at pp.9-10 and 19.

statement that there is no internal flight alternative for ethnic Chechen asylum – seekers from Chechnya.³⁰

Often, those civilians who got caught in the combat zone are in a much more dangerous position than those who are able to move to other areas.³¹ In such life threatening situations, preventing the free movement of IDPs to a safe part of the country may be considered as a violation of right to life of IDPs, as non-admission to a part of the country is analogous to the situation of closure of national borders to prevent civilians fleeing life threatening situations to seek asylum. The latter situation concerning external displacement is considered as prohibited at all times due to its incompatibility with the right to life.³² Similarly, there is no reason to deny such protection to IDPs moving internally, as becoming an IDP is often the first phase before going through the phase of external displacement. Derogation of Article 12(1) must not violate the right to life, as it is not in compliance with the principle of non-derogability in Article 4 of the ICCPR. Such a derogation would affect the legality of the derogation measure prohibiting movement of IDPs to safe parts of the State.

Another dimension of freedom of movement is concerned with the IDPs relocated in open camps and settlements.³³ On the basis of freedom of movement, IDPs have the right to move freely in and out of the camp. The restriction of free movement in and out of the camps would leave the IDPs with insufficient time to spend out of the camp, to search for or involve in income generating activities or cultivate their land, thereby affecting the right to an adequate standard of living and continuous improvement of living conditions of IDPs and also the right to education of the children.³⁴ For instance, due to the restrictions on the movement in and out of regroupment camps in Burundi, IDPs were left without sufficient

³⁰ UNHCR, 'Paper on Asylum Seekers from the Russian Federation,' paras.83-85

³¹ UNHCR, *The State of the World's Refugees 1997-98: A Humanitarian Agenda* (Oxford, 1997) at p.103.

³² Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2002/74 (9 January 2002) para. 8(g).

³³ Confinement of IDPs in closed camp is a violation of right to liberty and security of person as protected in Article 9 of the ICCPR; also see Principle 12 of the UN Guiding Principles on Internal Displacement.

³⁴ Articles 11 (1) and 13 of the ICESCR; Article 28 on the right to education of the 1989 CRC is non-derogable; State party has an affirmative obligation to provide education to children in terms of Article 4 (3)(a) of Additional Protocol II; Article 28 on the right to education of the 1989 CRC is non-derogable.

time to cultivate their land.³⁵ Therefore free movement of IDPs in and out of their camps or settlement is important by virtue of their right to freedom of movement and to exercise their other human rights.³⁶

The other important outcome of protection with this freedom of movement is that when attacks are launched at the camps or other human rights violations take place, IDPs would be able to move away from the vicinity of the camps to other parts of the country. This is relevant to safe areas established by the United Nations or the ICRC.

As far as humanitarian law is concerned, no guarantee is provided for the free movement of civilians to a safe part of the country from the effects of hostilities. Such a right of civilians to move to a safe area is explicitly provided in international armed conflict; if protected persons 'reside in an area particularly exposed to the dangers of war, they shall be authorised to move from that area to the same extent as the nationals of the State concerned.'³⁷ Without an explicit protection of freedom of movement in the dangers of armed conflict, the non-prohibition in Article 17 (1) of Additional Protocol II voluntary movement to other places,³⁸ cannot be considered as ensuring the free movement of civilians.

Movement related restrictions are, however, inconceivable unless such a measure is imperative. Thus, the protection of IDPs necessitates an explicit right to seek refuge internally in areas of relative safety within the country.³⁹

2. Right to Leave One's Own State and the Right to seek Asylum

Emphasizing the right of IDPs to move to a safe area within the country if there is an 'internal flight alternative,' should not minimize the importance or opportunities of seeking asylum in a foreign country, because, either a civilian can become an internally displaced person before becoming a refugee or he can straight away seek asylum if it is a more feasible and safer way than moving internally.⁴⁰ Asylum is a status that provides a real and unique international protection to IDPs that cannot be substituted by the internal flight alternative. If IDPs move to an area within the control of government which is one of the

³⁵Report of the Representative, *Profiles in Displacement: Burundi*, para.24

³⁶ Principle 14 of the UN Guiding Principles on Internal Displacement.

³⁷ Article 38(4) of the IV Geneva Convention of 1949.

³⁸ S. Junod, 'Commentary on Protocol II,' at p. 1472.

³⁹ Principle 15(a) UN Guiding Principles on Internal Displacement.

⁴⁰ UNHCR, *The State of the World's Refugees 1997-98*, at p.108.

parties to the conflict fought on ethnic lines, such movement cannot often be regarded as providing effective internal protection alternative to such IDPs. It might provide protection against indiscriminate bombing to IDPs who would no longer in their homes which are exposed to such attacks, but would not always provide protection against other human rights violations by the government security forces.

In the light of the absence of a right to seek asylum in the ICCPR, the right to leave one's country is significant to the protection of IDPs. The right to leave 'any country, including his own' in Article 12(2) of the ICCPR 'may not be made dependent on any specific purpose or on the period of time the individual chooses to stay outside the country.'⁴¹ Thus the derogable nature of this right during internal armed conflicts may not affect the departure of IDPs for permanent emigration, as such derogation is subject to the principle of proportionality. However, the effective enjoyment of this right of IDPs who wish to emigrate permanently due to unsafe conditions of internal armed conflicts can be affected by derogations or restrictions on the freedom of movement to a safe area within the country. For this particular purpose, the safe area would be the capital of the country, where only the foreign diplomatic missions are generally situated. Restrictions on movement by imposing internal permit systems, delays in the issuing of such permits and restrictions on the duration of stay in the capital would severely affect the emigration process and in turn the right to leave the country.⁴² Thus, for the effective exercise of the right to leave, the right to move freely within the country must be protected. Moreover, the right to leave one's own country includes the right to obtain the necessary travel documents and therefore unreasonable delay or refusal in issuing a passport may not be proportionate to the exigencies of the situation.⁴³

As the enjoyment of the right to leave one's own country is not dependant only on the country of nationality but on the State of residence as well,⁴⁴ IDPs who wish to leave the country to seek asylum can be protected by this right. As noted by the Human Rights Committee in its concluding observations, not allowing asylum seekers to disembark from ships at

⁴¹ Human Rights Committee, 'Freedom of Movement,' para.8.

⁴² See above, Section, B. 1.

⁴³ Human Rights Committee, 'Freedom of Movement,' paras.9,17.

⁴⁴ *Ibid.*, paras.8, 9.

ports to give them a chance to assert their individual claims, imposing sanctions on passenger carriers and other 'pre-frontier arrangements, would involve issues of compatibility with the right of any person to leave their own country under Article 12(2) of the ICCPR.⁴⁵ This can be interpreted as imposing an obligation on the state of destination to 'allow a foreigner to enter space within the jurisdiction of that state as a part of the right to leave, even if the right of the person to enter the territory of that state has not yet been determined and might entail issues not governed by Article 12 of the ICCPR.'⁴⁶ In the absence of the right to seek asylum in the ICCPR, the limited guarantee of disembarkation at the port of entry which facilitates the assertion of asylum seekers' claims, is significant to those who seek asylum from persecution.⁴⁷ Though such an opportunity does not necessarily result in the granting of asylum, at least it would extend protection from rejection at the frontier and sending back to their country of origin or to any country where they would be likely to be in danger of persecution or torture or execution or enforced disappearance.

Though right to seek and enjoy asylum provided in Article 14(1) of the Universal Declaration of Human Rights, is non-binding, such right in Article XXVII of the 1948 American Declaration, Article 22(7) of ACHR and Article 12(3) of ACHPR involves at least a right to advance a claim of asylum and a guarantee of security from *refoulement*.⁴⁸ Such a right to make a claim would become illusory if the State of asylum had the discretion to send the asylum seeker back to his or any other country without identifying him as subjected to persecution with a determination procedure.⁴⁹ The right to seek and enjoy asylum in that sense is thus implicit in the refugee definitions of Articles 1 and 33 of the 1951 Refugee Convention and its 1967 Protocol and in Articles I (2) and II of the OAU Convention of 1969, and Article III(3) and III(4),(5) of the

⁴⁵ Human Rights Committee, Concluding Observations: France, CCPR/C/79/Add.80, (4 August 1997), para.20; Human Rights Committee, Concluding Observations: Austria, CCPR/C/79/Add.103 (19 November 1998) para.11.

⁴⁶ M. Scheinin, 'Forced Displacement and the Covenant', at p.68.

⁴⁷ Human Rights Committee, General Comment, No.15, 'The Position of Aliens Under the Covenant' (11/04/86) para.5.

⁴⁸ R. Plender, 'The Present State of Research Carried Out by the English -Speaking Section of the Centre for Studies and Research' in *The Right of Asylum*, Centre For Studies and Research in International Law and International Relations, 1989, p.63, at pp. 82, 88 and 96.

⁴⁹ See generally, *ibid.*, at pp.82-88.

Cartagena Declaration of 1984, as claims of refugee status depend on such definitions. Moreover, the right to seek and enjoy asylum is supported by the principle of *non-refoulement* in customary international law including non-rejection at the frontier and by the prohibition on torture, cruel, inhuman and degrading treatment and the prohibition on arbitrary deprivation of life in international human rights law.⁵⁰

International recognition of the right to seek and enjoy asylum which necessitates as a pre-condition the right to leave for such purposes, would impose obligations on the receiving state not to obstruct such civilians seeking asylum by defeating the exercise of these rights 'with the view to ensuring that potential refugees remain in their own country and do not find protection.'⁵¹ However such an obligation on the receiving state cannot be expected to mean that visas should be granted to those IDP applicants who are subject to danger in their own country, as this is 'far from being accepted in the practice of States.'⁵² The right to seek asylum is therefore important as the in-country protection is temporary in nature and cannot be an alternative to the protection of asylum which is an effective protection where asylum seekers are 'physically and legally outside the country of their nationality and unable or unwilling to avail themselves of the protection of that country and whose return to that country can only be voluntary.'⁵³

In humanitarian law, as with Article 17(1), Article 17(2) of Additional Protocol II does not prohibit voluntary external displacement of civilians. However, such provision cannot be regarded as granting protection to leave or seek asylum in other countries.

⁵⁰ See above, Ch. 1, for the customary nature of the principle of *non-refoulement*; Articles 3 CAT 1984; 22(8) of the ACHR; 13(4) of the Inter-American Convention to Prevent and Punish Torture 1985; see below, Section, B.3 for cases decided by the European Court under Article 3 of the ECHR; Human Rights Committee, 'The Position of Alien' para.5 states that even in the absence of the right of aliens in the ICCPR, to enter or reside in the host state, an alien (in this context asylum seeker) may enjoy this right in certain situations by the prohibition of inhuman treatment; Principle 5 of the 1989 UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Execution and Article 8(1) of 1992 UN Declaration on the Protection of All Persons from Enforced Disappearance, however both are not legally-binding instruments; Vienna Declaration and Programme of Action, A/CONF.157/23 (12 July 1993), para.23; Report of the Special Rapporteur on Extrajudicial Executions, E/CN.4/2002/74 (9 January 2002) para.8(g)

⁵¹ G. Goodwin-Gill, 'Right to Leave', at p.99; also see above, Ch. 3, Section, B for in-country protection as a method of containment.

⁵² G.S. Goodwin-Gill, 'Right to Leave,' at p.100.

⁵³ L. Franco, 'Examination of Safety Zones', at p.883.

3. Right to be Protected Against Forcible Return or Resettlement

IDPs are often forcibly returned to their homes or habitual places of residence, or forcibly resettled in areas where their life, safety, liberty or health would be at risk. The IDPs are often reluctant to return to their places of habitual residence due to destruction and confiscation of property; absence of assistance in the reconstruction or restitution and compensation of property; implantation of settlements consisting of civilians belonging to the opposite party; appropriation or occupation by government armed forces or armed opposition groups of the property of IDPs for establishment of military camps; prevailing insecurity due to human rights abuses and the possibility of further outbreak of hostilities; and the enduring effects of landmines and unexploded ordnances.⁵⁴ Thus, without any protection or relief for their abject poverty and safety, IDPs are unlikely to return to their places of habitual residence.

States can force the return of IDPs in camps and settlements to active combat zones such as by threatening to arrest them on false charges, withdrawing food allowances; cutting off gas and electricity supplies to the camp which affects the IDPs during winter seasons, and closing down IDP camps without providing any alternative shelter.⁵⁵ For instance, IDPs from Chechnya, who fled the effects of hostilities, were forced to return to the Chechen Republic by the authorities of Moscow.⁵⁶ Moreover, IDPs are reluctant to be resettled in areas other than their habitual places of residence, for instance, where they have to live with civilians belonging to opposition ethnic group or in remote areas where their survival is not feasible due to lack of opportunities for work, education and other needs. In such situations they cannot be subjected to forced return without regard for their safety and dignity. Thus there is a need for the protection of IDPs against forced return resettlement.

Protection as such against forced return or resettlement of IDPs does not exist in human rights law or humanitarian law as corresponding to the principle of non-refoulement with regard to refugees in Article 33 of the 1951 Refugee

⁵⁴ See below, Ch. 6, Section B.

⁵⁵ See Human Rights Watch, 'Into Harm's Way: Forced Return of Displaced People to Chechnya,' January 2003, Vol.15, No.1. <http://www.hrw.org> .

⁵⁶ *Ibid*; Amnesty International, 'Russian Federation: Chechnya for the Motherland' (December 1999) AI index: EUR 46/46/99, <http://www.reliefweb.int/library/documents/chechfull.htm>.

Convention and in certain human rights instruments.⁵⁷ Explicit prohibition against return of asylum seekers is provided in the CAT which states that '[n]o State Party shall expel, return ('refouler') or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.'⁵⁸ ECHR and ICCPR have adopted such an interpretation in terms of Articles 3 and 7 respectively to include a positive obligation of *non-refoulement* with regard to asylum seekers.⁵⁹ The main difference between the protection of *non-refoulement* provided by CAT on the one hand and by the ECHR and ICCPR on the other is that the former is restricted to the risk of torture and the latter is extended to torture and cruel, inhuman or degrading treatment or punishment. In addition, the ICCPR provides protection against forced return to the country of origin under Article 6 on the right to life and Article 9 on the right to liberty and security.⁶⁰

The factual situation of an IDP who is subjected to forced return to any place within a country is by analogy similar to the situation of a refugee who is subjected to forced return to his country of origin or any country which would send him back to his country of origin where he is exposed to danger to life or freedom or torture. If such an external return of refugees can be regarded as torture or inhuman treatment, violation of the right to life, and violation of the right to liberty and security, there is every conceptual justification to extend it to the internal return of IDPs by analogy. An extension of internal *non-refoulement* on the basis of the right to life is consistent with the mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions as it includes a

⁵⁷ Human Rights Committee, 'Replaces General Comment 7 Concerning Prohibition of Torture,' para.9 interprets Art.7 as including the *non-refoulement* of refugees; Human Rights Committee, Concluding observations : Dominican Republic, A/56/40 vol. I (2001) at para.78 (16).

⁵⁸ Art.3(1) of the 1984 CAT; Article 22(8) of the ACHR.

⁵⁹ *Chahal v. U.K*, No.00022414/93 (15/11/1996) para.80; Human Rights Committee, 'Replaces General Comment 7 Concerning Prohibition of Torture,' para.9.

⁶⁰ Human Rights Committee, 'Nature of the General Obligation' para.12 states the *non-refoulement* obligations concerning risks contemplated by Articles 6 and 7 of the ICCPR; *G.T v. Australia*, No.706/1996, CCPR/C/61/D/706/1996 (4 December 1997) paras.8-1-9 ; Principle 5 of the 1989 UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions ; Art.8(2) of the 1992 UN Declaration on the Protection of All Persons from Enforced Disappearances .

situation of '[e]xpulsion, refoulement or return of persons to a country or a *place* where their lives are in danger...'.⁶¹

As far as the asylum seekers are concerned, contracting states have an obligation to protect asylum seekers within their country of origin not only from ill-treatment but also from exposure to the risks of ill-treatment, even in a third country which is not a contracting state. Such protection of human rights is applicable not only against return to the country of origin, but may cover the removal of an asylum seeker to a third country where he/she has already sought protection and where there are substantial reasons to believe that such country would return the asylum seeker to the country of origin without considering the case properly or applying a restrictive interpretation of the 1951 Convention.⁶² In such a situation, the country of refuge engages responsibility for inhuman treatment as it exposes the asylum seeker indirectly to inhuman treatment. By analogy, foreseeable risk to IDPs by forcible return should be avoided, including forcible resettlement in other parts of the state.

A further difference lies in the issue of the source of torture. As far as asylum seekers are concerned, in terms of CAT torture is limited to acts of the agents of State.⁶³ CAT does not provide protection from *non-refoulement* for risk of torture posed by non-state actors, unless such risk of torture is posed with the consent or acquiescence of the State.⁶⁴ Therefore, torture by armed opposition groups in an internal armed conflicts would not be covered by the protection of *non-refoulement*. However, if non-state actors have established quasi-governmental institutions which provide some public services, the danger of being subjected to torture if

⁶¹ Report of the Special Rapporteur on Extrajudicial Executions, (9 January 2002) para.8(g) (emphasis added) ; Committee on CERD, General Recommendation. No.22, 'Article 5 and Refugees and Displaced Persons' (24/08/96) para.2(b).

⁶² *TI v. U.K.*, Application No. 43844/98, Decision, 7 March of 2000, 2000-III *RE CHR* 437.

⁶³ Article 1 (1) of the CAT defines torture as intentional acts that cause severe pain or suffering for certain purposes, 'inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.'

⁶⁴ *V.X.N and H. N v. Sweden*, Communication Nos.130 and 131 /1999, CAT/C/24/D/130 &131/1999 (2 September 200) para.13.8.

returned to the country of origin would be considered by the Committee on Torture as falling within the scope of Article 3 of the CAT.⁶⁵

In contrast, the Human Rights Committee considers that Article 7 of the ICCPR on the prohibition of torture and inhuman treatment includes acts inflicted in an official capacity, outside official capacity as well as in a private capacity by virtue of the positive obligation of the State to protect through legislative and other measures.⁶⁶ Similarly, Article 3 on the prohibition of torture and inhuman treatment under the ECHR covers acts of physical or mental suffering caused by State or non-state actors.⁶⁷ In *H.L.R v. France* the European Court of Human Rights stated that '[o]wing to the absolute character of the right guaranteed, the Court does not rule out the possibility that Article 3 of the Convention may also apply where the danger emanates from persons or groups of persons who are not public officials. However, it must be shown that the risk is real and that the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.'⁶⁸ Therefore, States of asylum have an obligation to protect asylum seekers from *non-refoulement* if they have a real risk of torture or inhuman treatment in the country of origin by non-state actors.

Moreover, ECHR may protect the immigrants not only against the acts of inhuman treatment by State authorities or non-state actors but also to the exposure of risks, the source of which cannot engage direct or indirect responsibility of the public authorities of the home state but due to conditions of internal armed conflicts, where basic subsistence needs for survival, such as shelter, food, and medication, are scarce causing risks to life or health.⁶⁹ However, such situations had been considered as a violation of Article 3 of

⁶⁵ *Elmi v. Australia* CAT, (120/1998), A/54/44(14 May 1999) paras.6.7-7.

⁶⁶ Human Rights Committee, General Comment No.20, 'Replaces general Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art.7)' (10/03/92) para. 2; Human Rights Committee, 'Nature of the General Obligation', para.8.

⁶⁷ *Bensaid v. U.K* No.44599/98 (6 February 2001) para.34; *Ahmed v. Austria*, No.0025964/94 (17/12/1996) para.44.

⁶⁸ *H.L.R. v. France*, application No. 00024573/94 (29/04/1997) Reports 1997-III, para.40.

⁶⁹ In *D v.UK*, Judgment of 2 May 1997, Report 1997-III, 792, para.52 the European Court held that a forcible return of an AIDS patient in his terminal stages to his home island of St Kitts is a violation of Article 3 of the ECHR by referring as to the lack of general medical facilities and family support; *Bensaid v.U.K.*, para.34.

the ECHR only in extreme situations.⁷⁰ Such a strict requirement of compelling circumstances to result in violation of Article 3 of the ECHR is perhaps for the reason that, aliens who are subject to expulsion are not in principle entitled to remain in the territory of the sending state to benefit from the medical and social assistance of the same despite the difficulties for such services in their home states.

However, the approach as to the source of torture or the requirement of extreme situations of lack of basic survival needs with regard to asylum seekers is insignificant in the context of the right against forced return of IDPs. The State is bound to protect IDPs as nationals, regardless of the source of harm and conditions, as IDPs are still within the area controlled by the government and have the right to remain in safety and dignity anywhere of their choice within the territory. Government cannot exercise due diligence in the protection of IDPs against acts of armed opposition groups by sending them to areas controlled by armed opposition groups. Therefore, governments by virtue of their positive obligations are required to ensure respect for human rights at stake and should not forcibly return or resettle IDPs to places where they are exposed to risks including torture or inhuman treatment by non-state actors including paramilitary and armed opposition groups. In addition, the government cannot send IDPs back to life threatening situations such as to an area where conduct of hostilities are taking place. Moreover, governments cannot forcibly return or resettle IDPs in places which in internal armed conflicts lack basic subsistence needs such as medical facilities that affect the health of IDPs.

Moreover, the scope of protection against *non-refoulement* provided by all these human rights instruments except Article 22(8) of the ACHR is wider than that provided in Article 33 of the Refugee Convention, as the latter is only applicable in situations of threats to life or freedom on discriminatory grounds. The position the of UN Guiding Principles on Internal Displacement reflects the

⁷⁰ In the following cases return to the country of origin was not considered as in violation of Article 3 of the ECHR: *Bensaid v. U.K*, paras.40-41; *Meho v. The Netherlands*, Application no.76749/01, Decision of 20 January 2004 ; *S.C.C. v. Sweden*, Application no.46553/99, Decision of 15 February 2000.

broader approach of human rights instruments, as they do not limit the protection of *non-refoulement*, to dangers arising from persecution.⁷¹ Such an approach is beneficial for protection of IDPs who have been compelled to flee by the effects of armed conflict.

The application of Article 33 of the 1951 Refugee Convention is not absolute as it is restricted on the ground that there should not be a danger to the security of the country of refuge.⁷² However, the protection of *non-refoulement* based on the grounds of the provisions on torture or inhuman treatment under CAT, ICCPR and ECHR is broader than Article 33 of the Refugee Convention, as it is absolute and cannot be derogable in any circumstances.

As stated by the Committee on Torture in *Tapia Paez v. Sweden*, due to the absolute nature of Article 3 of the Convention, ‘the nature of the activities in which the person concerned engaged could not be a material consideration when making a decision under Article 3.’⁷³ Likewise, it was stated by the European Court of Human Rights that, when there are substantial grounds to believe that the expulsion of an individual would expose him/her to a real risk of treatment contrary to Article 3 of the Convention, the activities of the individual subjected to expulsion, however ‘undesirable or dangerous, cannot be a material consideration.’⁷⁴ Therefore, asylum seekers cannot be returned to the country of origin on the basis that their presence in the country of refuge is not conducive to its national security, if that return would expose the asylum seekers to the risk of torture or inhuman treatment in the country of origin. Similarly, the governmental authorities cannot force IDPs belonging to an adverse party to return to their place of habitual residence where they are exposed to torture or inhuman treatment, on the ground that their presence in government controlled areas is a threat to security.

As far as humanitarian law is concerned, Additional Protocol II does not contain an explicit protection against forcible return of those displaced by the consequences of conflict. However, Article 17(1) of Additional Protocol II extends a limited protection at least to IDPs who have been displaced initially

⁷¹ Principle 15(d).

⁷² Article 33(2) of the 1951 Convention Relating to the Status of Refugees.

⁷³ Communication No.39/1996, UN Doc. A/52/44 28 April 1997) at para.14.5.

⁷⁴ *Chahal v. U.K*, para.80.

for reasons of their own safety or for security reasons, from being forcibly returned to those places, as long as the unsafe situation still exists.⁷⁵ The obligation to set the camps of IDPs in safe conditions in Article 17 (1) of Additional Protocol II further implicitly necessitates that they should not be sent forcibly to unsafe conditions from which they have initially been displaced.

C. Need for Documentation

Displacement not only results in loss of property of IDPs but also in the loss of necessary documents such as birth, marriage and death certificates, passports, personal identification and title deeds to land. Consequently this would prevent IDPs enjoying their necessary legal rights, render them vulnerable to arbitrary arrest, and exclusion from schools and health services, and sometimes prevent their returning to their own house or land.⁷⁶ Therefore it is important to register IDPs and to provide or replace with documents necessary for access to food rations, schools and health services.⁷⁷

The right to recognition everywhere as a person before the law in Article 16 of the ICCPR would render an IDP capable of being a person before the law to enjoy all other individual rights.⁷⁸ As this capacity of individuals begins with birth, the duty to register every child after birth as stated in Article 24(2) of the ICCPR and Article 7 of the CRC is important in their due recognition and protection as persons entitled to legal rights (legal personality).⁷⁹ As this right is non-derogable in the ICCPR and ACHR and Article 7 of the CRC, there is no difficulty in emphasising the provision to IDPs of documentation of which they are in need during displacement in order to exercise their rights as a person before law.⁸⁰

⁷⁵ Human Rights Watch, 'War Without Quarter,' at pp.214-15.

⁷⁶ N. Kastberg, 'Strengthening the Response to Displaced Children' (2002)15 *Forced Migration Review* 4, at p.6.

⁷⁷ Additional Report of the Special Representative of the Secretary General for Children in Armed Conflict, *Rights of the Child*, E/CN.4/2000/71 (9 February 2000), para.27.

⁷⁸ Similarly, Article 3 of the ACHR ; and Article 5 of the ACHPR; M. Nowak, *UN Covenant*, at pp.282-3; the absence of this right in ECHR does not mean that it cannot be deduced from other provisions of the Convention, M. Nowak, *ibid.*, at p.282.

⁷⁹ *Ibid.*, at p.285.

⁸⁰ Also see Article 8 of the CRC.

Absence of registration of IDPs at all, or those IDPs who get married or the birth of IDP children, renders them incapable of being recognised as IDPs or as persons entitled to legal rights. For instance, in Sri Lanka, it is difficult to obtain a birth certificate as the original birth registration number and date of registration are required and displaced children do not have such information to re-establish their identity in legal terms.⁸¹ The result is the denial of full access to education to IDP children, such as the chance to sit exams or in some instances entitlement to free school uniforms or books.⁸² Moreover, in certain situations, the local authorities in the region where the IDPs have displaced into, without issuing new, lost or expired documents, unreasonably require them to go get back to their places of habitual residence to obtain such documents. For instance, IDPs from Chechnya were required to return to Chechnya to get their internal passports, without considering the danger of travelling without a document which may result in arbitrary arrest and detention, and the great expenses incurred.⁸³

For these reasons, births of all children in IDP camps or outside have to be registered and the documents issued accordingly. This would facilitate the education of IDP children and ensure priority in humanitarian assistance, due to their vulnerability to displacement during armed conflicts. Moreover, providing IDPs with personal identification documents which they have lost during displacement in their places of displacement, would reduce arbitrary arrests on suspicion and facilitate their freedom of movement and right to residence in a safe part of the country, and their access to medical services and other assistance. Although both the UN Guiding Principles on Internal Displacement and the ILA Declaration on IDPs recognise this right specifically, the former is more elaborative than the latter in this regard.⁸⁴

⁸¹ Save the Children, *War Brought Us Here, Protecting Children Within Their Own Countries By Conflict*, UK, 8 May 2000, at p.120.

⁸² *Ibid.*, at pp.119-120.

⁸³ Global IDP Survey, 'Chechen IDPs Remain Deprived of Access to Documents and Registration'; K. Desormeau, 'The Outside Inside', at p.8.

⁸⁴ See UN Guiding Principle on Internal Displacement, Principle 20 ; ILA Declaration on IDPs, Article 6.

The international humanitarian law applicable to internal armed conflict does not contain such an obligation to provide necessary documentation to IDPs.⁸⁵

D. Need for Family Reunification

Separation of families can happen during displacements, due to the effects of hostilities, human rights violations such as enforced disappearances, recruitment of children to armed groups; or relocation by the parties to the conflict. For instance, in Rwanda in 1994, between 80,000 to 100,000 children were separated from their families as a result of genocide.⁸⁶ In situations of separation due to effects of hostilities, disappearances and recruitment to armed forces, in order to reunite the dispersed family members it is necessary to search for them and to restore contact between them. In the situation of forced displacement, family members should not be separated or they should be evacuated with necessary arrangements such as registration of particulars of identity to facilitate their reunification.

As discussed above, if the derogation measures are not strictly necessary to the exigencies of the situation and the limitations are generally sufficient, there is no need for derogation from certain rights.⁸⁷ To similar effect, the Inter-American Court of Human Rights stated that ‘the Convention establishes a contrary principle, namely, that all rights are to be guaranteed and enforced unless very special circumstances justify the suspension of some, ...’⁸⁸ The right to respect for family life is such a right, the derogation of which cannot be sufficiently justifiable during public emergency and it is indeed a non-derogable right under the ACHR.⁸⁹ An explicit right of children internally displaced by armed conflicts to be reunited with their parents is stated in Article 25(2)(b) of

⁸⁵ But humanitarian law applicable to international armed conflicts recognize the right to legal personality of civilians in particular of children to some extent, see Article 50 of IV Geneva Convention of 1948 and Article 78 of the Additional Protocol I.

⁸⁶ C.Petty, ‘Family Tracing and Reunification-Safeguarding Rights and Implementing the Law,’ (1996) 4, *International Journal of Children’s Rights* 165, at p.165 and at pp.170-71.

⁸⁷ Human Rights Committee, ‘States of Emergency’, para.5.

⁸⁸ Habeas Corpus in Emergency Situations (Arts 27(2),25(1) and 7(6)) ACHR Requested by the Inter-American Commission on Human Rights, Advisory Opinion OC-8/87 of 30 January 1987, para.21.

⁸⁹ Art.17(1) and 27(2) of the ACHR; 23(1) of the ICCPR; Art.8(1) of the ECHR; Art.18 of AFCHR

the African Charter on the Rights and Welfare of the Child 1990.⁹⁰ However, Article 23 of the ICCPR or other regional human rights instruments do not contain an explicit right to reunification of displaced families or the right to know the fate and whereabouts of missing relatives or the right of interned IDPs to correspond with or to receive visits from their families.⁹¹ The second right is important not only for the reunification of the family but also in respect for the emotional ties among the family members.

Article 23 of the ICCPR only states the general protection of the family as a 'natural and fundamental group unit of society' and therefore the State and society 'must seek to preserve its [family] bonds, or at least, to mitigate the negative impact of their dissolution.'⁹² Article 9(1) of the CRC states the obligation not to separate children from their parents against their will. In line with this, any derogatory measures adopted from this right under Article 4 of the ICCPR must be proportionate and consistent with the other international obligations of the state which includes obligations under international humanitarian law. As such, Article 23 may be interpreted as including obligations to take measures to trace missing family members to learn their fate and for reunification of families and provide for correspondence between interned IDPs and their family members.⁹³

Other than under Article 23 of the ICCPR, States have a general obligation to investigate missing persons under Article 2(1) of the ICCPR for violation of the right to life for the failure of the state to carry out a 'prompt, adequate or effective' investigation upon the complaint of the relative.⁹⁴ Failure on the part of the state to investigate coupled with the suffering and anguish generated by the fact of

⁹⁰ Art.10(1) of the CRC concerns the obligation for family reunification only in a situation of external displacement.

⁹¹ Art.17 of the ICCPR; Art.10(1) of the ICESCR; Art. 8 of the ECHR; Art. VI of the American Declaration of the Rights and Duties of Man,1948; Arts.1(2), 17(1) and 27(2) ACHR; Art.18(1)(2) of the ACHPR; Arts 15 and 16 (Art. 16 states that a child of young age should not be separated from his mother) of the Additional Protocol to the ACHR in the Area of Economic, Social and Cultural Rights 1988; Art.16 of the CRC.

⁹² F.Volio, 'Legal Personality, Privacy, and the Family,' at p.201.

⁹³ Human Rights Committee, General Comment 19, 'Protection of the Family, the Right to Marriage and Equality to the Spouses (Art.23)' 27/07/90, para.5 states that the right to found a family means also the 'possibility to live together;' this implies the 'adoption of appropriate measures, ... to ensure the unity or reunification of families, particularly when their members are separated for political, economic or similar reasons.'

⁹⁴ *Tas v. Turkey*, 24396/94 Judgment of 14 November 2000, paras. 68,72.

disappearance on the next of kin, may make a family member victim of the violation of the right to be free from cruel, inhuman or degrading treatment.⁹⁵

In a situation of systematic enforced disappearances, this can include cases even without any evidence as to the initial arrest of IDPs. The absence of evidence as to the disappearance of an IDP in an internal armed conflict, such as in cases of enforced disappearance, effects of hostilities or recruitment into the armed groups or paramilitary, does not alter the obligation of the state to investigate into the fate and whereabouts of the missing IDP. The family member who complains about the alleged disappearance of an IDP can also be regarded as a victim of cruel and inhuman treatment, even in such grey cases of disappearances. Because in *Cakici v. Turkey* the European Court emphasised that, ‘the essence of such a violation does not so much lie in the fact of the “disappearance” of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a family member may claim directly to be a victim of the authorities’ conduct.’⁹⁶ Moreover, search for the disappeared and for the identities of the abducted children can also be considered a form of reparation namely, satisfaction to IDP victims.⁹⁷

Though the international instruments of human rights do not contain an express right of reunification of displaced families, since family unit is entitled to protection from the State and society in terms of Article 23(1) of the ICCPR, it is imperative on the part of the State to take positive measures to protect the ‘individual right to have and enjoy the integrity of the family.’⁹⁸

An obligation to reunite the families temporarily separated when children are involved is provided in Additional Protocol II of 1977.⁹⁹ However, it only requires the parties to the conflict to take ‘appropriate steps’ ‘to facilitate’ the

⁹⁵ *Quinteros v. Uruguay* No.107/1981, CCPR/C/19/D/107/1981 (21 July 1983) para.14; *Bamaca Velasquez* Judgment of the Inter-American Court of Human Rights (November 25 2000) para.165; *Tas v. Turkey*, para. 79.

⁹⁶ Application no.23657/94, judgment of 8 July 1999, para.98; confirmed in *Tas v. Turkey* para.79

⁹⁷ Principle 22(c) of the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law Annex to the Human Rights Resolution of the Commission on Human Rights 2005/35 (19 April 2005).

⁹⁸ F.Volio, ‘Legal Personality, Privacy, and the Family,’ at p.201; also see, L. Rao Penna, ‘Legal Problems Relating to Reunification of Families Dispersed as a Result of Armed Conflicts’, 1998, *Year Book of International Institute of Humanitarian Law*, San Remo, at p.141.

⁹⁹ Art.4(3)(b) of Additional Protocol II ; Art.74 of Additional Protocol I explicitly provides for an obligation to reunite families dispersed as a result of armed conflict.

reunion of families rather than imposing an absolute obligation.¹⁰⁰ Other than that, Article 8 of Additional Protocol II covers the search for wounded and sick IDPs. Article 17(1) of Additional Protocol II does not provide for non-separation of family members during relocation by a party to the conflict.¹⁰¹ It is only during internment or detention that parties are required to accommodate the family together and the internees must be allowed to remain in contact with their families through correspondence.¹⁰² Moreover, when displaced mothers having young children are arrested or detained or interned for reasons related to the conflict, there is no provision to decide their case with the ‘utmost priority’ for the sake of physical and mental well being of such children.¹⁰³

Apart from the above discussed specific obligations, Additional Protocol II does not contain either a general obligation to reunite the families dispersed by armed conflicts¹⁰⁴ or a right to know the fate of those displaced civilians missing during armed conflicts.¹⁰⁵ However, both these obligations have the customary status in internal armed conflict.¹⁰⁶ In addition to the customary status of the obligation to reunite families in humanitarian law, it is a rule of customary international law that family members shall not be separated in situations of relocation carried out in terms of Article 17 (1) of Additional Protocol II.¹⁰⁷

It is to be noted in this regard that Article 4(3)(e) of Additional Protocol II, which provides for temporary removal of children from an area where hostilities are taking place to a safer area within the country whenever possible with the consent of the parents, is in conflict with the provision in Additional Protocol II which requires reunification of temporarily separated families, as ‘children taken away from their families but in places of safety may suffer more in psycho-social terms than those who remain with their families but at greater risk.’¹⁰⁸ Such a

¹⁰⁰ M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at p.642.

¹⁰¹ But see Article 49(3) of the IV Geneva Convention of 1948.

¹⁰² Art.5(2)(a)(b) of Additional Protocol II.

¹⁰³ Such an obligation is provided in international armed conflict, Art.76(2) of Additional Protocol I.

¹⁰⁴ See Art.26 of IV Geneva Convention of 1948 and Art.74 of Additional Protocol I for such obligations in international armed conflicts.

¹⁰⁵ See Arts.32 and 33 of Additional Protocol I for such a right in international armed conflict.

¹⁰⁶ J.M. Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, Rules.105 and 117, at pp.379-383 and 421-427.

¹⁰⁷ *Ibid.*, Rule 131, at pp.463-65.

¹⁰⁸ F. J. Hampson, *Legal Protection Afforded to Children*, at p.55, para.7.5.

measure is not viable and conducive to the best interest of the children concerned, or family reunification in a conflict fought on ethnic lines.

As family reunification and tracing family members and correspondence between interned IDPs exists in customary humanitarian law obligations of the state can be used to flesh out the corresponding rights of the IDPs under human rights law. Due to the crucial nature of family reunification in internal armed conflicts, the broad right of IDPs to family-reunification in the UN Guiding Principles on Internal Displacement is warranted.¹⁰⁹

E. Subsistence and Other Basic Needs and the Humanitarian Assistance

1. Human Rights Law

Displacement often causes food crisis to IDPs who are within the relocation camps or are in outside, due to destruction of houses and farms, or abandoned crops and livestock, and deprivation of other income generating sources. The ensuing vulnerability, coupled with overcrowded shelter, poor quality of sanitation and safe water and reduced access to healthcare facilities may cause epidemics and other physical and mental health hazards.¹¹⁰ Protection of IDPs is thus meaningless without material assistance such as food, water, clothing, shelter and services such as medical care and sanitation essential for the survival of IDPs during their displacement. In addition, adequate measures to be taken to ensure IDPs of their basic needs such as housing, continuation of education for the children and assistance to resettle or return of IDPs to their homes with the agreement of the parties to the conflict.¹¹¹

In other words, providing assistance to IDPs is part of providing protection to them, as it is one of the components of protection which includes physical and material protection. Therefore, treating protection and assistance as two different

¹⁰⁹ Principles 17 and 16(1)(2); Article 7 of the ILA Declaration on IDPs merely states that the IDPs are entitled to the right to family reunification.

¹¹⁰ X. Leus et al., *Internally Displaced Persons*, (2001) 16 *Pre hospital and Disaster Medicine*, p.75, at p.76 (<http://www.reliefweb.int>); it is in such circumstances, Angola in April 1999 experienced the largest polio epidemic in Africa, *Ibid.*, at pp.76-77.

¹¹¹ See M. Cottier, 'Attacks on Humanitarian Assistance or Peacekeeping Missions' in O. Triffterer, *Commentary on the Rome Statute* p. 187, at p.190 for return and resettlement measures as a form of humanitarian assistance; Committee on ICESCR, Concluding Observations: Sudan, E/C.12/1/Add.48 (1 September 2000) para.37.

notions is misleading.¹¹² As a derivative of sovereignty, the primary obligation to provide survival needs for its nationals in internal armed conflicts, whether in the territory within its control or in the control of insurgents, rests with the government party to the conflict.¹¹³

Problems of providing survival needs to IDPs can arise generally in three situations: the first two situations occur in the context of availability of indispensable provisions to a party to the conflict. In such a situation, firstly, a party which has control of IDPs can deliberately deny them any supplies. Secondly, one of the parties to the conflict may be willing to provide indispensable provisions for the survival of IDPs but due to the obstruction of the opposition party, be unable to supply them. Thirdly, parties to the conflict may not have adequate indispensable provisions.

The material deprivation of IDPs brings heightened subsistence needs and therefore it is important to discuss the scope of the economic and social rights to survival needs, as opposed to a discretionary response of the state on humanitarian grounds. This is important because it is often held that economic and social rights are not 'justiciable' to be invoked in the court of law in their violations.¹¹⁴ Here the IDPs concerned are both those who are within the state controlled part of the territory, whether within or outside the IDP camps and settlements and those within the rebel held areas of the territory.

This is because, unlike humanitarian law which obliges each party to the conflict to provide assistance to certain categories of civilians within its control, human rights law more explicitly imposes the obligation primarily on the state to provide the core needs of IDPs, regardless of whether they are within the territory under its control or not.¹¹⁵ In this regard Article 11 (1) of the ICESCR recognises the right of everyone to an adequate standard of living including 'adequate food,

¹¹² Thus an approach which treats assistance and protection as two sides of the same coin by the ICRC cannot be justified as assistance is a form of protection, see ICRC, *Assistance: General Introduction* (<http://www.icrc.org>); Speech by Dr. J. Kellenberger, 'The Relevance of International Humanitarian Law in Contemporary Armed Conflicts', CAHDI (2004)27, 28th Meeting, Strasbourg, 13-14 September 2004, Meeting Report, Appendix IV, at p.35 (<http://www.coe.int>) states, that [f]or the ICRC, protection and assistance activities are very closely linked. They are in fact the two sides of the same coin, mutually reinforcing each other.'

¹¹³ Article 2(1) of the ICCPR; Article 2 of the ICESCR.

¹¹⁴ M.Scheinin, 'Economic and Social Rights as Legal Rights' in A. Eide *et al.* (eds.), *Economic Social and Cultural Rights*, 2nd ed., (Netherlands, 2001) at p.29.

¹¹⁵ D.Schindler, 'Humanitarian Assistance, Humanitarian Interference and International Law' in R.St.J.Macdonald (ed.), *Essays in Honour of Wang Tieya* (Hague, 1994) p. 689, at p.695

clothing and housing, and to the continuous improvement of living conditions,' and Article 11(2) the 'fundamental right of everyone to be free from hunger.'¹¹⁶ Article 12(1) of the same recognises every one's entitlement to the 'highest attainable standard of physical and mental health.'¹¹⁷ Right to education is stated in Articles 13 and 14 of the ICESCR.¹¹⁸ The fact that these rights (except for limitations) are not subject to derogatory measures during a public emergency does not seem to make much difference in the effectiveness of their protective functions in terms of Article 2(1) of the ICESCR, as the implementation is not immediate but of a progressive nature, depending on the State party's 'available resources.'¹¹⁹ As such, this seems to allow states to avoid these obligations by recourse to the claim of lack of resources as a result of armed conflicts. If so, this would have major humanitarian impact on IDPs who have been materially deprived by displacement.

However, by recognising the core content of economic and social rights it can be underscored that certain aspects of these rights cannot be realized progressively but should be provided in an immediate manner.¹²⁰ Therefore, if any significant number of IDPs is deprived of 'essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education' it can be stated that the state party is failing to discharge its minimum core obligations under the Covenant.¹²¹ The obligation to ensure

¹¹⁶ Art.25(1) of the Universal Declaration of Human Rights ; Article XI of the American Declaration on the Rights and Duties of Man Article 12 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Articles 24 and 27 of the CRC; for the implicit recognition of right to food and right to housing or shelter in the ACHPR, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, paras.58-69.

¹¹⁷ Similarly, Art.25(1) of the Universal Declaration of Human Rights ; Art. 11 of the European Social Charter; Art.16 of the ACHPR; Article XI of the American Declaration on the Rights and Duties of Man; Art.10 of the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights ; Article 5(e)(iv) of the CERD; Arts. 11(1) (f) and 12 of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women ; Article 24 of the CRC.

¹¹⁸ Art.28 of the CRC; Art.XII of the American Declaration of the Rights and Duties of the Man;Art.13 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights; Article 17 of the ACHPR.

¹¹⁹ Committee on the ICESCR See General Comment No.14, 'The Right to the Highest Attainable Standard of Health', E/C.12/2000/4 (11 August 2000) para.28 with regard to Art.4 of the ICESCR.

¹²⁰ B.Toebes, 'The Right to Health' in A.Eide *et al.* (eds.), *Economic Social and Cultural Rights*, 2nd ed., (Netherlands, 2001) p. 169, at p. 176.

¹²¹ Committee on ICESCR, General Comment No.3, 'The Nature of States Parties Obligations' (Art.2.1) (14/12/1990) para.10.

these rights without discrimination is an obligation with immediate effect.¹²² Therefore, IDPs cannot be discriminated against on the basis of their displacement or other grounds as stated in the non-discrimination clause which contains a non-exhaustive list of grounds.¹²³ These core obligations are non-derogable in any situations or difficulties including armed conflicts.¹²⁴ A state party that deliberately denies these basic needs to IDPs to IDPs would be in violation of its obligations under Article 11, 12, 13 and 14 of the ICESCR.

The international humanitarian law obligations can be resorted to as *lex specialis* with regard to certain aspects of these rights to derive some core obligations to be adhered in internal armed conflicts.¹²⁵ It should be borne in mind that the obligations of a state with regard to socioeconomic rights are broader than the humanitarian law obligations concerning treatment of IDPs and are not subject to derogation during internal armed conflicts. Therefore, limiting the core obligations under the socioeconomic rights to provision of emergency relief to IDPs would be inconsistent with the *raison d'être* of these rights as a medium or long term measure.¹²⁶

'Available resources' includes both resources existing in the state and those available through the international community and thus any humanitarian assistance by international humanitarian organisations. Even if such resources are inadequate, 'the obligation remains for a State party to ensure the widest possible enjoyment of the relevant rights under the prevailing conditions,' to use its 'available resources' as a matter of 'priority' to fulfil those core obligations, over other issues.¹²⁷ Such an approach would enable the IDP to assert a right against

¹²² *Ibid.*, para.1.

¹²³ Art.2(1) of the ICESCR.

¹²⁴ Committee on ICESCR, 'The Right to the Highest Attainable Standard of Health,' para.47; 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998)20 *HRQ* 691, at p. 695, para.9.

¹²⁵ See for instance, Committee on ICESCR, General Comment No.15, 'The Right to Water' paras. 21 and 22 and nn.20 and 21 the Committee on ICESCR states that the obligation to respect the right to water during armed conflicts includes humanitarian law obligations including prohibition of destruction of objects indispensable for survival of civilians including drinking water installations.

¹²⁶ S.Leckie, 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998)20 *HRQ* 81, at p.102.

¹²⁷ Committee on ICESCR, 'The Nature of States Parties Obligations' paras.13, 11,10; 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *HRQ* 122, at p.126, Principles 21-28; 'The Maastricht Guidelines' at p. 695, paras.9 and 10.

the state. However, recognising the core content does not in any way render the implementation of the other elements not covered in the core as ‘indefinite’ obligations, as states should endeavour to ‘move as expeditiously and effectively as possible towards the goal’ for full realization of the rights.¹²⁸ Due to the non-derogable nature of these rights, the state has to take steps with international assistance towards the full realization of these rights for the protection of IDPs in a ‘protracted’ internal armed conflict. ‘Failure to utilize the maximum of available resources towards the *full realization* of the Covenant’ can constitute a violation of the right concerned.¹²⁹

The personal effort within the capacity of the individual is a precondition for the realization of adequate standard of living.¹³⁰ This depends on the effective use of the individual’s own property or working capacity.¹³¹ ‘State obligations are intended to supplement personal efforts whenever needed.’¹³² Since IDPs are deprived of their income generating resources or work due to displacement or restriction of freedom of movement from the IDP camps or settlements to find work or to cultivate their farms or to go to sea to carry out their traditional work such as fishing, they are not in a position to ensure their right to an adequate standard of living. The rationale for providing the basic survival needs for IDPs is that IDPs in camps and temporary shelters, or wounded and sick, are not in a position to take effective measures on their own to attain ‘adequate food,’ or shelter or other basic survival needs for reasons beyond their control; States therefore have the obligation to provide them *directly* with the basic survival needs to be free from hunger and want of other basic survival needs. This has to continue until the conditions in which they can obtain their own entitlements such as property are established and/or employment is obtained.¹³³

With regard to the right to adequate housing, the state has the core obligation to facilitate ‘self-help’ to IDPs, as an affected group, for basic shelter,

¹²⁸ Committee on ICESCR, *ibid.*, para.9;B.Toebes, *Right to Health*, at p.176

¹²⁹ ‘The Maastricht Guidelines’, para. 15(e). (emphasis added).

¹³⁰ A.Eide, ‘The Right to an Adequate Standard of Living Including the Right to Food’ in A.Eide *et al.* (eds.), *Economic, Social and Cultural Rights*, 2nd ed. (Netherlands, 2001) p.133, at p.139.

¹³¹ *Ibid.*

¹³² A.Eide, *ibid.*, at pp.139-40, states that, ‘State obligations are intended to supplement personal efforts whenever needed.’

¹³³ *Ibid.*, at p.145; Principle 18 of the UN Guiding Principle on Internal Displacement affirms the right to an adequate standard of living of IDPs and the obligation of the authorities to provide them with the basic survival needs; see *Dogan and Others v. Turkey*, application nos. 8803-8811/02, 8813/02 and 8815-8819/02, judgment of 29 June 2004, para154.

which in an internal armed conflict situation often means a temporary one.¹³⁴ The creation of IDP camps or settlements is also part of this obligation of the state to provide basic shelter. However, in the long term, the state has the obligation to provide durable housing in fulfilment of the right to adequate housing so as to facilitate IDPs' integration, resettlement or return. As discussed above, core obligations cannot replace the full realization of the right. It is not only a right to an adequate standard of living including adequate housing but also a right to the 'continuous improvement of living conditions.'¹³⁵ In this context, the observation of the Committee on ICESCR on Sri Lanka is pertinent as it urged the government to 'seek further international assistance in its efforts to provide permanent housing to displaced persons who have been living in "temporary" shelters since the war began 15 years ago.'¹³⁶

As the rights of the ICESCR are based on the 'inherent dignity of human person,' 'housing' should be interpreted in a manner taking into consideration a variety of factors, including the homeless situation of IDPs.¹³⁷ Such housing, as opposed to a basic shelter, contains in itself adequate security, adequate privacy, space and adequate ventilation, which is important for the IDPs generally and in particular for the more vulnerable such as female headed IDP families, children, elderly and disabled IDPs to live in dignity.¹³⁸ This means, the return in safety and dignity to their homes or places of habitual residence or resettlement and integration elsewhere is necessary in the medium and long term, rather than living in mere basic shelter in IDP camps or settlements as short term emergency relief.¹³⁹

The right to 'adequate food' in Article 11(1) which is derived from the general right to an 'adequate standard of living' goes beyond the provision of basic survival needs and has to be realized progressively.¹⁴⁰ The core obligation

¹³⁴ Committee on ICESCR, General Comment No.4, 'The Right to Adequate Housing, Art.11(1)' (13/12/91) paras.10, 11.

¹³⁵ Article 11(1) of the ICESCR.

¹³⁶ Committee on ICESCR, Concluding Observations: Sri Lanka, E/C.12/1/Add.24 (16 June 1998), para. 22.

¹³⁷ Committee on ICESCR, 'The Right to Adequate Housing,' para.7.

¹³⁸ See *ibid.*

¹³⁹ *Ibid.*, para. 7 states that right to housing 'should not be interpreted in a narrow or restricted sense which equates it with, for example, the shelter provided by merely a roof over one's head... . Rather it should be seen as a right to live somewhere in security, peace and dignity.'

¹⁴⁰ Committee on ICESCR, General Comment No.12, 'The Right to Adequate Food (Art.11)' E/C.12/1999/5 (12 May 1999) para.6.

of Article 11 (1) which is stated in Article 11(2) of ICESCR imposes obligations on states to take ‘immediate and urgent steps’ to ‘mitigate and alleviate’ hunger even in times of ‘natural or *other disasters*.’¹⁴¹ Therefore this relates to the basic survival needs. As the immediate obligation to ensure freedom from hunger is not an end in itself in the realization of the right to food, the state has an ‘immediate and continuous obligation to move as expeditiously as possible towards the full realization of the right to food, particularly for the vulnerable population groups and individuals’ including IDPs in the medium and long term.¹⁴² Related to right to food and health is the right to water, which is indispensable for survival and to lead a dignified human life. It can also be considered as a right since the word ‘including’ in the right to an adequate standard of living indicates that the catalogue of rights stated therein is not exhaustive.¹⁴³ To ensure the right of access to water and water facilities and services to disadvantaged or marginalized groups which includes IDPs is a core obligation.¹⁴⁴ Likewise, where the right to health is concerned, IDPs are, as a minimum, to be ensured access to ‘basic shelter, housing and sanitation, and an adequate supply of safe and potable water’; nutritionally adequate safe food; and ‘health facilities, goods and services’ on a non-discriminatory basis.¹⁴⁵

Hunger or undernourishment ‘refer to an insufficient supply or, at worst, a complete lack of calories.’¹⁴⁶ The obligation of the state in this regard to IDPs is explicitly stated by the Committee on ICESCR. For instance, the Concluding Observations of the Committee with regard to Sri Lanka is pertinent: ‘[t]he results of an independent survey which estimated the incidence of undernourishment of women and children living in temporary shelters to be as high as 70 per cent, and by reports that in many cases food assistance did not reach the intended beneficiaries.’¹⁴⁷ Therefore the Committee recommended the government to ensure that the IDPs ‘actually receive the assistance.’¹⁴⁸

¹⁴¹ *Ibid.*, paras.1, 6 and 17 ; M. Craven, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Oxford,1995) at pp.306-7.

¹⁴² A. Eide, ‘The Right to an Adequate Standard of Living Including the Right to Food’ at p.139.

¹⁴³ Committee on ICESCR, ‘The Right to Water’ para.3.

¹⁴⁴ *Ibid.*, para.37 (b).

¹⁴⁵ Committee on ICESCR, ‘The Right to Highest Attainable Standard of Health’, para.43.

¹⁴⁶ Report by the Special Rapporteur, *Right to Food*, E/CN.4/2001/53 (7 Feb 2001), para.16.

¹⁴⁷ E/C.12/1/Add.24 (16 June 1998) at para.7.

¹⁴⁸ *Ibid.*, para.22.

There are no explicit provisions in ICESR that protect disabled and older IDPs unlike in the international humanitarian law provisions as Article 5(1)(a) and (b) of the Protocol II of 1977 protect them as wounded and sick and to provide them food, drinking water, safeguards as to health and hygiene clothing and shelter as protection against rigours of the climate as internees.¹⁴⁹ As displacement excessively affects the disabled and older IDPs, this is a serious lapse in their protection as one of the most vulnerable categories of IDPs.¹⁵⁰ Although protection of basic survival needs to those IDPs whose liberty has been restricted or who have been relocated by the order of the state or wounded and sick is recognised as a minimum by customary humanitarian law,¹⁵¹ the obligation of the state to provide food as a basic survival need in human rights law is much broader, as it obliges the state to provide food even to those IDPs who are displaced by the effects of hostilities as opposed to those who have been relocated by the state.

It is pertinent in this regard to consider the issue whether the right of the IDPs to be free from hunger includes the right to be free from malnutrition. Malnutrition is characterized by the deficiency of vitamins and minerals, of food which otherwise contain sufficient calories.¹⁵² The core content of the right to food and health recognises that to be free from hunger means that everyone should have access to ‘sufficient, nutritionally adequate and safe’ food.¹⁵³ According to the Committee on ICESCR, Article 11(2) of the ICESCR ‘more immediate and urgent steps may be needed to ensure “the fundamental right to freedom from hunger and malnutrition.”’¹⁵⁴ This indicates the converging nature of health and food concerning the concept of nutrition and the core obligation of

¹⁴⁹ Explicit protection is provided in other human rights instruments, Art.23 CRC; Art. 18(4) of the ACHPR; Art.18 of the Additional Protocol to the ACHR.

¹⁵⁰ But see for the view which requires for high priority in protection for such people within the general provisions of the ICESCR, see Committee on ICESCR, General Comment No.5, ‘Persons with Disabilities’ (09/12/94)General Comment No.6, ‘The Economic, Social and Cultural Rights of Older Persons’ (08/12/95).

¹⁵¹ Arts.17(1), 5(1)(b)(c), (2)(d), and 7(2) of Additional Protocol II; compare these with Art..5(3) of Additional Protocol II; J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 118 at pp. 428-431, Rule 131 at pp. 463-465 and Rule 110 at pp.400-403 respectively.

¹⁵² Report by the Special Rapporteur, *Right to Food*, E/CN.4/2001/53 (7 Feb 2001),para.16,

¹⁵³ Committee on ICESCR, ‘The Right to Adequate Food’ para.14; Committee on ICESCR, ‘The Right to the Highest Attainable Standard of Health,’ para.43(b).

¹⁵⁴ Committee on ICESCR, ‘The Right to Adequate Food’ para.1.

the state to take measures to alleviate hunger in situations of internal displacement by internal armed conflicts.¹⁵⁵

Instructive in this regard is the humanitarian law obligations of the detaining state as to the civilian internees in international armed conflict as it requires that the daily food rations provided to them 'shall be sufficient in quantity, quality and variety to keep internees in a good state of health and prevent the development of nutritional deficiencies.'¹⁵⁶ If to this extent the social rights concerning alien civilian internees are protected in the form of obligations of the detaining state, there is every justification to reinforce such social rights to the citizens in terms of right to freedom from hunger in peace as well as armed conflict situations to include nutritionally adequate food in quality and quantity.¹⁵⁷

However, particular categories of IDPs such as children and women in particular expectant and nursing mothers are more vulnerable than others. As far as children between birth and their age five are concerned, these vitamins and minerals are essential, as deficiency will have an impact on such children as a 'hidden hunger' and will cause the children to 'suffer from stunted growth, infections and other disabilities.'¹⁵⁸ As such, it is important to regard malnutrition as part of hunger, which however also includes undernourishment, and to provide nutritious food in particular to more vulnerable IDPs. This can be illustrated by the recommendation of the Committee on ICESCR to the government of Sri Lanka which states that, 'the government reassess the food assistance programme already in place in affected areas with the view to improving the nutritional standards of the food provided, particularly to children and expectant and nursing mothers.'¹⁵⁹ Therefore freedom from hunger means not merely the provision of sufficient basic food, but adequate in terms of nutrition.

If so, a priority in supply and accessibility of nutritionally adequate food to children is essential, to protect this vulnerable group of IDPs, due to the

¹⁵⁵ *Ibid.*, para.6.

¹⁵⁶ Article 89 of the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949.

¹⁵⁷ T. Jasudowicz, 'The Legal Character of Social Rights From the Perspective of International Law as a Whole' at p. 39.

¹⁵⁸ Report by the Special Rapporteur, *Right to Food*, E/CN.4/2001/53 (7 February 2001), paras.16, 47.

¹⁵⁹ E/C.12/1/Add.24 (16 June 1998) para. 22.

scarcity and high demand for such food in internal armed conflicts. Providing nutritious food at least to reduce malnutrition in children has been regarded as part of the positive obligations of the right to life for the reason that in extreme situations, even if children have food with sufficient calories, a lack of minerals can be life threatening. The Human Rights Committee, in recognising the positive obligation of a state with regard to the right to life, considered that it 'would be *desirable* for States Parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.'¹⁶⁰ However as it considers these measures as 'desirable' rather than obligatory, failure to take such measures does not necessarily violate Article 6(1) of the ICCPR to make States internationally accountable. This makes such a broad view illusory, especially in internal armed conflicts where displaced children are physically and mentally vulnerable. Since deaths can be a reasonably foreseeable result in such situations, states are legally obliged to take positive measures to prevent malnutrition and epidemics to prevent arbitrary deprivation of life. Therefore obligation of the state to prevent arbitrary deprivation of life arises not only against the acts of third parties but also in situations such as internal displacement.

The view of the Human Rights Committee may have been based on the ground that the entitlement for right to life of IDPs is concerned with 'arbitrary' deprivation of life, and malnutrition and epidemics are not arbitrary unless such a result leading to death is deliberately pursued by the policy of the state.¹⁶¹ This view starkly differs from the broader one adopted by the Inter-American Court of Human Rights which explicitly considered that the right to life includes,

not only the right of every human being not to be deprived of his life arbitrarily, but also the right that he will not be prevented from having access to the conditions that guarantee a dignified existence. States have the obligation to guarantee the creation of the conditions required in order that violations of this

¹⁶⁰ Human Rights Committee, General Comment No.6, 'The Right to Life (Art.6)' (30/04/82), para.5.

¹⁶¹ Human Rights Committee has considered such measures as socio-economic rights under Article 26 of the ICCPR, see below, n.191 ; Y. Dinstein, 'The Right to Life, Physical Integrity, and Liberty' in L.Henkin(ed.), L.Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York, 1981) p.114, at pp.115-116 is of the opinion that right to life is strictly a civil right which emphasizes only the arbitrary deprivation of life and does not guarantee the survival needs as they are social rights recognised in Articles 11 and 12 of the ICESCR .

basic right do not occur and, in particular, the duty to prevent its agents from violating it.¹⁶²

In this case the Court stressed the conceptualization of right to life as belonging to the domain not only of civil and political rights but also economic, social and cultural rights.¹⁶³ Therefore, the person may be deprived of the right to life, not only by causing death directly by unlawful acts of homicide or deliberate deprivation of humanitarian assistance to IDPs but also by not taking measures to avoid circumstances that lead to deaths, such as starvation.¹⁶⁴ Taking positive measures to ensure the right to existence is important with regard to ‘vulnerable and defenceless persons, in situation of risk.’¹⁶⁵ As, generally IDPs and in particular, IDP children are vulnerable to malnutrition and epidemics due to the very nature of displacement and to the scarcity and difficulties of access to basic needs in internal armed conflicts, the state party has the obligation to ensure the creation of conditions to prevent or to reduce violations of the right to life by providing the basic survival needs for IDPs to live in dignity.

Similarly, the CRC considers the core content of the right to food and health as part of the right to life. Taking positive measures as part of the right to life of children is recognised in the CRC which obliges the States Parties to ensure ‘to the maximum extent possible the survival and development of the child.’¹⁶⁶ This can be interpreted as including provision of ‘medical assistance’ and ‘nutritious foods and clean drinking water’ to combat disease and malnutrition as part of the right to life.¹⁶⁷ Such an approach can be supported due to the extreme vulnerability of children, in particular, IDP children to hunger, malnutrition and childhood diseases.¹⁶⁸

¹⁶² *Villagran Morales et al.* (the ‘Street Children’ Case) Judgment of 19 November 1999, Inter-American Court of Human Rights, Series C No.63, para. 144.

¹⁶³ *Ibid.*, Joint Concurring Opinion of Judges A.A. Cancado Trindade and A. Abreu-Burelli, para.4; this view can be supported by crimes against humanity of extermination and genocide, see below.

¹⁶⁴ *Ibid.*, see para.3.

¹⁶⁵ *Ibid.*, para.4.

¹⁶⁶ Art. 6(2) of the CRC.

¹⁶⁷ Art.24(2)(b),(c) of the CRC.

¹⁶⁸ ‘Wherever it occurs, displacement has a profound physical, emotional and developmental impact on children and increases their vulnerability.’ Graca Machel, *The Impact of Armed Conflict on Children* A/51/306.Add.1 (6 September 1996) <http://www.un.org/special-rep/children-armed-conflict/KeyDocuments/Printable/Report/...>; in Somalia, in 1992, many children under five died due to hunger or diseases resulting from malnutrition, Report by the Special Rapporteur, *Right to Food*, E/CN.4/2001/53(7 February 2001) para.74.

As the CRC is applicable even during armed conflict situations, it could fill the gap in the protection of IDP children as *lex specialis*. Moreover the core content of the right to health of the CRC gives priority to the health care of pregnant women and children; immunization against major infectious diseases; and treatment and control of epidemic diseases. Therefore a State party has the legal obligation to give priority in access to basic survival needs supply to IDP children and pregnant women who are prone to life threatening malnutrition and epidemics in armed conflict situations.¹⁶⁹

Right to receive education of IDP children is affected in internal conflicts due to high tuition fees, lack of documentation to access schools and lack of schools within the geographical location of IDPs and destruction of schools.¹⁷⁰ In this regard failure of a state to provide compulsory primary education free to all IDPs and failure to take measures to address *de facto* educational discrimination to IDPs can be considered as violations of right to education during internal armed conflicts.¹⁷¹

With regard to the above discussed core contents of rights to adequate food, housing, health and education out of three obligations, namely, to respect, protect and fulfil,¹⁷² the obligation of the state to fulfil is relevant with regard to IDPs as they are for reasons beyond their control unable to enjoy such rights and therefore need to be provided with them directly including through international assistance.¹⁷³ This means that whenever the state is *unable* to provide food and medical assistance due to lack of resources or *unable* to reach those IDPs in rebel held areas, it has an obligation to seek 'international co-operation and assistance' such as humanitarian assistance to provide the IDPs with basic survival needs.¹⁷⁴ The realization of the core contents of these rights 'to the maximum of its available resources' means to cover both resources existing

¹⁶⁹ Also see Art.19 and Art. 27(1) of the IACHR as to protection of children which are non-derogable during public emergency.

¹⁷⁰ Report of the Representative, F.M.Deng, *Profiles in Displacement: Indonesia*, E/CN.4/2002/95/Add.2 (15 February 2002) para. 24; Committee on CRC, Concluding Observations: Burundi, CRC/C/15/Add.133 (16 October 2000) paras.64, 65.

¹⁷¹ Committee on ICESCR, General Comment 13, 'The right to Education' E/C.12/1999/10 (8 December 1999) para. 59.

¹⁷² E. Eide, 'Economic, Social and Cultural Rights as Human Rights' in A.Eide *et al.* (eds.), *Economic Social and Cultural Rights*, 2nd ed., (Netherlands, 2001) p. 9, at p.23

¹⁷³ Committee on ICESCR, 'The Nature of States Parties Obligations' para.13

¹⁷⁴ Arts.11(1),2(1), 23 of the ICESCR.

within the state and available from the international community.¹⁷⁵ Therefore the state need not wait until it receives an offer from an international organisation, but has to take initiatives to receive such assistance, which is a much broader obligation than the one in humanitarian law. For instance, the Committee on ICESCR recommended such a measure with regard to Sri Lanka: ‘Mechanisms should be established to facilitate the flow of humanitarian assistance and to strictly monitor and ensure that the intended recipients actually receive the assistance. In particular, the government should seek further international assistance in its efforts to provide permanent housing to displaced persons who have been living in “temporary shelters” since the war began 15 years ago.’¹⁷⁶

A state claiming inability to carry out its core obligation due to the lack of resources or in accessing the IDPs within the rebel held areas, has the burden of proving that international support has been sought unsuccessfully to ensure availability and accessibility of food, shelter and other basic necessities.¹⁷⁷ This means, any arbitrary refusal to accept such an offer may be regarded as deliberate ‘retrogressive measures’ which must be justified by the state, ‘by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.’¹⁷⁸ If a state refuses to accept the offer of an international humanitarian organisation to provide the IDPs with basic necessities without valid reasons, in extreme circumstances, it may be considered as in violation of its obligations to respect under Article 2(1) of the ICESCR with regard to the right concerned.¹⁷⁹ To the extent of the obligation of the state to provide the basic survival needs including by seeking the international assistance, the IDPs have a right to request and receive the protection of humanitarian assistance from national authorities.¹⁸⁰

In most instances, the problem is not the unavailability of the resources but the deliberate policy of the state to deny them to IDPs within the area under its control in IDP camps or settlements or scattered outside or to those displaced within the rebel held areas. Where providing internal and international assistance

¹⁷⁵ Committee on ICESCR, ‘The Nature of States Parties Obligations’ para.13.

¹⁷⁶ E/C.12/1/Add.24 (16 June 1998), para.22.

¹⁷⁷ Committee on ICESCR, ‘The Right to Adequate Food’ para.17; Committee on ICESCR, ‘The Right to the Highest Attainable Standard of Health,’ para.45.

¹⁷⁸ Committee on ICESCR, ‘The Nature of States Parties Obligations’ para.9.

¹⁷⁹ See, *ibid.*, para.10.

¹⁸⁰ Principle 3(2) of the UN Guiding Principles on Internal Displacement.

in this context, the humanitarian law obligations of the state can be used as *lex specialis* to specify the minimum obligations of the state under human rights law to the extent it overlaps with the core obligations of human rights, as the latter does not contain any explicit *obligations to respect* as to access and supply of food and medical assistance to IDPs in armed conflicts. This means the state should refrain from: taking measures that would deprive IDPs from access to food and health care;¹⁸¹ using starvation as a method of combat on discriminatory grounds against IDPs in order to deprive them of such subsistence needs. This includes ‘the prevention of access to humanitarian food aid in internal conflicts or other emergency situations’ to particular groups;¹⁸² depriving IDPs from their lands and properties which are used as income generating sources by destruction or other methods to make them useless or forcible eviction; providing discriminatory and delayed medical care to IDPs; and attacking relief and medical supplies, transportation and personnel of international humanitarian organisations which provide assistance to IDPs.¹⁸³

With regard to the education of IDP children, international humanitarian law is relevant to indicate the core obligations of the right to education in the ICESCR in internal armed conflict as Article 4(3) (a) of Additional Protocol II obliges the parties to the conflict to provide education to children and customary humanitarian law prohibits attack on civilian objects including schools.

Apart from the context of socio-economic rights, deliberate withholding of food and medical assistance to civilians in the IDP camps by the state party in areas under its control and in the rebel held areas to cause starvation; and refusal to evacuate the wounded and sick from areas of siege can be a violation of the right against arbitrary deprivation of life. Furthermore, deliberately starving the civilian population *inter alia.*, by destruction of objects indispensable for the survival of civilians or deliberate omission to send humanitarian assistance to IDPs, and obstruction of humanitarian assistance to the affected civilian population, can also be considered as violations of right against arbitrary deprivation of life by the humanitarian law rules as *lex specialis*.

¹⁸¹ Committee on ICESCR, ‘The Right to the Highest Attainable Standard of Health,’ para.34; see Principles 24-27 of the UN Guiding Principles on Internal Displacement.

¹⁸² Committee on ICESCR, ‘The Right to Adequate Food,’ para.19.

¹⁸³ A.Eide, ‘The Right to an Adequate Standard of Living Including the Right to Food’ at pp.142-143.

Inclusion of such deaths within the scope of the right to life can be justified on the basis of crimes against humanity of extermination, persecution, apartheid and genocide as they are wider in scope to include killings by less direct means.¹⁸⁴

Crimes against humanity of extermination can be committed by killing or by subjection to conditions of life such as ‘deprivation of access to food and medicine calculated to bring about the destruction of part of a population’ who need not necessarily share a common link as in persecution.¹⁸⁵ Therefore mass killings of IDPs in camps by deliberate deprivation of basic survival needs would constitute extermination.

Large scale killing of IDPs which constitutes genocide is a specific form of violation of their right to life. It can be by a direct act of ‘killing’ or in a less direct way by deliberately inflicting conditions of life such as to physically destroy a national, ethnic, racial or religious group ‘with intent to destroy, in whole or part.’¹⁸⁶ The less direct ways can include depriving civilians of ‘resources indispensable for their survival, such as food or medical services, or systematic expulsion from homes.’¹⁸⁷ However, as genocide differs from simple homicide, intent to physically destroy a group of civilians is adequate and the result of such acts is not relevant.¹⁸⁸ Therefore, mere infliction of such conditions of life on IDPs in rebel held territories or those in IDP camps, such as imposition of embargo on food, medicines and other essential items and denying or impeding access to IDPs by any humanitarian organisations to provide assistance, with the intention to destroy them physically an ethnical, racial or religious group may constitute genocide.

Moreover, deprivation from shelter and livelihood can constitute inhuman treatment in internal armed conflicts.¹⁸⁹ Therefore, large number of IDP children living in regroupment camps and in extremely difficult conditions in many situations, constitute cruel, inhuman and degrading treatment.¹⁹⁰ The significance

¹⁸⁴ See generally, C. Rottensteiner, ‘The Denial of Humanitarian Assistance as a Crime Under International Law’ (1999) No.835 *IRRC* 555.

¹⁸⁵ Art.7(2)(b) of the Statute of the ICC.

¹⁸⁶ *Akayesu*, Trial Chamber, para.505.

¹⁸⁷ *Elements of Crimes*, at p.7, n.4, however, such methods are not exhaustive.

¹⁸⁸ M. Boot, *Genocide, Crimes Against Humanity, War Crimes*, at p.407; to this effect see *Elements of Crimes*, at p.7.

¹⁸⁹ *Selcuk and Asker v. Turkey*, paras.79-80; *Bilgin v. Turkey*, para.103; *Dulas v. Turkey*, para.55.

¹⁹⁰ Committee on CRC, Concluding Observations: Burundi, CRC/C/15/Add.133 (16 October

of treating such violations under the civil and political rights, namely, right to life, right against inhuman treatment, right to be free from arbitrary interference with family and home, is that they can provide an alternative implementation mechanism in the absence of individual communication procedure to the ICESCR. In addition, Article 26 of the ICCPR can provide an independent right to non-discrimination through which any rights not included in the ICCPR, including socio-economic rights, can be implemented through the individual communication procedure under Optional Protocol to the ICCPR.¹⁹¹

2. Humanitarian Law

a. Medical Assistance

In international humanitarian law, obligations are imposed on both parties to the conflict which would avoid practical difficulties in the implementation of humanitarian assistance in the rebel held areas. The obligation of the parties to the conflict to provide survival needs to the displaced civilians is not explicitly stated in common Article 3 apart from the assistance to wounded and sick civilians.¹⁹² As IDPs are vulnerable to sickness and injuries as a result of exhaustion by long journeys due to displacement and exposed to effects of hostilities during displacement, this obligation is significant for their protection, whether they are in a relocation camp or merged into the community. However, without an explicit meaning in Additional Protocol II its application would be limited to those who are wounded and sick in the literal sense. In this regard, therefore, Additional Protocol I additional can be 'useful interpretative tool for the substantive content of analogous, but less detailed, provisions in Protocol II',¹⁹³ because of the adoption of 'single terminology' for both instruments in the Diplomatic Conference.¹⁹⁴ As such, the definition of wounded and sick in

2000) para. 38.

¹⁹¹ Lack of 'socio-economic assistance' granted by the State party to IDPs in particular in 'education of children and medical care' was considered by the Human Rights Committee, in Concluding Observations : Colombia, CCPR/CO/80/COL (26 May 2004), para.19; Human Rights Committee, Concluding Observations: Serbia and Montenegro, CCPR/CO/81/SEMO (12/08/2004) para.18 considered access to social services, educational facilities, unemployment assistance and adequate housing rights.

¹⁹² Common Article 3(2).

¹⁹³ R.K. Goldmann, 'International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflict', (1993) 9 *Am.U.J.Int'l L. & Pol'y*, 49, at p.65; S. Junod, 'Commentary on Protocol II', , at p.1393.

¹⁹⁴ M. Bothe, K.J. Partsch and W. A. Solf, *Commentary*, at p.655-56 state that, '[a]lthough Protocols I and II constitute two separate legal documents, their interpretation has to take into

Article 8 (a) of the Additional Protocol I could be used in Additional Protocol II.¹⁹⁵ Consequently, the general provision on wounded and sick in Additional Protocol II could be regarded as including expectant mothers, maternity cases, new-born babies, aged, disabled IDPs and others who have become sick or wounded due to internal displacement.

In this context, the treaty and customary obligation to ‘collect and care for’ of the wounded and sick IDPs in common Article 3(2), as elaborated by Articles 7 and 8 of Additional Protocol II provides guidance on carrying out these tasks.¹⁹⁶ Accordingly the wounded and sick ‘in all circumstances’ shall be treated humanely without delay as far as practicable and without any distinction except for medical ones.¹⁹⁷ Therefore making distinction between the IDPs belonging to the same party and those belonging to an adverse party is not permitted. Further it obliges both parties to the conflict to search for wounded civilians without delay in possible circumstances, in particular after an engagement.¹⁹⁸ The ‘general and absolute’ nature of these obligations to provide medical care is on the party which controls the area within which the IDPs have displaced.¹⁹⁹ Such a party to the conflict is obliged to protect the IDPs who get wounded in the conduct of hostilities.

Moreover, wounded and sick IDPs of an adverse party whose liberty has been restricted for reasons related to the conflict are protected by Articles 5(1) (a) and 5 (3) of Additional Protocol II which reiterates the protection provided in Article 7 of the Additional Protocol II.²⁰⁰ Though this seems to be redundant in the light of the general obligation, the significance of such specific protection cannot be underestimated in the context of internal

account the fact that they were negotiated together and that the Conference chose a single terminology for both the Protocols.’

¹⁹⁵ In terms of Art.8(a) of Additional Protocol I, ‘wounded’ and ‘sick’ ‘mean persons, whether military or civilian, who because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility. These terms also cover maternity cases, new-born babies and other persons who may be in need of immediate medical assistance or care, such as the infirm or expectant mothers, and who refrain from any act of hostility.’

¹⁹⁶ L. Moir, *Law of Internal Armed Conflict*, at pp.115-16; J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rules. 109-111 at pp.396-405.

¹⁹⁷ Art.7(2) of Additional Protocol II.

¹⁹⁸ Art.8 of Additional Protocol II.

¹⁹⁹ S. Junod, ‘Commentary on Protocol II’, at p.1410.

²⁰⁰ See below, Section, E. 2.b. for discussion.

armed conflicts fought on discriminatory grounds, where movement of IDPs in camps and settlements are restricted.

The protection provided in internal armed conflicts for the maternal role of women is not as extensive as that in international armed conflict, as in the latter, pregnant women are explicitly treated as wounded and sick,²⁰¹ and during hostilities are required to be released or evacuated without delay from internment,²⁰² or encircled areas;²⁰³ there is a prohibition of transfer of maternity cases unless their safety imperatively requires it; and there are to be given priority in food, clothing and medicines.²⁰⁴ Such 'maternity-oriented provisions of humanitarian law' have been criticised 'for reflecting rather Victorian views of women as being the equivalent of children in their weakness and need for special care.'²⁰⁵ This view cannot be substantiated from a medical or humanitarian point of view generally in internal armed conflict situations, where special care is necessary for pregnant women due to the inherent risks in conflicts.²⁰⁶ As far as IDP women are concerned, the need for special medical care is further heightened in view of their vulnerable physical position due to displacement.

Because of the absolute obligation to 'respect and protect' the wounded and sick, a party to the conflict which is unable to or unwilling to provide such medical assistance with its own authorities, is obliged to take measures to provide it with the assistance of relief societies in the territory, such as National Red Cross Societies in its area or in the area of the adverse party in terms of Article 18(1).²⁰⁷ In such situations, Articles 9, 10 and 11 of Additional Protocol II provide protection for the medical personnel, medical units and transport from attack and such protection is not limited to the attacks by a party which is in control of the territory in which these are located but also include attacks

²⁰¹ Art.8(1) of Additional Protocol I.

²⁰² Art.132 of IV Geneva Convention of 1949.

²⁰³ Art.17 of IV Geneva Convention of 1949.

²⁰⁴ Arts. 16, 23, 89 and 91 of IV Geneva Convention of 1949.

²⁰⁵ J. Fitzpatrick, 'The Use of International Human Rights Norms to Combat Violence Against Women,' in R.J. Cook (ed.), *Human Rights of Women: National and International Perspectives*, (Philadelphia, 1994) p.532, at p.548.

²⁰⁶ See generally, M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at p.96.

²⁰⁷ To 'Protect' the wounded and sick means to take positive measures with regard to them, S.Junod, *Commentary on Protocol II*, at p.1408; M. Bothe, K.J.Partsch and W.A.Solf, *ibid.*, at pp.695-96.

from the air or land by another party to the conflict.²⁰⁸ This has an added significance to the protection of IDPs, as by protecting such personnel and their units and transport, the medical protection of wounded and sick IDPs in an entire state would be ensured.

b. Other Needs of Subsistence

With regard to the obligation of the parties to the conflict to provide supplies essential to the survival of IDPs, there is no explicit provision in common Article 3 or Article 4 of Additional Protocol II. An obligation to provide survival needs can be implied in common Article 3 at least with regard to interned IDPs and relocated civilians in the light of the express provision in Article 5(1) (b) and Article 17 (1) of Additional Protocol II of 1977 to prevent such outcomes.²⁰⁹ However, a prohibition against deliberate deprivation of such supplies to civilians within the control of a party to the conflict can be implied in the fundamental guarantees of Article 3(1) (a) and Article 4(2)(a) of Additional Protocol II, in particular, absolute prohibitions against violence to life and person and cruel treatment as starvation of civilians is prohibited in Article 14 of Additional Protocol II.²¹⁰ Moreover the protection of these provisions extends to all IDPs within the control of a party to the conflict, as opposed to certain categories of IDPs, as discussed below.

Additional Protocol II does not impose an explicit general obligation on the parties to the conflict to grant survival needs including medical care to civilians displaced as a consequence of armed conflict, unless they are interned in camps or have become wounded and sick or subjected to enforced displacement under Article 17(1) of Additional Protocol II.²¹¹ In terms of Article 5(1) (b) of Protocol II, internees must be provided with food, drinking water and other safeguards concerning health and hygiene, protection from climate such as clothing and shelter and dangers of armed conflict to the

²⁰⁸ See below, Section, E.2. d. ii. for detailed discussion.

²⁰⁹ Monika Sandvik- Nylund, *Caught in Conflicts: Civilian Victims, Humanitarian Assistance and International Law*, (Turku, 1998) at p.22.

²¹⁰ Article 3(1) (a) of IV Geneva Convention of 1949 states that, 'Persons taking no active part in hostilities ...shall in all circumstances be treated humanely'...

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds,... cruel treatment...'

²¹¹ Arts. 5(1)(a), (b) and 7 of Additional Protocol II

same extent as the local population. In the light of such positive obligation to provide, withholding or reducing the food rations to civilian internees in a camp to the extent of deficiency which results in death or severe health problems would also be an infringement of Article 4(2) (a) concerning the absolute prohibition on violence to life and health of civilians.²¹²

The relative standard connected with the conditions of the local civilian population which includes IDPs does not always seem to be reasonable given the situation of internal displacement in armed conflict and the absence of positive obligation to provide them with survival needs, because when the IDPs tend to suffer, the internees are also compelled to suffer.²¹³ As far as human rights are concerned, since the core obligations of Article 11 of the ICESCR do not require such a relative standard but require the state party to provide basic survival needs to all civilian population who are not in a position to provide themselves in situations including armed conflicts, in practice, there cannot be any actual difference of treatment between local IDPs and interned IDPs.

However in terms of Article 5(3) of Additional Protocol II, those IDPs caught in an isolated locality situated in the middle of combat zones, are protected in a limited manner, confined to receiving medical care and attention.²¹⁴ Article 5(3) fails to impose an obligation on the party in control, to provide such IDPs with survival needs as in Article 5(1) (b) of Additional Protocol II, as shortage of these is common in such a situations. Therefore parties to the conflict are expressly obliged to provide subsistence needs only to those displaced civilians who are within their physical control, though with regard to other IDPs they are prevented from deliberately depriving of survival needs including relief actions by humanitarian organisations under Article 18(2) to cause starvation in terms of Article 14 of Additional Protocol II.

However, all the above discussed positive obligations to provide subsistence needs to certain categories or the negative obligations to refrain from

²¹² L. Moir, *Law of Internal Armed Conflict*, at p. 229; also see J.S. Pictet, *Commentary IV*, , at p.597.

²¹³ See L. Moir, *ibid.*, at p.113.

²¹⁴ M. Bothe, K.J.Partsch and W.A.Solf, *Commentary* at p.645 state that, the restriction of liberty of movement for reasons related to the conflict would include factual situations as well.

deliberately depriving IDPs of such needs, resulting in violence to life and cruel treatment, are limited to the protection of IDPs within the control of the parties to the conflict.²¹⁵ Such an obligation is narrower than that imposed on the State party under human rights law given the primary obligation on the state to provide subsistence needs to all IDPs within the whole territory of such state. To the extent of such obligations of states, IDPs have a right to seek and receive assistance for their protection from national authorities.²¹⁶

c. Starvation of IDPs

Starvation has increasingly become a method of combat that adversely affect the survival of IDPs who become impoverished due to displacement and also leads to secondary displacement.²¹⁷ Intentional starvation can be carried out by destruction of objects indispensable for the survival of civilians of the adverse party; depriving civilians of the adverse party of supplies from outside by siege, contraband measures or blockade; a scorched earth tactics resorted to by a party to the conflict in defence of its territory.²¹⁸

Article 14 of Additional Protocol II absolutely prohibits starvation as a method of combat, by deliberately attacking or destroying or removing or rendering useless civilian objects indispensable for the survival of civilian population *anywhere* in the country.²¹⁹ Moreover, imposing intentional embargoes on objects indispensable for the survival of IDPs within the rebel held areas or depriving IDPs of an adverse party of supplies from outside by siege, deliberately impeding access of humanitarian aid to IDPs including by looting for the use of one of the parties to the conflict or causing impediments to humanitarian personnel in delivering relief supplies to IDPs and the restriction of freedom of movement of humanitarian relief personnel may constitute starvation as

²¹⁵ However, the prohibition of starvation is broader in its application, see below.

²¹⁶ D.Schindler, 'Humanitarian Assistance, Humanitarian Interference and International Law', at p.695.

²¹⁷ Also see Art.54 of Additional Protocol I.

²¹⁸ E. Rosenblad, *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems* (Geneva, 1979) at p.103.

²¹⁹ The removal of foodstuff and livestock intended for the usage of civilians by the armed forces for their own use. Additionally this is strengthened by Article 4 of Additional Protocol II on prohibition of pillage; civilian objects can be rendered useless for example, by laying of anti-personnel landmines in agricultural lands, so as to render it inaccessible to civilians to cultivate crops ; polluting water installations, contaminating food stuffs by adding chemical agents; these verbs 'are used to cover all eventualities', S. Junod, 'Commentary on Protocol II', at p.1458; see *ibid.*, at p.1459.

removing includes depriving IDPs of objects indispensable for their survival. Starvation of civilians is prohibited in customary law as well.²²⁰ Article 14 of Additional Protocol II absolutely prohibits starvation as a method of combat, and any exception on the ground of military reasons such as the assistance would benefit the armed opposition group, is therefore not permitted.²²¹

Starvation has a general meaning apart from killings caused by hunger to include 'deprivation or insufficient supply of some essential commodity, of something necessary to live.'²²² As far as objects indispensable to IDPs are concerned, the list of objects enumerated in Article 14 is not exhaustive, as indicated by the words 'such as' and includes apart from food and water and medicines, basic shelter and clothing indispensable for the survival of IDPs as a result of 'climates or other circumstances.'²²³ As such this provision can be significant for the protection of IDPs who are materially deprived of such necessities due to displacement.

However, Article 14 does not make any distinction between the objects intended solely for civilians and armed forces and for mixed usage. Bothe *et al*, state that although the literal construction of this provision limits the scope of its prohibition to attacks against objects indispensable exclusively for the survival of civilians, it can be inferred by the application of principle of proportionality as incorporated into Additional Protocol II through the *Martens* clause, that attack against objects which are intended for sustenance value for both civilians and armed forces is also prohibited if it causes excessive effects on civilians, disproportionate to the military advantage anticipated.²²⁴ This view regarding the objects of mixed usage cannot be justifiable in the light of the absolute prohibition on starvation, without a military necessity exception in Additional Protocol II. As a simplified version of Article 54 of Additional Protocol I, the application of Article 14 is

²²⁰ C.Rottensteiner, 'The Denial of Humanitarian Assistance' at pp.568-69; J.M.Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at pp186-188; the non-prohibition in the Statute of ICC of starvation as a war crime in internal conflicts should be seen in the light of Art.10 of the same.

²²¹ S.Junod, 'Commentary on Protocol II', at p. 1456.

²²² M.Cottier, 'Starvation of Civilians as a Method of Warfare' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (1999) p.254, at p.256.

²²³ M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at p.655; these objects 'must be understood in the broadest sense to cover the infinite variety of needs of the populations of different geographical areas throughout the world.' S.Junod, 'Commentary on Protocol II', at p.1458.

²²⁴ M. Bothe, K.J. Partsch and W. A. Solf, *ibid.*, at p. 680.

subject to the rules stated in the former.²²⁵ Even ‘a fair reading’ of Article 54 of Protocol I suggests that the absolute prohibition of starvation of civilians remains without any restriction.²²⁶ The absolute prohibition on starvation in Article 14 of Additional Protocol II would simply apply to attack on such objects of mixed usage²²⁷ because in such a situation, combatants are the last and the civilians are the first to starve.²²⁸ Thus, it can be stated that it is prohibited to attack objects for mixed usage by both civilians and combatants, even if the latter use these objects for their subsistence along with civilians.²²⁹

The fact that resort to starvation as a method of combat against military personnel is not prohibited in Article 14 of Additional Protocol II, is a drawback in the law applicable to internal armed conflicts and can cause adverse effects on IDPs.²³⁰ This is because the destruction of objects solely used by armed forces or used for military purpose may provoke the affected armed forces to attack objects indispensable for the survival of civilians and thereby cause the food supplies of IDPs to be subject to attack or pillage, rendering protection from starvation practically difficult.²³¹

A party could use starvation as a method of combat in internal armed conflicts by destruction of civilian objects within the territory under its control, to further displace the IDPs of an adverse party or as a collective punishment against IDPs for their perceived support for rebels. Additional Protocol I permits derogation from the prohibition of destruction of objects

²²⁵ P. Macalister-Smith, ‘Protection of the Civilian Population and the Prohibition of Starvation as a method of Warfare: Draft Texts on International Humanitarian Assistance,’ (1991) No.284 *IRRC*, p.440, at pp.443-45; M. Bothe, K.J. Partsch and W.A. Solf, *ibid.*, at p.680.

²²⁶ P. Macalister-Smith, *Ibid.*, at p.444; the prohibition against destruction in Article 54(2) of Additional Protocol I is not applicable when the objects indispensable for the survival of civilians are used as sustenance solely by the military; however, even if they are used not as sustenance but in ‘direct support of military action,’ such measures against these objects shall not be taken if it ‘*may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.*’ (emphasis added) Article 54 (3) of Additional Protocol I.

²²⁷ Especially in non-international urban conflicts, civilians and combatants both rely for water on supplies from drinking water installations.

²²⁸ H. Blix, ‘Modernizing the Laws of Armed Conflicts: Present Issues and Approaches,’ in M.K. Nawaz (ed.), *Essays in International Law, in Honour of Krishna Rao* (Leiden, 1976) p. 266, at p.273.

²²⁹ S. Junod, ‘Commentary on Protocol II’, at pp. 1458-59; Article 54 (3) (a) of Additional Protocol I provides to this effect.

²³⁰ P. Macalister-Smith, ‘Protection of the Civilian Population and the Prohibition of Starvation’ at p.443; S. Junod, ‘Commentary on Protocol II’, at pp.1458-59; see Art 54 (3)(a) of Additional protocol I.

²³¹ A. Mourey, ‘Famine and War’ (1994) No.285 *IRRC*, 549, at p. 553.

indispensable for the survival of civilians within the territory of a party for imperative military necessity.²³² Additional Protocol II is absolute and it does not contain such an exception of military necessity for prohibition of starvation. Since rules of humanitarian law have been formulated with consideration for military necessity, it is not generally a defence for acts prohibited by humanitarian law treaties unless there is express limitation to that effect.²³³ This construction can be used in the context of the changing nature of territorial controls in internal armed conflict, as otherwise the absolute prohibition of starvation would become meaningless. This conclusion is further strengthened by specific prohibitions of Additional Protocol II concerning collective punishment and pillage of civilians within the control of a party.²³⁴ Thus, objects indispensable for the survival of civilians located within the area under the control of a party to the conflicts²³⁵ are absolutely protected by Additional Protocol II and consequently it is not permitted for a party to use starvation as a method of combat against IDPs of an adverse party within the area under its control.

Indispensable objects necessary for the survival of civilians are protected only against direct attack. Therefore incidental destruction of such objects and thereby the starvation caused by such acts are not protected by Article 14. The prohibition of the (indiscriminate) use of remotely delivered anti-personnel mines is significant in the protection of agricultural lands as Article 14 only protects such lands against being rendered useless by direct acts or attacks.²³⁶ Such use of anti-personnel mines in agricultural lands would affect agricultural activities which indirectly cause deaths by malnutrition and starvation.

Despite an explicit prohibition on starvation in Protocol II and the existing customary prohibition on starvation as a method of combat,²³⁷ the absence of a prohibition in the Statute of the ICC as a war crime is a serious gap

²³² Art 54(5) of Additional Protocol I.

²³³ A.Roberts & R.Guelff, (ed.) *Documents on the Laws of War*, 2nd ed, (Oxford, 1989) at pp.5-6

²³⁴ S.Junod, *Commentary on Protocol II*, at p. 1459, para.4811.

²³⁵ *Ibid.*, at p.1459.

²³⁶ Articles 3(8) and 6 of the 1996 Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the 1980 CCW; Article 1 of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction.

²³⁷ C.Rottensteiner, 'The Denial of Humanitarian Assistance', at pp.568-69; J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rules.53-54 at pp.186-93.

in the protection of IDPs in internal armed conflict. Invoking protection under crimes against humanity and genocide is difficult due to the rigorous requirement of a policy or an intention to destroy the ethnic, racial or religious group.²³⁸ However, it is possible to get protection through individual communication procedure under ICCPR or other regional human rights instruments for such humanitarian law violations as a violation of the right to life, or inhuman treatment.

d. External Assistance

The significance of international protection in the form of relief activities to IDPs must be seen from the perspective that, except for interned or relocated IDPs, there is no general positive obligation on the parties in control of respective territories to provide internal assistance to IDPs displaced as a consequence of hostilities.²³⁹ Such a limited obligation would render the latter category of IDPs dependent on the mercy of parties to the conflict for essential supplies. Thus the external assistance provided in common Article 3(2) and in Article 18(2) of Additional Protocol II which address the suffering of all civilians including IDPs in a territory of a High Contracting Party, regardless of whether the liberty of the IDPs are restricted or not, is favourable for the protection of IDPs.²⁴⁰

For the admittance of an international humanitarian organisation into a state, the consent of the state concerned is necessary. As common Article 3(2) states that international organisations 'may offer' services to the parties to the conflict, it seems that the parties do not have a legal obligation to accept the offer.²⁴¹ In contrast, Article 18(2) of Additional Protocol II seems more obligatory²⁴² as it states relief actions 'shall be undertaken' even though the provision of assistance by an international organisation is subject to the consent of the High Contracting Party concerned. This means the party concerned

²³⁸ See above Ch. 3, Section, C.1.a.

²³⁹ Arts 5 and 17 of Additional Protocol II.

²⁴⁰ Article 18(2) of Additional Protocol II is much explicit as it states, 'civilian population is suffering.'

²⁴¹ P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Dordrecht, 1985), at p.31; L. Moir, *Law of Internal Armed Conflict*, at pp. 63 and 118; but D. Schindler, 'Humanitarian Assistance, Humanitarian Interference' at p.696.

²⁴² M. Bothe, 'Relief Actions: The Position of the Recipient State' in F. Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters* (Dordrecht, 1989) p. 91, at p.92; D.Schindler, 'Humanitarian Assistance, Humanitarian Interference' at p.696.

does not have discretion in refusing consent but can do so only for 'valid reasons, not for arbitrary and capricious ones.'²⁴³ The positive aspect of Articles 3(2) and 18(2) is that, an offer by international organisations can no longer be treated as interference in the internal affairs of a state during internal armed conflicts.²⁴⁴ Though there is no legal obligation on the parties to the conflict to accept the international assistance in terms of Article 3(2), if it is interpreted in the context of Article 3 as a whole, in extreme situations, the practical effect may be different. As such, even though a party can refuse some offers of humanitarian organisations, if a party is not in a position to fulfil the absolute obligations imposed on it with regard to IDPs under Article 3 of the 1949 Geneva Conventions as elaborated by Articles 5(1) (3) and 17 (1) of Additional Protocol II, it cannot then refuse to accept the services offered to it under common Article 3(2) without valid reasons.²⁴⁵ Similarly, in an extreme situation of shortage of food and other survival needs, similar to that referred to in Article 18(2) of Additional Protocol II, if a state party deliberately denies external assistance to IDPs belonging to an adverse party *within its power* and this leads to starvation, it may become a violation of common Article 3(1)(a) which prohibits violence to life or cruel treatment.²⁴⁶

In other words, an obligation to accept external relief as a subsidiary measure would arise, in an extreme situation where a party is unable or unwilling to meet these mandatory obligations on its own.

The state party to the conflict simultaneously becomes liable for failure to ensure the right to life and right against inhumane treatment of the ICCPR, right to an adequate standard of living and right to the enjoyment of the highest attainable standard of physical and mental health of the ICESCR²⁴⁷ of IDPs in the *whole territory* of the state *regardless of the power* by the same. As humanitarian law and human rights obligations of a state are not mutually exclusive but

²⁴³ M. Bothe, K.J. Partsch and W. A.Solf, *Commentary*, at p.696.

²⁴⁴ *Military and Paramilitary Activities In and Against Nicaragua*, para.242; though ICRC is given a legal basis in common Article 3, it does not have monopoly in offering assistance in non-international armed conflict, M.Torrelli, 'From Humanitarian Assistance to 'Intervention on Humanitarian Grounds'?' (1992) No.288 *IRRC* 228, at p.231.

²⁴⁵ See J.S. Pictet, *Commentary IV* at p.41; D. Schindler, 'Humanitarian Assistance, Humanitarian Interference' at p.696 states Common Article 3 provides a duty to accept the offer of external relief and 'consent may not be refused without valid reasons.'

²⁴⁶ See S. Junod, 'Commentary on Protocol II', at p.1456 states starvation a specific application of humane treatment in common Article 3 and in particular the prohibition on violence to life.

²⁴⁷ See L. Moir, *Law of Internal Armed Conflict*, at pp.228-229.

complementary and concurrent, in the context of common Article 3 as a whole and human rights obligations it is not possible for a state party to refuse an offer under Article 3(2) under extreme situations that cause suffering or undue hardship for IDPs.

The general situation of widespread internal displacement can be precisely explained in terms of Article 18(2) of Additional Protocol II, as the condition for the undertaking of relief actions is the suffering of 'undue hardship,' by civilians due to lack of supplies essential for survival, which is often the general consequence of internal displacement. 'Undue hardship' of IDPs includes lack of adequate food supplies and 'medical requirements,' such as the services of medical personnel, resulting from hostilities.²⁴⁸ With regard to medical requirements, a state party can justify the rejection of international assistance in the light of the acceptance of the services of National Red Cross Societies. However, the efficiency, accessibility and impartiality of such services, and the availability of resources to meet the diverse needs of wounded and sick IDPs such as those with land mine injuries or evacuation of wounded and sick IDPs from combat zone by negotiating temporary cease-fire, is questionable, particularly in the context of ideologically based armed conflicts and widespread internal displacement.²⁴⁹ Further, inadequacy of medical supplies in its strict sense, would necessitate external assistance. Therefore legitimate refusal of such relief actions by a state party concerned would often be limited in an internal displacement by the explicit terms in Article 18(2) itself and by other related provisions of Additional Protocol II.²⁵⁰

Thus, if a state is no longer able to provide survival supplies to its civilians, it has no discretion in refusing the offer of services by an international organisation, because refusals should always be regarded as an exception to the rule of acceptance of relief services.²⁵¹ 'Invocations of sovereignty to justify the obstruction or denial of relief assistance to

²⁴⁸ S. Junod, 'Commentary on Protocol II', at p. 1479.

²⁴⁹ Especially the National Red Cross services in the government-held territory occupied by adverse ethnic groups may not be accepted by the insurgents due to their apparent lack of impartiality.

²⁵⁰ M. Bothe, K.J. Partsch and W.A.Solf, *Commentary*, at p.434; ex. Arts. 4, 7, 5(1)(a)(c), 5(3) and Art.14 on starvation.; also see above, Section,E.2.D. i.

²⁵¹ The state no longer has the exclusive power of consent, M. Torrelli, 'From Humanitarian Assistance' at p. 233.

displaced persons no longer command over the needs of persons at risk.’²⁵² Refusal to accept relief for the benefit of IDPs in rebel-held areas or in government controlled areas, is in stark contrast to the objective of the state party which is engaged in combat in defence of its national unity and territorial integrity as expressed in Article 3 of Additional Protocol II.

The ‘core obligation’ of the state with regard to the right to be free from hunger in human rights law which obliges it to seek and obtain international assistance even in internal armed conflict situations indicates the existence of a broader obligation beyond the acceptance of the assistance offered by international humanitarian organisations.²⁵³ The declaration made by the European Union on 23 January 1995 concerning the internal armed conflict situation in Chechnya reflects this attitude of the international community: ‘freedom of access to Chechnya and the proper conveying of humanitarian aid to the population be guaranteed.’²⁵⁴ Therefore a refusal by the legal government cannot be legitimised solely on security reasons,²⁵⁵ such as, that the aid would reach the hands of rebels.

The state can, however, legitimately deny admittance to a humanitarian organisation based on its attributes. Common Article 3 focuses on the nature of the *organisation*, indicating that it should be both impartial and humanitarian, such as the ICRC.²⁵⁶ Here, an international organisation that speaks out about human rights and humanitarian law violations may be considered as partial and its offer could be refused. However, speaking out about undeniable publicised violations cannot be considered as such. Additional Protocol II concentrates more on the nature of the *relief action*, by stating ‘humanitarian and impartial’ and ‘without any adverse distinction.’²⁵⁷ As the approach adopted by common Article 3 emphasises a preconceived view regarding an organisation, Additional Protocol II

²⁵² F. M.Deng, ‘Frontiers of Sovereignty’ at p.279; *Military and Paramilitary Activities in and Against Nicaragua*, para.242.

²⁵³ Committee on ICESCR, ‘The Right to adequate food’, paras.6 and 17.

²⁵⁴ Council of European Union-General Secretariat, Press Release 4385/95 (press 24) at 1(23 January 1995) as cited in *Tadic* (Jurisdiction) para. 115.

²⁵⁵ See M. Bothe, K.J. Partsch and W. A. Solf, *Commentary*, at p.434.

²⁵⁶ P. Macalister-Smith, ‘Rights and Duties of the Agencies Involved in Providing Humanitarian Assistance and Their Personnel in Armed Conflict’ in F. Kalshoven (ed.), *Assisting the Victims*, p.99, at p.103.

²⁵⁷ *Ibid*; M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at p.435 state that, the requirement ‘without adverse distinction’ is ‘less a condition of admission than a rule of conduct for the action.’

approach can be regarded as more flexible and conducive to the admission of humanitarian organisations. Therefore this ground can hardly be raised in most cases as an excuse for denial of admission, as it is difficult to predict at the stage of admission of a humanitarian organisation that a relief action will be carried out with ‘adverse distinction.’²⁵⁸ Furthermore, when IDPs of an adverse party are in extreme hardship, such a refusal intended to deprive them of indispensable survival needs will be in violation of Article 14 of Additional Protocol II which prohibits starvation as a method of combat and human rights standards namely, Articles 2 and 6 of the ICCPR and Articles 11(2) and 12 of the ICESCR.²⁵⁹

Therefore it can be stated that Principle 25(2) of the UN Guiding Principle on IDPs correctly emphasizes the right of international humanitarian organizations and other actors to offer their services in support of the IDPs and the obligation of the state to not to withhold consent arbitrarily, in particular, if the authorities of the state concerned are unable or unwilling to provide necessary humanitarian assistance.²⁶⁰ To the extent of the obligation of the States to accept humanitarian assistance, the IDPs have the corresponding right to receive it, if offered by humanitarian organizations.²⁶¹

i. Access to Rebel Held Areas

Even after admittance within a country, access to rebel-held areas can be denied to humanitarian organisations by state parties, which would deprive the IDPs in those areas of relief aid. This is perhaps due to the fear that it would strengthen the rebels and weaken the government’s capacity; or would expose their policies which contributed to the conflict and eventual displacement.²⁶²

²⁵⁸ However later providing special protection and assistance to IDPs of a minority community over the displaced civilians of majority community, if the former are in a vulnerable position due to discriminatory treatment against them, cannot be regarded as adverse distinction.

²⁵⁹ M. Bothe, , ‘Relief Actions’ at p.94; M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at pp. 434-35; S.Junod, ‘Commentary on Protocol II,’ at p. 1458; see above, Sections, E.1. and E.2.c.

²⁶⁰ See for the development of such a right in practice, M. E.O’ Connell, ‘Humanitarian Assistance in Non-international Armed Conflict: The Fourth Wave of Rights, Duties and Remedies’ (2001) 31 *Israel Yearbook on Human Rights* 183.

²⁶¹ D.Schindler, ‘Humanitarian Assistance, Humanitarian Interference’ ,at p.696

²⁶² R.Cohen and F.M.Deng, *Masses in Flight*, at pp.6-7; M. Ellen O’Connell, ‘Humanitarian Assistance in Non-International Armed Conflict’ at p.198.

As the plain meaning of Article 18(2) of Additional Protocol II refers only to the consent of the state concerned, the state can refuse its consent to such organisations to carry out relief actions in areas controlled by rebels,²⁶³ whereas common Article 3(2) maintains the practical reality by offering the external assistance to each of the 'parties to the conflict.'²⁶⁴ In terms of common Article 3, if a humanitarian organisation wishes to carry out its relief activities in a rebel controlled area, only the consent of the rebels concerned is sufficient, provided it is possible to have access to the rebel territory without passing through the territory controlled by the government.²⁶⁵ Such assistance provided in rebel-held areas, in spite of an arbitrary refusal by a state, does not taint the character of an impartial offer of relief.²⁶⁶ Such assistance, can be provided in situations when part of the territory held by insurgents forms the border of another state. For instance, a cross-border relief operation against the wishes of Ethiopian central government was carried out by the ICRC in 1976 from Sudan to render assistance to Tigray and Eritrea, which were then in rebellion. Similarly, relief was given to Iraqi Kurds from Iran before the end of the regime of the Shah.²⁶⁷

However the word 'concerned' in Article 18(2) of Additional Protocol II could be interpreted similarly to the corresponding Article 70 of Additional Protocol I to mean that a state party is 'concerned' only when it receives relief, or grants transit to the rebel-controlled areas.²⁶⁸ It follows that in other situations, consent of the state party is not necessary.²⁶⁹ This is not only consistent with Article 3(2), which imposes obligations on both parties to the

²⁶³ A.Eide, 'New Humanitarian Law in Non-International Armed Conflict' in A. Cassese. *The New Humanitarian Law of Armed Conflict* (Napoli, 1979) p.277, at p.294.

²⁶⁴ M.Torrelli, 'From Humanitarian Assistance' at pp.233-34.

²⁶⁵ M.Torrelli, *ibid* ;D.Schindler, 'Humanitarian Assistance, Humanitarian Interference' at p. 700

²⁶⁶ D.Plattner, 'ICRC Neutrality and Neutrality in Humanitarian Assistance,' (1996) No.311, *IRRC* 161, at p.176.

²⁶⁷ D. P. Forsythe, 'The International Committee of the Red Cross and Humanitarian Assistance: A Policy Analysis,' (1996) No.314 *IRRC* 512, at pp.517-18.

²⁶⁸ M. Bothe, K. J. Partsch and W. A. Solf, *Commentary* at p. 696; M. A. Meyer, 'Developments of the Law Governing Relief Operations,' in M. A. Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, (London: 1989) p.209, at p.221.

²⁶⁹ As C. Sommaruga, 'Assistance to Victims of War in International Humanitarian Law and Humanitarian Practice', (1992) 289 *IRRC* p.373, at p. 376 stresses, '...it is not the formal consent of the government that we seek to go somewhere in the country where it is not in control. In such cases we require the consent of those exerting effective power in the specific region where there are humanitarian needs.'

conflict to provide humanitarian assistance but also generally with the nature of obligations of humanitarian law which imposes equal obligations on both parties to the conflict.²⁷⁰ Another way to overcome the state consent is to interpret this provision in the light of Article 14 of the Additional Protocol II.²⁷¹ In addition, the state has a primary obligation in human rights law to protect IDPs, and therefore the prevention of access to humanitarian food aid in internal conflicts or other emergency situations to particular groups might render the state in violation of the right to freedom from hunger.²⁷²

In such a situation, the role of the neighbouring state is important to give meaning to such interpretation in allowing and facilitating the rapid and unimpeded passage of relief consignments and personnel to a rebel-held areas.²⁷³ Although an assistance 'exclusively' humanitarian nature to civilians suffering 'undue hardship' cannot be regarded as an unfriendly act, the absence of an obligation to allow free passage to the neighbouring state can place the viable outcome of such a flexible interpretation at the mercy of neighbouring states. However Security Council Resolution 1296 of 2000 addresses the role of neighbouring states in providing access to relief activities by UN agencies on the basis that denial of such access may constitute a threat to international peace and security.²⁷⁴ This resolution does not distinguish between international and internal armed conflicts, and is in accordance with the broader interpretation of Article 18(2) regarding access.

The insurgents are equally obliged to receive such relief services with regard to IDPs under their control in terms of the explicit obligation on them to

²⁷⁰ Resolutions of the Security Council, 1261 (30 August 1999) para. 11; 1296 (19 April 2000) paras.10, 12.

²⁷¹ P. Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions*, at p.31; D. Plattner, 'Assistance to the Civilian Population: the Development and the Present State of International Humanitarian Law' (1992)No.288, *IRRC* 249, at p.260.

²⁷² A. Eide, *The Right to Adequate Food and to be Free From Hunger*, E/CN.4/Sub.2/1999/12, (28 June 1999) para. 57.

²⁷³ Art.70(2) of Additional Protocol I provides such an obligation on neighbouring state to a territory under the control of the party to the conflict.

²⁷⁴ Resolution of the Security Council 1296 (2000) 'calls upon' all parties including neighbouring states to cooperate in access to unimpeded humanitarian assistance by UN agencies; if a denial of access by such state 'may constitute a threat to international peace and security' which can be committed by 'deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict.'

provide the basic needs of civilians in undue hardship.²⁷⁵ Such obligation also means not deliberately impeding the delivery of food and medical supplies or diverting them for their own use.²⁷⁶

Common Article 3 is not wide enough to imply an obligation to grant free passage to relief consignments destined to the adverse party.²⁷⁷ In international armed conflicts, a general obligation exists to ‘allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel ...even if such assistance is destined for the civilian population of the adverse Party.’²⁷⁸ Even though humanitarian personnel and their property can be subjected to the checks and controls of the parties to the conflict,²⁷⁹ having such an explicit provision to internal armed conflicts will effectively prohibit delays, blockades and unjustified formalities imposed by customs and police officials of a transit party to the relief convoys destined to the IDPs of the adverse party.²⁸⁰ However, a limited prohibition on deliberate deprivation by attacking relief convoys destined to IDPs under a party’s control to endanger their lives and health can be implied from common Article 3. The absence of such a general obligation to free passage in Article 18(2) of Additional Protocol II can be resolved by the explicit prohibition of attack on objects indispensable for the survival of civilians in Article 14 of the Additional Protocol II, as it has a strengthening effect on the shortcomings in the provisions concerning relief activities.²⁸¹ Even though certain ways of bringing starvation are emphasised in Article 14 by using the word ‘therefore,’ and these explicitly cover attacks on relief convoys, the listed ways are not exhaustive.²⁸² This makes it possible to include other ways such as wilful impediment of relief to cause starvation.

²⁷⁵ See Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflicts, S/2001/331 (30 March 2001) para.7.

²⁷⁶ This was the situation in 1992 in Somalia, Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflict, S/1999/957 (8 September 1999) para.19.

²⁷⁷ E. Rosenblad, *International Humanitarian Law of Armed Conflict*, at pp.114-15, n. 326.

²⁷⁸ Art.70(2) of Additional Protocol I.

²⁷⁹ Art.59(4) of IV Geneva Convention of 1949; Arts.15(4),70(3) a, b of Additional Protocol I.

²⁸⁰ Y. Sandoz, ‘Article 70- Relief Actions’ in Y. Sandoz, C. Swinarski, C., and B.Zimmermann, (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of August 1949*, (ICRC, Geneva 1987) p. 815, at p. 823.

²⁸¹ P. Macalister-smith, *International Humanitarian Assistance*, at p.31; see above, Section, E.2.c.

²⁸² S. Junod, ‘Commentary on Protocol II’, at p. 1458.

Acceptance of external relief activities by the parties to the conflict amounts to acceptance of the situation of 'undue hardship' of civilians. Therefore impediment caused thereafter by unjustified denial, diversion or undue delay of relief activities caused by either party to the conflict to cause starvation, is prohibited. The war crimes applicable to international armed conflicts in the Statute of the ICC, which prohibits starvation as a method of warfare including 'wilfully impeding relief supplies,' can offer an authoritative guidance for such interpretation.²⁸³ Therefore invoking military reasons as an excuse for the impediment of relief to the suffering civilians of an adverse party can amount to a violation of Article 14 of Additional Protocol II.²⁸⁴ Rapid and unimpeded passage of humanitarian relief is now considered as forming part of the customary humanitarian law applicable to internal armed conflicts.²⁸⁵

ii. Protection of Humanitarian Personnel

Admittance of humanitarian organisations into a country concerned is not in itself an end to the problems of hunger, malnutrition and epidemics experienced by IDPs. Difficulties in accessing the IDPs would cause problems in distribution of food, medical supplies and services and render humanitarian assistance unproductive. Effective humanitarian assistance to IDPs in such difficult conditions, therefore, depend on the safety of humanitarian workers and their relief activities, as attacks on them would render them unable to perform such relief activities.²⁸⁶ Such a consequence is detrimental to the IDPs affected by conflicts fought on discriminatory grounds, where the government is often unwilling to provide goods and services essential for survival.

²⁸³ Art.8(2)(b)(xxv) of the Statute of the ICC.

²⁸⁴ Perhaps on this legal basis, Security Council resolutions 794 of 3 December 1992 and 814 of 26 March 1993 adopted with regard to Somalia condemned the 'deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population.'

²⁸⁵ J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 55 at pp.194-196; also see Principle 25(3) of the UN Guiding Principles on Internal Displacement.

²⁸⁶ In Sudan and Somalia relief workers were killed or kidnapped and they and their vehicles and buildings were often attacked by rebels and militiamen. U.S. Committee for Refugees, *World Refugee Survey 2000*, at pp.116, 120; ICRC delegates and staff were killed in Chechnya, Burundi and Democratic Republic of Congo, F. Bugnion, '17 December 1996: Six ICRC Delegates Assassinated in Chechnya,' (1997) No.317 *IRRC* 140; 'Three ICRC Delegates Killed in Burundi' (1996) No.312 *IRRC* 323; 'Six ICRC Staff Killed in the Democratic Republic of the Congo' (2001) No.842 *IRRC* 489.

Except for Article 3(2) of the 1949 Geneva Conventions, which encourages parties to enter into special agreements to bring all or part Geneva Conventions to protect assistance activities, common Article 3 is brief with regard to relief actions, as it does not contain details concerning access to the area of need in the conflict zone, protection of humanitarian personnel, protection of installations and their vehicles from attack and protective emblems.²⁸⁷

Additional Protocol II deals only with one category of personnel and their transportation namely, the respect and protection of medical and religious personnel involved in assistance activities²⁸⁸ their medical units and transport²⁸⁹ and respect for the Red Cross emblem,²⁹⁰ as opposed to personnel participating in relief activities.²⁹¹ As in internal armed conflicts, 'the area of confrontation is not well-defined, or shifts frequently,'²⁹² to make the protection feasible, medical units which shelter wounded and sick civilians and the vehicles that provide transport are protected against violent acts by parties in control and from attack in hostilities and by the distinctive emblems of the Red Cross or Red Crescent.²⁹³ In order to ensure the practical application of such protection, Additional Protocol II prohibits the improper use of the Red Cross emblem.²⁹⁴

²⁸⁷ Most special agreements have been by the initiative of the ICRC. See M. Veuthey, 'Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross,' (1983)33 *Am.ULRev* 83, at p.92; protection of humanitarian personnel will however fall within the protection guaranteed for civilians in common Article 3; M. Torrelli, 'From Humanitarian Assistance' at p.233 states that '[t]he exact scope of that provision[common article 3] with respect to assistance is all too often unknown.'; however, J.E. Bond, *The Rules of Riot: Internal Conflict and the Law of War* (Princeton, 1974), at p.131 states that, acceptance of an offer by the ICRC implicitly requires the party to respect Red Cross emblem, hospital and their personnel.

²⁸⁸ Arts. 9 and 10 of Additional Protocol II.

²⁸⁹ Art.11 of Additional Protocol II; see for the meaning of medical units and transports, Art.8 (e) and (g) of Additional Protocol I ; Art.8(2)(e)(ii),(iv) of the Statute of the ICC.

²⁹⁰ Art.12 of Additional Protocol II.

²⁹¹ But see Art.71(3),70(4) of Additional Protocol I ;they fall within the general protection of civilians in Article 4 of Additional Protocol II; Article 33(1) of the draft Protocol II submitted to plenary contained such a protection that stated that '...no one shall be harassed, prosecuted, convicted or punished for such [relief]activities' (CDDH/402) was not adopted in the final text. See D.P. Forsythe, 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts,' (1978)72 *AJIL* 272, at p.282-83.

²⁹² S. Junod, 'Commentary on Protocol II', at p.1440.

²⁹³ In terms of Art. 8(1) of Additional Protocol I this means the protective function of the emblem in time of armed conflicts as opposed to the indicatory function that only designates the personnel and objects to the red cross institution without rendering protection.

²⁹⁴ Art.12 of Additional Protocol II.

Humanitarian assistance in internal armed conflicts²⁹⁵ and prohibition of both the intentional direction of attacks and other violence against medical and relief personnel, their materials, transport and hospitals and places where wounded and sick are collected have emerged as norms of customary law to strengthen the protection of IDPs.²⁹⁶ The prohibition of attacks against relief personnel and their materials and vehicles in the Statute of the ICC is significant in the absence of such protection in Protocol II for the provision of effective humanitarian assistance.²⁹⁷ The ICRC study indicates a much broader customary protection of relief personnel and their objects as it provides for both 'respect and protection.'²⁹⁸

The protection of medical personnel in customary law as stated in the Statute of the ICC partly differs from Article 9 of Additional Protocol II, as the former covers only the prohibition of attack in conduct of hostilities and the latter deals with both protection from abuse of power and attack in hostilities.²⁹⁹ In the absence of a definition for medical personnel in Additional Protocol II, a definition that can be derived from Protocol I and the one developed for Additional Protocol II during the Diplomatic conference that led to the adoption of Protocols includes: medical personnel of a party to the conflict, whether military or civilian; medical personnel of Red Cross and Red Crescent Organisations recognised and authorised by parties to the conflict; and medical personnel of other aid societies recognised and authorised by the parties to the conflict and located

²⁹⁵ General Assembly Resolution 2675 of 1970, 'Basic Principles for the Protection of Civilian Population in Armed Conflicts,' para.8; *Tadic* Jurisdiction, paras.114-15; Gasser states that there has been a practice by states and insurgents to accept relief operations for civilian population by the ICRC, M. D. Dupuis *et al.*, 'The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987)2 *Am.U.J.Int'l L.& Pol'y*, 415, at p.481.

²⁹⁶ Article 8(2)(e)(ii)(iii)(iv) of the Statute of the ICC ; J. M. Henckaerts and L. Doswald - Beck, *Customary International Humanitarian Law*, with regard to medical personnel and their objects, Rules. 25, 26, 28, 29 and 30 at pp. 79-104 and regarding relief personnel and their objects-Rules 31, 32 and 33 at pp.105-114.

²⁹⁷ Art.8(2)(e)(iii) of the Statute of the ICC; to similar effect Resolution of Security Council 1286 on Burundi, S/RES/1286, 19 January 2000.

²⁹⁸ J.M.Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, Rule 31 and 32.

²⁹⁹ 'Respect and protection' for the medical personnel in Article 9 implies a duty not to attack' and therefore the scope of protection of Articles 11 (on medical units) and 9 of Additional Protocol II are identical, S. Junod, 'Commentary on Protocol II', at p.1421; such an interpretation is consistent with the definition of medical personnel in Art.8 (c) of Additional Protocol I as only 'those persons assigned, by a Party to the conflict, exclusively to the medical purposes' are entitled for such protection.

within the territory of the state where the armed conflict is taking place; or by an impartial international humanitarian organisation including the ICRC.³⁰⁰ However, such medical personnel should be assigned exclusively for medical purposes and their status is determined according to their functions and not by their qualifications.³⁰¹ The latter aspect broadens the scope of medical personnel, which is significant for the protection of IDPs in internal armed conflicts.

The protection of medical personnel and their units and transport does not depend on their identification by a distinctive emblem, as the use of such an emblem is optional in Additional Protocol II and in customary international law,³⁰² whereas in the Statute of the ICC the prohibition involves attack against ‘buildings, material, medical units and transport, and personnel using distinctive emblems of the Geneva Conventions in conformity with international law.’³⁰³ Thus the Protection provided by Additional Protocol II seems to be broader than the one provided in the Statute of the ICC in principle, although in practice such an effect is not feasible. In order to ensure the protection of medical personnel and their objects it is essential to use the distinctive emblems of the Red Cross or Red Crescent. This means that even though impartial international organisations such as CARE and Medicines Sans Frontiers which have their own recognisable symbols are respected and protected under Articles 9 and 11 of Additional Protocol II, their symbols do not benefit from international protection under Geneva Conventions.³⁰⁴ The prohibition of the Statute of the ICC which is restricted to attacks on medical personnel and their objects that use the distinctive Red Cross and Red Crescent emblems. The protection from direct attack of relief personnel other than those who use the Red Cross and Red Crescent would then fall either within the prohibition of direct attacks, on civilians in Article 8(2) (e) (i)³⁰⁵ or on personnel involved in humanitarian assistance in Article 8 (2)(e) (iii) of the

³⁰⁰ Article 8(c) of Additional Protocol I on ‘medical personnel;’ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at pp.81-82.

³⁰¹ S. Junod, ‘Commentary on Protocol II’, at p.1420.

³⁰² *Ibid.*, at p.1440; J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rules.25, 26, 28,29 and at p. 104 it states that the ‘display of the emblems is merely the visible manifestation of that function [medical] but does not confer protection as such.’

³⁰³ Art.8(2)(e)(ii) of the Statute of the ICC.

³⁰⁴ See J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at p.82.

³⁰⁵ Robinson and Von Habel, *War Crimes in Internal Conflicts*, at pp.201-202.

Statute of the ICC and to some extent by the protection of ‘hospitals and places where the sick and wounded are collected’ in Article 8(2)(e) (iv).³⁰⁶

The absolute and general protection attached to wounded and sick civilians is further reflected in the protection of medical units and transports in treaty and customary law stated in the Statute of the ICC, as their immunity from attack does not cease immediately if they are used to commit hostile act ‘outside their humanitarian function,’ but goes beyond that. As stated in Article 11(2) of Additional Protocol II such ‘protection may, however, cease only after a warning, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.’³⁰⁷ The rationale for such a provision which likely to provide time for evacuation is, again, the utmost protection provided for wounded and sick. In such a situation, time is provided for evacuation of wounded and sick from such units or transports. However, customary humanitarian law does not require to extension of a reasonable time limit but only an advance warning as a general precaution in attack.³⁰⁸

Apart from the protection of civilian medical personnel, protection of their activities is important in a highly sensitive situation of internal armed conflict if they are to render their services effectively in practice for the protection of IDPs. For this purpose, they are protected from punishment by the party in control of the area for having carried out medical activities ‘regardless of the person benefiting,’ whether a wounded combatant or a displaced civilian of an adverse party.³⁰⁹ The protection of the professional obligation of confidentiality of medical personnel regarding the victims under their care and protection from sanction for failing to give such information is important to ensure the protection of wounded and sick IDPs. However, subjecting this protection to national law leads to the possibility of restricting medical personnel from performing their duties in freedom.³¹⁰ This makes the practical value of

³⁰⁶ The supplies of humanitarian assistance include medical supplies and their transport and personnel such as doctors and nurses, M. Cottier, ‘Attacks on Humanitarian Assistance or Peacekeeping Missions’ at p.190.

³⁰⁷ See below, Section, F. 2.b.

³⁰⁸ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 20 at p.62.

³⁰⁹ Art.10(1) of Additional Protocol II.

³¹⁰ However, a medical personnel is protected at least by the prohibition against retrospective legislation in Art.6(2)(c) of Additional Protocol II.

protection of medical functions, particularly of national medical personnel, questionable.

A further drawback in Additional Protocol II is the absence of a provision for free movement of civilian medical personnel and relief personnel which is important for access to and identification of IDPs in need in rebel-held areas, to provide assistance.³¹¹ In terms of the 1996 Amended Land Mines Protocol II to the 1980 UN CCW, both parties to an internal armed conflict have obligations. The obligation to receive involves taking active measures to remove any obstacles; taking measures to protect the personnel of the ICRC or any other impartial humanitarian organization in their humanitarian mission from the effects of mines in any area under their control; and providing them with safe passage to or through any place under its control for access to victims.³¹² As the implantation of anti-personnel mines and anti-tank mines obstruct and delay access to IDPs and the location of such mines is only known to the party concerned, taking active measures to facilitate free passage is important for access to IDPs. Otherwise, there could be harmful consequences to IDPs. For instance, difficulties of vaccination teams in gaining access to the areas due to mines would increase infectious diseases among IDP children.

However, the ICRC study on customary law acknowledges the existence of a customary humanitarian law norm applicable to internal armed conflicts in this regard which is beneficial for the protection of IDPs and such freedom of movement can only be restricted for imperative military necessity, which is only temporary.³¹³

3. The Right to Humanitarian Assistance

The above discussed rights of IDPs to request and receive *internal* humanitarian assistance from national authorities raise another important question: whether IDPs have the right to humanitarian assistance in internal armed conflicts, which would empower the IDPs to demand and receive humanitarian assistance from international humanitarian organisations instead of depending on the mercy of

³¹¹ But see Art.15(4) and 71 (3) of Additional Protocol I.

³¹² Art.12(5).

³¹³ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 56 at pp. 200-202.

their own states.³¹⁴ The Guiding Principles on the Right to Humanitarian Assistance adopted by the International Institute of Humanitarian Law recognises such a right which would enable IDPs in destitution in an internal armed conflict to request such assistance from ‘competent national or international organizations and other potential donors.’³¹⁵ There does not exist a clearly defined right to humanitarian assistance in natural disasters,³¹⁶ despite the existence of a corresponding right to receive humanitarian assistance (but not to request) from international humanitarian organisations in internal armed conflicts, in terms of common Article 3(2) and Article 18(2) of Additional Protocol II.³¹⁷ Therefore without its peacetime applicability, the existence of such a right cannot be asserted.³¹⁸

The right to humanitarian assistance is still in the emerging form in the customary international law and an uncertainty exists with regard to the rights and obligations related to this right.³¹⁹ This emerging position of such a right is explicitly stated by the Inter-American Court as follows:

[t]he measures adopted by this Court, in the present case of the *Communities of the Jiguamiando and of the Curbarado*, as well as in the previous cases of the *Peace Community of San Jose de Apartado* (2000-2002) and of the *Haitians and Dominicans of Haitian Origin in the Dominican Republic* (2000-2002), are directed to the sense of the gradual formation of a true *right to humanitarian assistance*. ... In our days, one ought to concentrate attention on the contents and juridical effects of the emerging right to humanitarian assistance, in the framework of the treaties on human rights, Humanitarian Law, and Refugee Law, so as to refine its elaboration, to the benefit of the *titulaires* of that right.³²⁰

³¹⁴ B. Jakovljevic, ‘International Disaster Relief Law’ (2004) 34 *Israel Year Book on Human Rights* 251, at p.257 states that the right to humanitarian assistance contains two elements: to demand for assistance and to receive assistance whether demanded or offered without demand.

³¹⁵ Principles 1 and 2 of the Guiding Principles on the Right to Humanitarian Assistance, reproduced in (1993) No.297 *IRRC*, 519; ILA Declaration on Internally Displaced Persons, Article 3 states that the IDPs have the right to seek and receive humanitarian assistance and protection from ‘duly authorized international organizations.’

³¹⁶ Y.Dinstein, ‘The Right to Humanitarian Assistance’ (2000) *LIII Naval War College Review*. (available in <http://www.nwc.mil>).

³¹⁷ See above, Section E.2. d.

³¹⁸ Principle 3 of the UN Guiding Principles on Internal Displacement also states such right only with regard to national authorities.

³¹⁹ R.J. Hardcastle and A. T. L. Chua, ‘Humanitarian Assistance: Towards a right of Access to Victims of Natural Disasters’, (1998) No.325 *IRRC* p.589,

³²⁰ Concurring opinion of Judge A.A. Cancado Tridade, in *Communities of the Jiguamiando and of the Curbarado*, Order of the Inter-American Court of Human Rights of 6 March, 2003, Provisional Measures requested by the Inter-American Commission on Human Rights in the matter of the Republic of Colombia, para.6 (emphasis added in the original) ; according to B. Jakovljevic, ‘International Disaster Relief Law’ at p.258, ‘the right to humanitarian assistance is still in the

F. Direct and Indiscriminate Attacks, Acts of Violence on IDPs and Their Camps, or Settlements, or Objects used by Them

1. Protection Under Human Rights Law

The right to life of IDPs is increasingly threatened by acts of violence on IDP camps and settlements within the control of the parties to the conflict,³²¹ direct and indiscriminate attack in conduct of hostilities on IDPs and their camps or settlements or any other civilian objects where they have sought shelter or objects used by them during displacement.³²² The right to life is non-derogable even in internal armed conflicts. Such a right is 'inherent' and derived from the very existence of human beings and therefore it is fundamental to all other rights. In this sense, this right is regarded as a peremptory norm which binds even non-parties to the ICCPR.³²³ However, the right to life is not absolute in Article 6 of the ICCPR or in any other regional human rights Conventions, as they permit killings by lawful acts of armed conflicts.³²⁴

Where killings in combat are concerned, despite the continued applicability of the prohibition of arbitrary deprivation of life during internal armed conflict, the general nature of the right to life in the ICCPR does not give any guidance as to the extent of its applicability in such situations.³²⁵ Article 15 (2) of the ECHR contains an express provision to the effect that derogation from the right to life can only be made in respect of 'deaths resulting from lawful acts of war.' Since, during an armed conflict, the rules of international humanitarian law become applicable to prevent the abusive practices of a state, the

phase of development, but it is difficult to deny its existence as a human right, or subsidiary human right, invoked in order to ensure the protection of some other recognized basic rights.'

³²¹ For instance, an IDP camp in Western Darfur in Sudan was attacked and 80 makeshift shelters were burned by the armed Arab militants causing many killed and others to flee from the camp, UNHCR, '29 Killed in Attack on Darfur Camp: UNHCR Gravely Concerned,' 29 September 2005. (<http://www.unhcr.ch/cgi-bin/texis/vtx/chad?page=news&id=433c23744>).

³²² Indiscriminate aerial strikes on IDP camps and relief sites had taken place in Equatoria, Upper Nile, Bahr al Ghazal in Sudan during 2001, 'Indiscriminate Aerial Bombing on IDP Camps, Relief Sites and People Fleeing', Global IDP Survey, (<http://www.idpproject.org>); in February 2004, the Lord Resistant Army (LRA) which fights against the government's Ugandan Peoples' Defence Forces (UPDF) attacked Barlonyo IDP camp in Lira District, Uganda which resulted in 337 deaths. Human Rights Watch, *World Report 2005: Uganda* (<http://hrw.org/english/docs/2005/01/13/Uganda9862.htm>): Amnesty International, *Annual Report 2005: Uganda*, (<http://amnestyusa.org/countries/uganda/document.do?id=ar&yr=2005>).

³²³ Human Rights Committee, 'States of Emergency' para.11; the effect of such norm is its non-derogability in all circumstances, however all the non-derogable rights are not peremptory norms, for example, the non-derogable rights in Arts.11,18 of the ICCPR.

³²⁴ Arts. 6(1) and 4 of the ICCPR; Arts.2(2) and 15 ECHR; Arts.4 and 27; Art.4 of the ACHPR.

³²⁵ See above, Ch.2.

meaning of arbitrary deprivation of right to life in armed conflict situations of the ICCPR can be derived by resort to the former.³²⁶ The ICJ in its Advisory opinion in the *Legality of the threat or Use of Nuclear Weapons* made such a clarification as follows:

The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and deduced from the terms of the Covenant itself.³²⁷

A similar view was expressed by the Inter-American Commission on Human Rights when it informed itself by recourse to humanitarian law as an ‘authoritative guidance’ to determine the alleged violations of the right to life under Art.4 of the ACHR.³²⁸ It follows that what is regarded as unlawful in humanitarian law can be regarded as a violation of the right to life in human rights law. As human rights law does not contain any of the details of the definitional standards or rules to be applied during armed conflict situations, customary international humanitarian law becomes pertinent as *lex specialis* with all of its details as authoritative guidance to evaluate the question of what constitutes arbitrary deprivation of life during internal armed conflicts.³²⁹ However, as discussed earlier, if a state opts not to derogate from human rights during an internal armed conflict, the legality of the killings of IDPs would not be determined in terms of humanitarian law but as in peacetime conditions.³³⁰ Therefore, incidental killings of IDPs are not permitted for any reason in peacetime situations.

The obligation of the state to ‘respect’ the right to life of all civilians within its territory, including rebel-held ones, from the conduct of hostilities, can be justified by its obligation in Art.2(1) of the ICCPR. It obliges the state ‘to respect and to ensure respect to all individuals within its territory and subject to its

³²⁶ Human Rights Committee, ‘States of Emergency’ para.3.

³²⁷ Para. 25.

³²⁸ *Abella v. Argentina*, para. 161.

³²⁹ *Tadic*, Jurisdiction, paras.110, 111,112.

³³⁰ See Article 15 (2) of the ECHR, for the express requirement as to derogation from right to life during armed conflicts.

jurisdiction' the rights recognised in the ICCPR. Jurisdiction can be interpreted to mean within the 'power or effective control' of the state party.³³¹ It is construed in a disjunctive manner to respect the rights either on the basis of those present within the territory or if not within the jurisdiction of the state.³³² Such a construction can be supported by Optional Protocol to the ICCPR, ECHR and ACHR, all of which refer to the requirement of *jurisdiction*. Therefore a state may not be obliged to take positive measures to protect acts of killings against IDPs by the armed opposition groups in areas under their control for the reason that state is not able in practice to exert its power in such areas.³³³ However, it has an obligation to respect and to ensure respect with regard to the right to life of IDPs within its territory as a whole to the extent it can exercise its power or effective control by its acts over such rebel-held areas such as, by air strikes or shelling.

The scope of the right to life is concerned, the state has the obligation to refrain from certain killings of IDPs in military operations. The criteria to decide the unlawfulness of such killings are: the legality of the target; the disproportionate nature of the attack on the legal target, due to the nature of the attack itself; the use of an unlawful weapon or using the weapon in an unlawful manner.³³⁴ Therefore, direct attack on relocation camps and other places which shelter the IDPs;³³⁵ and disproportionate killings of IDPs and destruction of IDP camps and other shelters in a legitimate attack on a military objective, are violations of their right to life indeed.³³⁶

In this regard the right to life of IDPs who often take shelter in religious places is protected not only by the right to life but also indirectly by the right to cultural identity as well.³³⁷ The destruction of such 'non-renewable cultural resources' can be a part of ethnic cleansing policy as happened in the former Yugoslavia, which erases not only the identity of the minority civilians but also the

³³¹ Human Rights Committee, 'Nature of the General Legal Obligation,' para.10.

³³² T.Buergenthal, 'To Respect and to Ensure: State Obligations and Permissible Derogations,' at p.74; Human Rights Committee, *ibid*; Provost, *International Human Rights*, at pp.19-20.

³³³ See above, Ch.2.

³³⁴ See for detailed discussion of this aspect, F. Hampson, 'Using International Human Rights Machinery' at p.128.

³³⁵ Special Rapporteur, Extrajudicial Executions, E/CN.4/2000/3 (25 January 2000) paras.43-44.

³³⁶ *Third Report on Colombia*, Ch. IVc, para.189.

³³⁷ J. Symonides, 'Cultural Property' in J. Symonides (ed.), *Human Rights: Concept and Standards* (Ashgate, 2000) p.175, at pp. 193-94.

IDPs themselves sheltered therein.³³⁸ Even if civilian deaths can be attributable to a military mistake, such as to negligent failure to verify that an object is a military object, it can still be a violation of the right to life.³³⁹

If the usage of a specific weapon is not prohibited in internal armed conflict, whether by treaty or customary law, despite its prohibition in international armed conflicts, deaths of civilians resulting from its usage in itself do not constitute arbitrary deprivation of life in internal armed conflicts, unless the manner of its usage violates the principle of distinction and principle of proportionality. This undesirable distinction concerning the deprivation of life by use of weapons, between international and internal armed conflict, is the reality of the application of international humanitarian law as *lex specialis*.³⁴⁰ However, under the customary norm that prohibits the choice and use of means of combat, this effect can be very much reduced. For instance, the use of anti-personnel landmines which affect IDPs during displacement is prohibited by treaty law as an indiscriminate weapon in itself. Therefore, death of IDPs occurring as a result of their usage by state parties to the 1997 Ottawa Convention would be arbitrary deprivation of life.

Acts of violence against IDPs, such as murder, genocide, extermination, summary or arbitrary executions and enforced disappearances that threaten or result in death, are violations of the right to life regardless of whether they are committed during peace or conflict situations. Therefore killing a group of IDPs with the intent to destroy by recourse to weapons of an indiscriminate nature such as chemical weapons can also be regarded as constituting genocide and violation of the right to life.³⁴¹ Murder and extermination of IDPs as crimes against humanity have a wider scope in internal armed conflicts to include killings occur in violation of conduct of hostilities.³⁴² As Fenrick observes, '[i]f the object of a policy is to kill or injure civilians, that policy can be implemented by rounding up and killing civilians in occupied territory or by bombing or shelling

³³⁸ See generally, H. Abtahi, 'The protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia', (2001) 14 *Harvard Human Rights Journal*, 1.

³³⁹ D. Weissbrodt & B. Andrus, 'The Right to Life During Armed Conflict: Disabled Peoples' International V. United States' (1988) 29 *Harvard International Law Journal*, p.59, at pp.80-81.

³⁴⁰ See below, for further discussion on the use of weapons.

³⁴¹ See *Legality of the threat or Use of Nuclear Weapons*, para.26.

³⁴² *Akayesu*, Trial Chamber, para.589.

a city still under the control of the opposing side.’³⁴³ Therefore murder or extermination constituting crimes against humanity committed during internal armed conflicts may require the application of the international humanitarian law rules of hostilities to determine the legitimacy of the alleged incidental killings of civilians.³⁴⁴ As such, proportionate incidental civilian casualties occurring in an attack directed against a legitimate military objective do not constitute crimes against humanity, as such an attack cannot be regarded as directed against civilian population.³⁴⁵ If the international humanitarian law rules are not applied, it would undermine the credibility of humanitarian law as a system by rendering proportionate incidental civilian killings in armed conflicts as illegitimate in terms of crimes against humanity.

Therefore, international criminal law is useful in determining the scope of the right to life of IDPs. In internal armed conflict situations however, common Article 3(1)(a) and Art.4(2)(a) of Additional Protocol II can be resorted to in order to strengthen the non-derogable nature of the right to life in particular of IDPs as they ‘are very similar to the norms of international human rights law in terms of both content and the problems they deal with.’³⁴⁶

A qualification can be added, however, to their scope of application. The prohibition of violence to life in humanitarian law is more limited than the right to life in human rights law in its scope of application, since the former only deals with the prohibition of violence to life of IDPs within the control of the party to the conflict, directly or indirectly such as by starvation, as opposed to killings. As the state is obliged to respect the rights of all individuals within its ‘territory and subject to its jurisdiction,’ this fundamental right to life is undoubtedly of a wider scope of application, extending even to IDPs within the rebel-held areas, to the extent that the state can exercise control over such parts of the territory. A state is responsible for an internationally wrongful act, when an action or omission of a state:

‘(a) Is attributable to the State under international law: and

³⁴³ W.J. Fenrick, ‘Should Crimes Against Humanity Replace War Crimes,’ at p.780.

³⁴⁴ See W.J. Fenrick, *ibid.*, at p.782.

³⁴⁵ *Ibid.*, at p.785.

³⁴⁶ D. Plattner, ‘The Protection of Displaced Persons in Non-International Armed Conflicts’ (1992), No.291, *IRRC* 567, at pp. 571-572.

(b) Constitutes a breach of an international obligation of the State.’³⁴⁷

Attribution of responsibility on states for the acts of insurgents is only possible if the state fails to exercise due diligence with regard to harmful acts of insurgents. In this regard the operational constraints of the state authorities should be taken into account and therefore the obligation to protect the human rights of IDPs in rebel-held area does not impose a disproportionate burden on the state.³⁴⁸

However, a state could exercise its power by land or air attacks. As such, the right to life is broader in its scope to protect the massacres of IDPs within the area in its control and from direct and indiscriminate killings of IDPs by air or land attacks by the government armed forces in areas under the control of rebels. However the lack of effective control over rebel held areas does not absolve the state from taking other positive measures wherever possible to protect the right to life of IDPs, such as sending humanitarian assistance to IDPs. The non-responsibility of state for the acts of insurgents in rebel held areas in human rights law, however, underscores the specificity of humanitarian law as a *lex specialis*, as it precisely provides protection to IDPs in such situations by imposing obligations on insurgents for their acts of violence.

The obligation to ensure respect for the right to life requires the states to take positive measures to protect the IDPs, such as precautions in attack as an attacking party which includes early warning, and declaration of safe areas or places to take shelter. As a defending party against attacks by opposition armed forces, precautions would include evacuating IDPs in besieged areas, and not keeping military objectives within the vicinity of the IDP camps or settlements. In this regard, the customary international humanitarian law obligations can be used as interpretative guides to determine the scope of right to life in internal armed conflicts.³⁴⁹

³⁴⁷ Art.2 of the Draft Articles on Responsibility of States for Internationally wrongful Acts, International Law Commission, adopted by at its 53rd Session (2001), General Assembly, 56th Session, Supplement No.10 (A/56/10).

³⁴⁸ *Osman v. U.K*, para.116.

³⁴⁹ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 20 at pp.62-65; Rules.22-24, at pp.68-76; see below, Section F.2.b.

2. Protection Under International Humanitarian Law

As discussed above, Article 3(1)(a) prohibits ‘murder of all kinds’ against IDPs within the control of a party to the conflict, and therefore it does not protect IDPs against attacks in hostilities.³⁵⁰ However, attack on civilians during hostilities has been considered as covered by the absolute prohibition in Article 3 (1)(a) regarding ‘violence to life and person’ against those taking no active part in the hostilities. In *Prosecutor v. Blaskic* the ICTY Trial Chamber also mentioned in passing that unlawful attacks upon civilians as provided by Additional Protocols I and II [those that occur in combat situations] are ‘satisfactorily’ covered by the specific provisions of common Article 3.³⁵¹

Such an interpretation is not feasible in terms of common Article 3. Although it does protect civilians in all circumstances, it covers only out of combat situations and prohibits murder or arbitrary or summary execution as opposed to unlawful attacks on civilians. The prohibition of common Article 3(1)(a) of any acts of violence to life, by its nature, does not necessitate a distinction to be made between military necessity and the protection of IDPs and their camps and other shelters as civilians and civilian objects.³⁵² Article 3(1) (a) ‘was largely intended to protect *individual* civilians in the power of an enemy party, rather than the civilian population as a whole. In contrast, the provisions of Additional Protocol II appear to be addressed not simply to the party in control of the civilians, but to all parties involved in the conflict, perhaps especially those *not* in control of the civilians.’³⁵³

Such an approach can be derived further from common Article 3 which deals with the humane ‘treatment’ of civilians which presupposes those within the control of a party.³⁵⁴ In contrast, an ‘attack’ in terms of Article 13(2) of

³⁵⁰ M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at p.667; S. Junod, ‘Commentary on Protocol II’, at p.1326.

³⁵¹ Para.170; in *Martic* the ICTY with regard to reprisals in conduct of hostilities based its decision not only on Article 13(1) of Additional Protocol II but also on Art.4 of the same concerning humane treatment.

³⁵² The Geneva rules are based on humanitarian ideals rather than the Hague rules which is more a compromise of military necessity and humanity. Y. Dinstein, ‘Human Rights in Armed Conflict: International Humanitarian Law’ in T. Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Oxford, 1984) p. 345, at p 346.

³⁵³ L. Moir, *Law of Internal Armed Conflict*, at p.117 (emphasis by the author); G.Abi-Saab, ‘Non-International Armed Conflicts’ at p. 235;L. Moir, *Law of Internal Armed Conflict*, at p.117; L. Zegveld, *Accountability of Armed Opposition Groups*, at pp.82-84.

³⁵⁴ L. Zegveld, *Accountability of Armed Opposition Groups*, at p.83 states that the notion of ‘treatment’ in common Art.3 ‘presupposes a degree of control over the person in question.’

Additional Protocol II in conduct of hostilities, is prohibited on IDPs as civilians in the territory under the control of an adverse party and requires a distinction between those who do not 'take a direct part in hostilities' as civilians and those who take an active part in hostilities as combatants.³⁵⁵ This can be further explained by the distinction between the absolute nature of common Article 3(1)(a) which prohibits violence to life and the non-absolute prohibition of the right against 'arbitrary' deprivation of life in the ICCPR. Therefore the absolute prohibition in common Article 3 cannot accommodate the incidental loss of lives of civilians, whereas the arbitrary deprivation of right to life is broad enough to include such loss of lives, in terms of the law of armed conflicts as *lex specialis*.

The direct attack on IDPs as such often results in the course of a direct attack on IDP camps or settlements to cause collective harm or if the camp is suspected to be used as a military base or during the displacement of IDPs. Article 13(2) of Additional Protocol II protects individual civilian and civilian population from being a target of attack by all means, namely, aerial bombardment, artillery and missile attacks and other attacks on the ground.³⁵⁶ However, Article 13 of Additional Protocol II does not explicitly refer to the principle of distinction, or the detailed rules to implement the protection of civilians stated therein from direct attack.³⁵⁷ The principle that requires for a distinction between civilians and combatants, namely, that an attack must not be directed against civilians but may be directed against combatants, has become a

³⁵⁵ Art. 49(1) (2) of Additional Protocol I on attack and its scope of application can be used to understand 'attack' in Additional Protocol II ;according to Article 49(2) of Additional Protocol I, the provisions of the Protocol 'with respect to attacks apply to all attacks in whatever territory conducted,'

³⁵⁶ L. Doswald-Beck, 'The Value of the 1977 Geneva Protocols for the Protection of Civilians,' in M.A. Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (London, 1989) p.137, at p.154.

³⁵⁷ In terms of the principle of distinction as stated in Art.48 of Additional Protocol I, 'the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.' However, principle of distinction is implicitly stated in Art.13(3) of the Additional Protocol I, J.G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*(Dordrecht, 1993) at p.7; E. Rosenblad, *International Humanitarian Law of Armed Conflict*, at p. 101.

customary humanitarian law applicable in internal armed conflicts.³⁵⁸ Therefore IDPs cannot be the object of direct attacks.

Customary humanitarian law, by requiring attacks to be confined to the combatants, by implication requires also that attacks be limited to legitimate military objectives.³⁵⁹ Protocol on Prohibitions or Restrictions on the Use of Incendiary weapons (Protocol III) to the 1980 UN CCW is now applicable to common Article 3 armed conflicts. It prohibits ‘in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons’ by each party to the conflict.³⁶⁰ The rule which requires a distinction between civilian objects and military objectives and prohibits direct attack on civilian objects has the customary status applicable to internal armed conflicts.³⁶¹ As such, IDP camps, settlements and other shelters are immune from direct attack. Nevertheless, it is important to define the scope of civilian objects to ensure such protection to the same.

Additional Protocol II does not explicitly provide for a general prohibition from attack against civilian objects as in Article 52(1) of Additional Protocol I except for the protection afforded to special objects from attack.³⁶² However, a prohibition of direct attack on civilian population cannot be meaningfully exercised without inferring that such protection includes a prohibition of direct attack on objects which are primarily used by civilians, such as houses, schools and IDP camps, unless they are used as military objectives.³⁶³ The absence of a definition of ‘civilian objects’ on the one hand and ‘military objective’³⁶⁴ on the other in Additional Protocol II, necessitates the usage of authoritative

³⁵⁸ *Tadic*, Jurisdiction, paras.111, 112,125, 127; Article 8(2)(e)(i) of the Statute of the ICC ; J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 1, at pp.3 and 5-8.

³⁵⁹ *Third Report on Colombia* 1999, Ch.IVa, para.40; *Tadic*, Jurisdiction, paras.111 and 112.

³⁶⁰ Articles 1(2), 2(1), 1(3) of the Amended UN CCW , 21 December 2001; The Second Review Conference of the 1980 UN CCW held in Geneva from 11 to 21 December 2001, extended the scope of the 1980 UN CCW to common Article 3 armed conflicts.

³⁶¹ M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* at pp.25 and 26-29.

³⁶² M. Bothe, K. J. Partsch and W.A.Solf, *Commentary*, at p. 676; Article 11(1) –medical units which includes hospitals and transport; Article 14-objects indispensable for the protection of civilians; Article 16-cultural property.

³⁶³ See M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at p.670.

³⁶⁴ Reference to military objectives in Article 15 of Additional Protocol II would also a basis for the consideration of Additional Protocol I definition of military objective.

definitions, to avoid the subjective interpretations by the parties³⁶⁵ of these terms to attack shelters of IDPs. The diplomatic conference when negotiating together Additional Protocols I and II chose the 'single terminology' for both Protocols.³⁶⁶ The definition of 'military objective' in Article 52(2) of Additional Protocol I, has been followed as authoritative guidance by international judicial bodies, in multilateral conventions and by scholars, in relation to internal armed conflict situations.³⁶⁷ Moreover, this definition is considered as having attained the status of customary international law applicable to internal armed conflicts.³⁶⁸

Additional Protocol I defines military objectives as: '... those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.'³⁶⁹ Civilian objects are defined negatively by excluding the objects which constitute military objectives.³⁷⁰ This implies that apart from military objectives in its strict sense, all other objects are civilian objects unless they meet the dual criteria in the definition of military objective. This negative definition of civilian object, according to the ICRC Study, is a customary norm applicable in internal armed conflict.³⁷¹

Though the dual cumulative criterion is useful to some extent in limiting the leeway provided in its application due to the abstract nature of the definition, an explicit non-exhaustive list of military objectives may be added to this definition.³⁷² For instance, the Cultural Property Convention specifies

³⁶⁵ S. Oeter, 'Methods and Means of Combat' in D.Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford, 1995) p. 105, at p. 155.

³⁶⁶ M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at p.655-56.

³⁶⁷ *Third Report on Colombia*, 1999, Chapter IVa para.67; Art. 2(6) of the 1996 Amended Mines Protocol II to the 1980 UN CCW; Art 1(3)of the 2001 Amended 1980 UN CCW; and Art.1(f) of the Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1999, reprinted in (1999)38 *ILM*, 769; See R.K. Goldman, 'International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua,' (1987)2 *Am.U.J.Int'l L. & Pol'y* p.539, at p.559, 561; see M.Sassoli, & A.A.Bouvier, *How Does Law Protect in War?* (Geneva, 1999) at p. 208 .

³⁶⁸ J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at pp.29-32.

³⁶⁹ Art.52(2) of Additional Protocol I.

³⁷⁰ Art.52(1) of Additional Protocol I ; this definition is adopted in: Article 2(7) of the 1996 Amended Mine protocol II to the 1980 UN CCW ; Art.1(4) of the Protocol III to the 1980 UN CCW (1980 UN CCW as amended by Art.1(4) of the 2001).

³⁷¹ J.M. Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, at pp.32-34

³⁷² E. Rosenblad, 'Area Bombing and Military Law' (1976) XV *The military Law and Law of Review*, p.54, at p.90.

as examples ‘an aerodrome, broadcasting station, ...a port or railway station of relative importance or a mainline of communication as military objectives.’³⁷³ It is to be noted that those IDPs leaving an area due to a threat of or actual intensive hostilities are likely to use various means of transport. A list like the above mentioned is not conducive to the protection of IDPs, as it includes certain objectives that have ‘dual use’ by civilians and military, such as transport and communications facilities.

To be attacked lawfully, these ‘dual use’ objects should be justified by the dual criteria in the military objective definition in order to protect IDPs who are in these objectives.³⁷⁴ Once such objectives are justified as military objective, the protection of IDPs therein would depend on the faithful application of the principle of proportionality and precautions.

However the risk involved here is that even a civilian object ‘may become a military objective and thereby lose its immunity from direct attack through use even if it is indirectly related to combat action’ but effectively contributes to the overall war effort or fighting.³⁷⁵ Attacks on such civilian objects can be, however, justified by a party to the conflict in internal armed conflicts, which are often fought on discriminatory grounds to suppress the claims of minorities, by claiming that they effectively contribute to the overall fighting.³⁷⁶

This harsh reality of the transformation of civilian objects into military objectives is to some extent reduced by the requirements of ‘warning’ and if appropriate a ‘reasonable time limit’ with regard to medical units and transports in Article 11(2) of Additional Protocol II and by the presumption concerning civilian objects dedicated normally to civilian purposes, in case of doubt as to their use in Article 52(3) of Additional Protocol I.³⁷⁷ This would at least avoid attacks ‘without having verified whether they were, at the time, making an effective contribution to military action, thereby losing their protection against attack.’³⁷⁸

³⁷³ Art.8 (1)(a) of 1954 Hague Convention for the Protection of Cultural property in the Event of Armed Conflicts; M. Bothe, K.J.Partsch and W. A.Solf, *Commentary*, at p. 324.

³⁷⁴ A.P.V. Rogers, *The Law on the Battlefield* (Manchester, 1996) at pp.36-37.

³⁷⁵ M. Bothe, K.J. Partsch and W.A. Solf, *Commentary*, at p.324.

³⁷⁶ See *ibid.*, at p.326.

³⁷⁷ *Ibid.*

³⁷⁸ *Third Report on Colombia*, Ch. IV c, para.139.

Consequently, IDPs are either protected from unjustifiable attack or at least provided with warning and opportunity to leave those civilian objects suspected to be of military usage. Such civilian objects in the front line are often used in combat activities. In particular, where the combatants are confronted with direct fire from the ground, it is unlikely that the combatants would have any doubt as to these objects and consequently they would apply the presumption concerning such civilian objects.³⁷⁹

This presumption is used in the 1996 Amended Protocol II to the 1980 UN CCW which is applicable to common Article 3 armed conflicts as well.³⁸⁰ Further, the Inter-American Commission on Human Rights has used this presumption in applying the customary protection of civilian objects in internal armed conflicts. However, since the customary nature of such a presumption in international armed conflicts is doubtful,³⁸¹ it cannot be asserted as having attained customary status in internal armed conflict.³⁸² A similar result can be achieved, in doubtful cases, under the customary rules of precautions, which require verification of the use of the target, before launching an attack.

In certain circumstances, houses or shelters or camps of IDPs are protected from direct attack if such attack would result in starvation of IDPs. Since the word 'such as' in Article 14 makes the enumerated list of survival objects non-exhaustive, even shelter becomes an indispensable objective for survival of IDPs in certain climatic conditions.³⁸³ Therefore, despite the permission to attack such houses for the reason of their military use, they should not be attacked if doing so risks the survival of IDPs.³⁸⁴ As Junod states, the significance of this rule should be seen in the light of the absence of

³⁷⁹ M. Bothe, K.J. Partsch and W.A. Solf, *Commentary*, at pp.326-327.

³⁸⁰ Art.3(8)(a) 1996 Amended Mines Protocol II to the 1980 UN CCW.

³⁸¹ C. Greenwood, 'Customary International Law and the First Protocol of 1977 in the Gulf Conflict,' at p.75.

³⁸² J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at pp.35-36.

³⁸³ C.Pilloud and J.Pictet, 'Article 54-Protection of Objects Indispensable to the Survival of Civilian Population' in Sandoz, Y., Swinarski, C., and B. Zimmermann, B., (eds.), *Commentary on the Additional Protocols*, p. 651, at p.655.

³⁸⁴ S. Junod, 'Commentary on Protocol II', p.1459; J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at p.192, state, that [i]t is doubtful, however, whether this exception [two exceptions in corresponding Article 54 of Protocol I]also applies to non-international armed conflicts, because Article 14 of Additional Protocol II does not provide for it and there is no practice supporting it.' See above, Section, E. 2. c.

a general protection of civilian objects in Additional Protocol II as in Additional Protocol I.³⁸⁵

It is therefore necessary to identify civilian objects in a strict sense, to protect them from attack. In terms of Additional Protocol I, objects which are predominantly of civilian character, such as, ‘a place of worship, a house or other dwelling or a school’ can be regarded as civilian objects.³⁸⁶ Customary humanitarian law prohibiting attacks on civilian objects provides guidance in this regard: dwellings and other objects solely designated for the protection of civilians; cultural property; and places and areas such as hospital zones assigned for the sole protection of civilians should not be the object of military operations.³⁸⁷ In the *Tadic* case the Appeals Chamber also cited the declaration by the Member States of the European Community with regard to internal armed conflicts in Liberia which states to ‘safeguard from violence...places of refuge such as churches, hospitals, etc., where defenceless civilians have sought shelter.’³⁸⁸ Though such protection for civilian objects is not, provided for in the Statute of the ICC as war crimes applicable to internal armed conflicts,³⁸⁹ this Statute cannot be ‘interpreted as limiting or prejudicing’ the existing rules of customary international law ‘for purposes other than’ the Statute.³⁹⁰

Security Council Resolution 1261 of 1999 condemns the attack on ‘places that usually have a significant presence of children such as schools and hospitals,’ ‘in situations of armed conflict,’ regardless of the nature of conflict.³⁹¹ The Inter-American Commission on Human Rights considers ‘cars, buses, stores and residences’ to be civilian in nature.³⁹² The significance of transport can be seen, for instance, in the cases against the Russian Federation where the vehicles and civilian convoys of IDPs escaping from the fighting were bombed.³⁹³ Therefore

³⁸⁵ *Ibid.*, at p.1456.

³⁸⁶ Art.52(3) of Additional Protocol I.

³⁸⁷ *Tadic*, Jurisdiction, para.127; Art 8(2)(e)(iv) of the Statute of ICC prohibits attack on ‘hospitals and places where the sick and wounded are collected, provided they are not military objectives.’

³⁸⁸ *Tadic*, Jurisdiction, para.113

³⁸⁹ But in international armed conflicts it is prohibited to: intentionally directing attack on civilian objects, Art.8(2)(b)(ii) of the Statute of the ICC; and to attack or bombard ‘by whatever means, towns, villages dwellings or buildings which are undefended and which are not military objectives,’ Art 8(2)(b)(v) of the Statute of the ICC.

³⁹⁰ Art.10 of the Statute of the ICC.

³⁹¹ S/RES/1261(1999), 30 August 1999.

³⁹² *Third Report on Colombia*, 1999, Ch.IVc,para.139

³⁹³ *Isayeva v. Russia; Isayeva, Yusupova and Bazayeva v. Russia.*

the transitory shelters of IDPs during displacement such as schools and places of worship, and the relocation or resettlement camps assigned for the sole protection of IDPs can be considered as protected from direct attack in customary international law applicable to internal armed conflicts.

The specific prohibition of attack on cultural property, in particular places of worship, in Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Time of Armed Conflicts can be related to displacement in internal armed conflicts, as objects that provides transitory shelter to IDPs.³⁹⁴ IDPs who flee either to escape from the dangers of attacks during hostilities or on request by the attacking party prior to an attack, often take refuge in places of worship which are generally considered as places providing refuge to IDPs in internal armed conflicts.³⁹⁵ But in humanitarian law cultural objects are primarily protected for their cultural value and any protection for IDPs by such objects is secondary.

Places of worship are absolutely protected against direct attack in Article 16 of Additional Protocol II.³⁹⁶ The 1954 Convention on Cultural Property supplemented by the Second Protocol to the Convention although allows derogation on the basis of ‘imperative military necessity’ this criterion is stricter than that provided for ordinary civilian objects in humanitarian law based on a limited definition of military objective. According to the former, attack is only possible that the cultural property by its function been made into a military objective and as long as there is no feasible alternative to obtain similar military advantage except by directing such an attack against that objective.³⁹⁷ The rule on advance warning before attack would give the attacking party an opportunity

³⁹⁴ Art.16 of the 1999 Second Protocol to the 1954 Hague Convention on Cultural Property. Art.4(1); Second Protocol to the 1954 Hague Convention Art.6, explicitly prohibits attack on cultural objects in common article 3 situations.

³⁹⁵ The ICTR considered the fact of massacre of tutsi IDPs who had sought shelter in churches which are ‘universally recognised to be a sanctuary’ an aggravating factor in sentencing for genocide and crimes against humanity, *Prosecutor v. Kumuhandu*, Case No.ICTR-95-54A-T, (22 January 2004) para.764.

³⁹⁶ S. Junod states that this is because Additional Protocol II extends special protection similar to that offered to a limited number of cultural property in Chapter II of the 1954 Hague Convention on the Protection of Cultural Property, ‘Commentary on Protocol II’, at p.1470; but K.J.Partsch, ‘Protection of Cultural property’ in D.Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford, 1995) p.377, at p.381 states that such an interpretation would considerably reduce the field of application of Article 16 of Additional Protocol II of 1977.

³⁹⁷ Art. 6(a) (b) of Second Protocol to the 1954 Hague Convention for the Protection of Cultural Property.

and time to verify the nature of the object before launching an attack and also enable the civilians to leave or to be evacuated from the places before being attacked.³⁹⁸

Providing greater scope of protection against attack, places of worship are referred to as cultural objects in Article 16 of Additional Protocol II if they reflect ‘the cultural or spiritual heritage of peoples.’ This means ‘those objects of which the importance transcends national borders and which are unique due to their relation to the history and culture of a people.’³⁹⁹ The 1954 Cultural Property Convention which is applicable to common Article 3 armed conflict situations similarly defines cultural property as ‘of great importance to the cultural heritage of every people’⁴⁰⁰ These two provisions do not differ greatly but for the inclusion of a spiritual element.⁴⁰¹ But such spiritual element does make an important difference in the protection of religious places and thereby the protection of IDPs as it broadens the application of Article 16 of Additional Protocol II to a larger number of places of worship. Therefore under Additional Protocol II places of worship can be protected for their spiritual significance whereas under 1954 Cultural Property Convention they can only be protected for their great importance to cultural heritage.⁴⁰²

Notwithstanding the enhanced protection from direct attack of cultural property, their limitation to places of worship with great importance, would not provide effective protection to IDPs who take shelter in places of worship that do not fall within the definition of either Protocol II of Additional 1977 or 1954 Cultural Property Convention. In such situations, IDPs would be protected against direct attack by the protection accorded to civilian objects.

The *Tadic* case recognised the protection of cultural property as a customary principle and does not state any details of the nature of such

³⁹⁸ Art.6(d) of the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property.

³⁹⁹ S. Junod, ‘Commentary on Protocol II’, at p.1469.

⁴⁰⁰ Art.1(a) of the 1954 Hague Convention for the Protection of Cultural Property; however, it does not explicitly refer to ‘places of worship.’

⁴⁰¹ J. Toman, *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol Signed on 14 May 1954 in the Hague and on Other Instruments of International Law Concerning Such Protection*, (U.K, 1996) at p. 388.

⁴⁰² K.J. Partsch, ‘Protection of Cultural property,’ at pp.382-383.

property.⁴⁰³ The ICRC Study on customary humanitarian law indicates that the customary protection is confined to highly important cultural property namely, ‘property of great importance to the cultural heritage of every people.’⁴⁰⁴ The Statute of the ICC, although contain a customary rule on the protection of cultural property, such as ‘buildings dedicated to religion,’ does not refer to its ‘great importance’ or ‘heritage of people.’⁴⁰⁵ Therefore the scope of special protection to ‘places of worship’ not of ‘great importance to the heritage of people’ against attack in hostilities are extended by the war crime and this in turn would provide enhanced protection to IDPs who take shelter therein.⁴⁰⁶ The added significance of this provision of the Statute of the ICC is to be considered given the absence of a specific protection against direct attacks on civilian objects in internal armed conflicts in the Statute of the ICC as similar to that in the international armed conflicts.⁴⁰⁷

There are other possibilities of attack on IDPs and their objects: by the presence of combatants in these objects; and by incidental effects during an attack on a legitimate military objective. The presence of individual combatants within such civilian population does not change the civilian character of such population.⁴⁰⁸ The ICRC Commentary to Additional Protocol I cites as an example ‘soldiers on leave visiting their families,’ to support the unchanged character of civilian population, on the basis that they are not ‘regular units with fairly large numbers.’⁴⁰⁹ The Inter-America-Commission on Human Rights states that, ‘the Army may not attack a house ...that, on the given occasion, armed dissidents have entered the house to eat or sleep.’⁴¹⁰ It follows that the presence of a few individuals whether ‘off-duty combatants’ or who have some link with the armed forces or groups among the population of displaced civilians would not deprive them of their character as civilians to make them vulnerable to attack.⁴¹¹

⁴⁰³ *Tadic*, Jurisdiction, para.217.

⁴⁰⁴ J.M. Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, Rules 38 and 39, at pp.127-135.

⁴⁰⁵ Article 8 (2) ((e) (iv) of the Statute of the ICC.

⁴⁰⁶ See, J. Toman, *The Protection of Cultural Property*, at p.50.

⁴⁰⁷ Article 8(2)(b) (ii) of the Statute of the ICC.

⁴⁰⁸ An expression to this effect see Art.50 (3) of Additional Protocol I.

⁴⁰⁹ C. Pilloud and J. Pictet, ‘Article 50-Definition of Civilians and Civilian Population’ in Sandoz, Y., Swinarski, C., and B. Zimmermann, B., (eds.), *Commentary on the Additional Protocols*, p. 609, at p.612.

⁴¹⁰ *Third Report on Colombia*, Ch. IV c, para.181.

⁴¹¹ M. Bothe, K. J. Partsch and W. A. Solf, *Commentary*, at p.296.

However ‘a fairly’ large number of combatants on duty among the civilian population in civilian objects such as IDP camps would blur the ‘lines between the civilian and military character of camps and so expose civilians inside to the risk of attack by opposing forces, where camps are perceived to serve as launching pads for renewed fighting.’⁴¹²

Attack on legitimate military objective can cause collateral damage to IDPs or to their camps or transport in its vicinity. Collateral or incidental damage is a grim ‘reality of warfare rendered inevitable by the practical impossibility of an absolute separation of civilian and military areas and activities,’⁴¹³ and is not prohibited in international humanitarian law. Therefore this raises the question whether there are any restrictions in humanitarian law to protect IDPs in such situations.⁴¹⁴

Rules that restrict such collateral damage to civilians namely, obligation to take precautions in attack; prohibition against indiscriminate attack; and the principle of proportionality, are not provided in Article 13 of Additional Protocol II as in Additional Protocol I.⁴¹⁵

a. Protection Against Indiscriminate Attack

Additional Protocol II does not contain a prohibition against indiscriminate attack, which is a necessary derivative of the application of principle of distinction, as these details were deleted at the Committee level to adopt a simplified text.⁴¹⁶ However, it can be argued that the reference to the ‘general protection against dangers arising from military operations’ to civilians in Article 13(1) of Additional Protocol II is wide enough to cover certain prohibitions against indiscriminate attacks.⁴¹⁷ Accordingly, indiscriminate attacks which necessarily

⁴¹² Report of the Secretary General to the Security Council on the Protection of Civilians in Armed Conflicts (S/2001/331) 30 March 2001, para.30; *Third Report on Colombia 1999*, Ch.IV c, para.180.

⁴¹³ H. McCoubrey, ‘Yugoslavia at War,’ at p. 915.

⁴¹⁴ Collateral damage is different from indiscriminate attack as the latter violates the principle of distinction and proportionality.

⁴¹⁵ Articles 51(4),(5); 51(5)(b); and 57, 58 respectively of Additional Protocol I; J.G. Gardam, *Non-Combatant Immunity*, at p.128.

⁴¹⁶ M. Bothe, K.J. Partsch and W. A. Solf, *Commentary*, at p.677.

⁴¹⁷ M. Bothe, K. J. Partsch and W. A. Solf, *ibid.* ; S. Junod, ‘Commentary on Protocol II’, at p.1449; L. Moir, *Law of Internal Armed Conflict*, at p. 117; F. Kalshoven states that ‘general protection should be distinguished from special protection; while the latter term...is used to indicate the fullest protection, verging on immunity, the former term implies that only a certain measure of protection is provided without there being an attempt to remove all the risks to which the category of persons or objects concerned is exposed. Thus, general protection of the civilian population and civilian

amount to a direct attack on civilians, namely, attacks not directed against or which cannot be directed against military objectives and area bombardments as prohibited in 51(4)(a)(b) and (5)(a) of Additional Protocol I, can be inferred within general protection.⁴¹⁸

According to the Appeals Chamber of the ICTY in the *Tadic* case, rules of customary international law applicable in internal armed conflict 'cover such areas as protection of civilians from hostilities in particular from indiscriminate attacks, ... as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.'⁴¹⁹ However it stated that these rules of conduct of hostilities applicable in internal armed conflicts are not the same as those applicable to international armed conflict.⁴²⁰ This attitude is later reflected in the Statute of the ICC which maintains a clear distinction between internal and international armed conflicts.

However, the subsequent decisions by the ICTY and other international judicial bodies seem to implement these abstract principles by referring to the corresponding rules of Additional Protocol I. The Trial Chamber in *Kupreskic et al*⁴²¹ elaborated that attacks even directed against military objectives would be illegal if 'conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians.'⁴²² The Trial Chamber seems to have implemented the 'general essence' extension of customary international law of the Appeal Chamber in *Tadic* case by resorting to those specific rules in Additional Protocol I as part of customary international law.⁴²³

objects basically implies two things: a prohibition on making them the object of direct attack, and a requirement to avoid unacceptable collateral loss or damage as a result of attacks on military objectives.' F. Kalshoven, 'Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977, Part II' (1978)IX *NYIL* 107, at p.113; S. Junod, *ibid.*, at p.1449 states that, the general protection is broader as it refers dangers arising from 'military operations' rather than an 'attack.' Military operations means, 'movements of attack or defence by armed forces in action.'

⁴¹⁸ M. Bothe, K.J. Partsch and W. A. Solf, *Commentary*, at pp.677.

⁴¹⁹ *Tadic*, Jurisdiction, para.217.

⁴²⁰ *Ibid.*, paras.126,127; C. Greenwood, 'International Humanitarian Law and the Tadic Case,'(1996)7 *EJIL* 265,at p.278; W.J.Fenrick, 'The development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', (1998) 3 *Journal of Armed Conflict Law*,197,at p. 211.

⁴²¹ *Prosecutor v. Kupreskic et al*, para.524.

⁴²² *Ibid.*

⁴²³ *Ibid.*, paras.524-5.

The Inter-American Commission on Human Rights opined that '[i]n as much as certain provisions of Additional Protocol I codify for the first time customary law rules designed to protect civilians and civilian objects from indiscriminate or disproportionate attacks, these provisions provide authoritative guidance for interpreting the extent of similar protection for these persons and objects during all internal armed conflicts.'⁴²⁴ It cited the first two paragraphs of Article 51(4) of Additional Protocol I as an example of the implementation of the customary prohibition against indiscriminate attack. However, the ICRC study on customary international law states that Article 51(4) (c) the third paragraph is also a norm of customary international law applicable in internal armed conflicts.⁴²⁵

Thus, indiscriminate attack means attacks: which are not directed at a military objective;⁴²⁶ which resort to methods or means of combat that cannot be directed at a specific military objective;⁴²⁷ and which employ methods or means of combat the effects of which cannot be limited as required by international humanitarian law.⁴²⁸ Further, carpet or area bombardments against heavily populated places⁴²⁹ can also be included in this extension.⁴³⁰

The prohibition against indiscriminate attack by weapons means the prohibition of any use of weapons which are inherently indiscriminate; and prohibition of using weapons in an indiscriminate manner in spite of their inherent ability to discriminate.⁴³¹ Such prohibition of choice and use of indiscriminate weapons is important as they are often used in areas of IDP concentration. For example, a village to which IDPs from other areas move for

⁴²⁴ *Third Report on Colombia*, 1999, Ch.IVa, para.75.

⁴²⁵ J.M.Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, at pp.40-43

⁴²⁶ Art 51(4) (a) of Additional Protocol I.

⁴²⁷ Art.51(4)(b) of Additional Protocol I; 1996 Amended Mines Protocol II to the 1980 UN CCW refers to these two instances as indiscriminate use of weapons.

⁴²⁸ .M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at p.40

⁴²⁹ Art.51(5) (a)of Additional Protocol I; Art.9 of the 1996 Revised Mines Protocol to the 1980 CCW also prohibits carpet bombardment.

⁴³⁰ Article 51(5) (a) of Additional Protocol I ; J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at pp.43-45;Cassese specifies four such rules which have attained general acceptance with regard to civil wars since 1930's irrespective of recognition of belligerency : the prohibition against deliberate bombing of civilians; the prohibition against attacking civilian objectives; precautionary rules when attacking military objects; and the rule concerning reprisals against civilians. A. Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts' in A.Cassese (ed.), *Current Problems of International Law*, Essays on U.S. and the Law of Armed Conflict,(Milan, 1975) p. 287, at p.292

⁴³¹ See M.N. Schmitt, 'Future War and Principle of Discrimination,' (1998)28 *Israel Yearbook on Human Rights* 51, at p.55; Art.51(4)(a) of Additional Protocol I.

safety reasons may be attacked by indiscriminate weapons on the ground of restricting infiltration of armed opposition groups. In *Isayeva v. Russia*, the military used ‘indiscriminate weapons’ i.e., bombs which had a damage radius exceeding 1000 metres and non-guided heavy combat weapons, within a ‘populated area’ in Chechnya which was declared as a ‘safety zone’ and contained IDPs from other areas as well.⁴³² Here, the European Court of Human Rights ruled that this attack, which resulted in loss of lives was a violation of the right to life, not on the basis of the duty to refrain from arbitrary deprivation of lives but because the state had failed in its ‘obligation to protect’ by not taking positive measures to plan and execute with the necessary care for the lives of civilians *inter alia.*, by using this kind of weapon. However, it did not resort to humanitarian law in which the rules against using indiscriminate weapons are stated as negative obligations.⁴³³

These norms were applied by the ICTY in the *Martić* case where it stated that though there is no formal proscription of cluster bombs in armed conflicts, ‘even if an attack is directed against a legitimate military target, the choice of weapon and its use are clearly delimited by the rules of international humanitarian law’ and applied Article 51(4)(b) of Additional Protocol I as a derivative of the customary principle of distinction.⁴³⁴ Regarding the inaccurate targeting nature and low striking force of Orkan rockets which delivered cluster bombs which are wide-area munitions,⁴³⁵ the ICTY in the *Martić* case considered that the employment of that weapon in that case was not designed to attack the military targets but to terrorize civilians and therefore constituted an indiscriminate attack.⁴³⁶ This implies that the restriction on the choice and use of such weapons in a given situation due to their indiscriminate effect on civilians, does not prohibit their use in all situations; rather, their legitimate use is permitted where a military objective is clearly separated from civilian concentration. In other words, prohibition of the use of a weapon as inherently indiscriminate *per se* at all circumstances cannot be realised by the application of this rule alone.

⁴³² Para.190.

⁴³³ Russia had not declared the state of public emergency in Chechnya at the time of this violation, *Isayeva v. Russia*, paras.189, 200, 201.

⁴³⁴ *Prosecutor v. Martić*, para.18.

⁴³⁵ See generally, V. Wiebe, ‘Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law’ (2000)22 *Michigan Journal of International Law* 85.

⁴³⁶ Para.30.

The absolute prohibition of weapons of an indiscriminate nature is not a likely event, even in multilateral treaties, as long as there is a chance of their being used in a discriminate manner in some circumstances. For instance, the Third Protocol on incendiary weapons to the 1980 UN CCW supplements these rules by prohibiting in all circumstances indiscriminate attack on military objectives located within a concentration of civilians, such as inhabited parts of towns or villages or camps for displaced civilians by air-delivered incendiary weapons.⁴³⁷ However, the non-prohibition of use of incendiary weapons other than air-delivered ones on a military objective clearly separated from the concentration of civilians, indicates the vulnerability of displaced civilians to incidental damage as an inevitable reality of the combat activities.⁴³⁸ Because the same harm can result if long-range multiple rockets that cannot be accurate in targeting are used to release incendiary bombs and given the nature of such weapons which set fire and cause burn injuries to civilians, the protective value of such provision is uncertain.

It has, however been stated by the International Court of Justice with regard to international armed conflict in its advisory opinion that, 'states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.'⁴³⁹ Existence of such a customary prohibition means that weapons of an inherently indiscriminate nature must be prohibited from use even in the absence of treaty prohibition in this regard.⁴⁴⁰ Though this specific rule is not stated explicitly in the *Tadic case*, at least the Appeals Chamber recognised the customary nature of the principle of distinction in internal armed conflicts. However, it should be noted 'that the principle of distinction is more often applied to the manner of deployment of particular weapons rather than

⁴³⁷ See the definition of 'concentration of civilians' in Art.1(2) of Protocol III to the 1980 UN CCW and Art.2(2) of the same; also see Article 3 (7), (8) and (9) of the 1996 Amended Mines Protocol II to the 1980 UN CCW concerning the prohibition on direction of mines including anti-vehicle mines, booby-traps and other devices against civilians and any indiscriminate use of the same.

⁴³⁸ Article 2(3) of the Protocol III to the 1980 UN CCW.

⁴³⁹ *Legality of the Threat or Use of Nuclear weapons*, ICJ, para.78.

⁴⁴⁰ L. Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons' (1997) No.316 *IRRC* p.35, at p.38; R.J.Mathews & L.H.McCormack, 'The Relationship Between International Humanitarian Law and Arms Control' in H. Durham and L. H. McCormack (eds.) *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Hague, 1999) p.65, at p.73.

to the weapons themselves. ...To the extent that any particular weapon type can be deployed in a discriminatory manner, it ought not to be illegal by reason solely of the application of this general principle.⁴⁴¹ Even blind weapons such as land mines were regarded by the Inter-American Commission on Human Rights as discriminatory and therefore legal to use provided they are recorded, marked and contain the capability to self-destruct within a reasonable time. Therefore unless such inherently indiscriminate weapons types are prohibited in international armed conflicts they cannot be regarded as illegal in themselves.

However, with regard to weapons usage in internal armed conflicts, the Appeals Chamber, based on the general principle that the means of injuring the enemy is not unlimited, stated the more general principle that '[w]eapons or other material or other methods prohibited in international armed conflicts must not be employed in any circumstances' which it regarded as extended to internal armed conflicts.⁴⁴² Accordingly, regardless of the specific nature of the weapon i.e., either for causing unnecessary suffering or of their inherently indiscriminate effect, it stated more generally that those weapons which are prohibited in international armed conflicts cannot be used in internal armed conflicts.⁴⁴³ At least such an extension of customary law is significant since Additional Protocol II or the war crimes provisions in the Statute of the ICC applicable to internal armed conflict do not prohibit the use of any weapons.

To prohibit weapons which cause unnecessary suffering by the customary principle without a prohibition of the same by treaty law,⁴⁴⁴ a general assessment of their lawfulness is required.⁴⁴⁵ The lack of a decisive

⁴⁴¹ R.J. Mathews & L.H. McCormack, *ibid.*, at p.73.

⁴⁴² *Tadic*, Jurisdiction, paras.110,119.

⁴⁴³ *Ibid.*, para.119 by citing the general principle in Art.5 (3) of the Turku Declaration of Minimum Humanitarian Standards of 1990 revised in 1994.

⁴⁴⁴ *Legality of the Threat or Use of Nuclear weapons*, para.78; though originally this principle focused on the suffering to combatants, technological developments and the resultant impact of weapons on civilians made it necessary to extend this to civilians, R.J.Mathews & T.L.H.McCormack, 'Relationship Between International Humanitarian Law and Arms Control', at p.72; see for such an extended application of the principle, H. Meyrowitz, 'The Principle of Superfluous Injury or Unnecessary Suffering' (1994)299, *IRRC* 98, at p.105; 11th Preambular para to Ottawa Treaty on Land mines; Art.3(3) of the Amended Protocol II on the Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, May 3 1996 to the 1980 UN CCW; see dissenting opinion of Judge Weeramantry in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons case*, ICJ, 8 July 1996, reprinted in (1996) 17 *HRLJ* 253-400, at pp.356-357 and 374 and Judge Koroma, *ibid.*, at p. 383.

⁴⁴⁵ L. Doswald-Beck, 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice' at p.45, n.29.

criterion regarding the assessment makes the application of this rule difficult, even in international armed conflicts. The International Court of Justice interprets unnecessary suffering as ‘harm ‘greater than that unavoidable to achieve legitimate military objectives.’⁴⁴⁶ The relevant factors to be considered to determine whether a weapon would cause unnecessary suffering are inevitability of serious permanent disabilities or inevitable deaths caused by such weapon.⁴⁴⁷ Unlike the difficulty involved in the assessment of unnecessary suffering of weapons, determining the inherent indiscriminate nature of a weapon is not so complicated. However, the reluctance of states to accept the evolution of such a customary law to prohibit the weapons *per se*, due to their unnecessary suffering or indiscriminate effect, even in international armed conflicts, is reflected in the Statute of ICC concerning war crimes.⁴⁴⁸ In terms of the ICC, to prohibit the employment of weapons, projectiles and materials which cause unnecessary suffering or which are of an inherently indiscriminate nature, an additional comprehensive prohibition whether in customary international law or conventional law is necessary.⁴⁴⁹ Such limitation in the war crimes of international armed conflicts and the absence of any prohibition of at least poisoned weapons in the Statute of the ICC with regard to internal armed conflicts indicate the restrictive tendency.⁴⁵⁰ Therefore the customary prohibition of weapons *per se* in internal armed conflict is subjected to its comprehensive prohibition in international armed conflicts. As indicated by Appeals Chamber in *Tadic*, ‘[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.’⁴⁵¹

The Appeals Chamber in *Tadic* considered that there is a general consensus in the international community that the use of chemical weapons is prohibited in

⁴⁴⁶ *Legality of the Threat or Use of Nuclear weapons*, para.78.

⁴⁴⁷ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at p.241.

⁴⁴⁸ According to Article 8(2)(b)(xx) of the Statute of ICC, superfluous injury or unnecessary suffering alone will not make an employment of a weapon of such nature subject to war crime, rather in addition, such weapon should be comprehensively prohibited by a multilateral treaty.

⁴⁴⁹ Art. 8(2)(b)(xx) of the statute of the ICC; see M. Cottier, ‘Preliminary Remarks on Subparagraphs (xvii)-(xx): Prohibited Weapons: Drafting History’ in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p. 239, at p.243.

⁴⁵⁰ J.M.Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law* state that, the in customary humanitarian law use of poison or poisoned weapons is prohibited in internal armed conflict, Rule 72, at pp.251-254.

⁴⁵¹ *Tadic*, Jurisdiction, para.119.

internal armed conflicts.⁴⁵² As weapons of mass destruction, chemical weapons are inherently indiscriminate in nature and would cause unnecessary suffering not only to IDPs but to their animals and vegetation and by rendering the survival objects useless and cause starvation to IDPs.⁴⁵³ The unqualified language used in 1993 Chemical Weapons Convention concerning development, production, or retention or use of chemical weapons ‘never under any circumstances,’ is wide enough to include internal armed conflicts as well.⁴⁵⁴ Despite the treaty law prohibition on the use and other purposes of chemical weapons, the customary law prohibition of use of the same is valuable as it not only binds those states not party to the 1993 Convention but the insurgents as well.

According to the ICRC study on customary law, the prohibitions on the use of means and methods which cause superfluous injury or unnecessary suffering and on the use of weapons which are by nature indiscriminate are customary norms applicable in internal armed conflicts.⁴⁵⁵ Therefore it could be stated that weapons which are widely prohibited in international armed conflicts for the above reasons can become prohibited in internal armed conflicts, by the application of these rules alone, even without a treaty prohibiting their use in internal armed conflict, if there is general consensus to this effect in the international community.⁴⁵⁶ The advantage of these rules is that an attack can be made unlawful for infringing the same rules without the need to assess the proportionality of the collateral loss of lives as discussed below.

Weapons regardless of their discriminate nature can still be used in an unlawful manner. This happens when such weapons are not directed at a specific military objective; or when directed against a military objective without

⁴⁵² J.M.Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, Rule 74, at pp. 260-63 state that the use of chemical weapons is prohibited in internal armed conflict as a rule of customary international law.

⁴⁵³ See T.Wulff, *Barriers Against Weapons: Developments of Weapons and Restrictions on Their Use* (Lund, 1984) at p.34.

⁴⁵⁴ Art.1(1) of the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction, January, 13, 1993 (1993)32 *ILM*, p. 800. Arts.1(5), 2(7) of the Convention specifically states that riot control agents shall not be used as a method of warfare because high concentrations of these will be dangerous, A.V.W.Thomas & A.J.Thomas, *Legal Limits on the Use of Chemical and Biological Weapons* (Dallas, 1970) at p.12.

⁴⁵⁵ J.M.Henckaerts and L.Doswald -Beck, *Customary International Humanitarian Law*, at pp.237-250.

⁴⁵⁶ In fact there is no difference between the use of weapons that are prohibited or restricted in international armed conflicts and in internal armed conflicts in customary humanitarian law, J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rules 72-86, at pp.251-296.

any precautionary measure, resulting in collateral loss of lives of IDPs, injury to IDPs and damage to objects of IDPs in excess of the anticipated direct military advantage. The customary rules concerning proportionality and precautions are relevant with regard to these situations of indiscriminate use of any weapon in internal armed conflicts.

b. Proportionality and Precautions

Even in an attack against a legitimate military objective, the safety of IDPs or IDP objects in the vicinity or IDPs who happen to be within such military objective can be endangered. In terms of the principle of proportionality, collateral loss or damage to civilians should not be excessive to the anticipated direct military advantage.⁴⁵⁷ If the collateral damage ‘may be expected to cause incidental loss to civilian life, injury to civilians, damage to civilian objects, or a combination thereof’ to civilians that outweighs the anticipated military advantage, as a matter of precaution such an attack shall be cancelled or suspended.⁴⁵⁸

It has been claimed that as a matter of logic by analogy, the disproportionate attacks codified in Article 51(5) and the connected precautionary measure in Article 57(2)(b) of Additional Protocol I can be asserted as a necessary derivative of the principle of distinction, and therefore to be applicable to internal armed conflicts.⁴⁵⁹ Extending rules by analogy is always preferable and not a difficult task with regard to internal armed conflicts. However, the difficulty lies at the implementation level, as the state parties do not like to extend to internal armed conflicts rules for which they had not shown their legal conviction. Especially due to the absence of an explicit principle of distinction in Protocol II and the elimination of the principle of proportionality and precautions with regard to internal armed conflicts at the committee level in the Diplomatic Conference leading to the adoption of Additional Protocols,⁴⁶⁰ it is not feasible to extend them to internal armed conflict even through the ‘general

⁴⁵⁷ The principle of proportionality which provides protection against indiscriminate attack is explicitly stated in Art.51(5)(b) of Additional Protocol I.

⁴⁵⁸ Art.57(2)(b) of Additional Protocol I.

⁴⁵⁹ M.Sassoli & A.Bouvier state, *How Does Law protect in War?* at p.207, n.211 and text.

⁴⁶⁰ M. Bothe, K.J.Partsch and W.A.Solf, *Commentary*, at pp. 670 and 678.

protection' in Article 13 (1) of Additional Protocol II.⁴⁶¹ This is especially with regard to attacks that cause disproportionate civilian losses, as 'Committee III has rejected that provision before the simplification process had been manifested.'⁴⁶² However, Bothe *et al* state that the principle of proportionality as provided in Article 51(5)(b),⁴⁶³ is 'inherent in the principle of humanity' which is made available for application in the fourth clause of the Preamble to Additional Protocol II.⁴⁶⁴ Therefore, provisions which regulate the conduct of hostilities in Additional Protocol II should be construed accordingly.⁴⁶⁵

Though the precise nature of the Martens Clause is not clear,⁴⁶⁶ this contention is justifiable in the light of the principle of humanity stated therein. As a reflection of public conscience, the principles of humanity in the Martens Clause can be regarded as a 'universal reference point and apply independently of the Protocol.'⁴⁶⁷ The principle of humanity prohibits any kind of violence which is not actually necessary for the purposes of armed conflict.⁴⁶⁸ As the Martens Clause enhances the demands of humanity and public conscience, it should be used as a proper interpretative guide to resolve any ambiguity or vagueness concerning the customary or treaty based rules and principles of

⁴⁶¹ M. Bothe, K.J.Partsch and W.A.Solf, *ibid.*, state that 'it is more difficult to load the obligation to take precautions in attack and the principle of proportionality on the provision for general protection.' *Ibid.*, at p.670; but see S. Junod, 'Commentary on Protocol II,' at p.1449 where he states that obligation to take precautions is covered by the 'general protection.'

⁴⁶² M. Bothe, K.J.Partsch and W.A.Solf, *ibid.*, at pp.677-78.

⁴⁶³ Art.51(5)(b) of the Additional Protocol I states that, 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated' is prohibited.

⁴⁶⁴ The preamble to Additional Protocol II provides that 'in cases not covered by the law in force, the human person remains under the protection' of the principles of humanity and the dictates of public conscience.

⁴⁶⁵ S. Miyazaki, 'The Martens Clause and International Humanitarian Law' in C.Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, (Geneva, 1984) p.433, at p.440 states that the basis for the application of international humanitarian law is the laws of humanity and the dictates of public conscience, which are 'jus cogens of human society.'

⁴⁶⁶ For various interpretations as to Martens Clause see A. Cassese, 'The Martens Clause : Half a Loaf or Simply Pie in the Sky?' (2000)11 *EJIL* 187.

⁴⁶⁷ S. Junod, 'Commentary on Protocol II', at p.1341.

⁴⁶⁸ In the law of armed conflict principle of humanity has been regarded as prohibiting the means and methods of war not necessary to attain the military objective, E.K. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application* (Doedrecht, 1992) at p.36; principle of humanity referred to in the Martens Clause of the preamble 'inherently prohibits the destruction of values which are not relevant and proportionate to the military advantage anticipated,' M. Bothe, K.J. Partsch and W.A. Solf, *Commentary*, at p.671.

humanitarian law.⁴⁶⁹ As the principle of humanity ‘reinforces the homocentric focus of international humanitarian law,’ and reduces ‘the traditional interstate emphasis of the law of war,’⁴⁷⁰ Meron states that,

No self-respecting state would challenge the applicability of such principles in internal armed conflict. More specific rules, such as proportionality, the prohibition of direct attack on civilians, the prohibition of indiscriminate and disproportionate attacks, the prohibition of means and methods of warfare that cause unnecessary suffering, can and should be regarded as necessary and proper derivations from the principles of humanity.⁴⁷¹

Such an attitude of states as to the applicability of the principle of proportionality stated in Article 51(5)(b) of Additional Protocol I, is evidenced in the 1996 Amended Mines Protocol II to the 1980 UN CCW which prohibits the disproportionate placement of by mines, booby-traps and other devices.⁴⁷² The Second Protocol to the Cultural Property Convention adopts extensive rules on precautions in Article 57 and 58 of Additional Protocol I to attacks on cultural property including those connected with the principle of proportionality: to cancel or suspend such attacks or to refrain from such attacks that ‘may be expected to cause incidental damage to cultural property.’⁴⁷³ Such enhanced protection with regard to cultural property is helpful to affirm and spell-out the application of the principle of proportionality and precautions in internal armed conflicts. On the other hand, it also reflects the ironic state of international humanitarian treaty law which provides enhanced protection to cultural property as opposed to the lives of human beings in internal armed conflicts, as the latter are provided with only a basic protection from direct attack in Article 13 of Additional Protocol II. However, displaced civilians who take shelter in such cultural property which is civilian in nature are indirectly protected by the enhanced protection of the Second Protocol to the Cultural Property Convention.

⁴⁶⁹ A.Cassese, ‘The Martens Clause: Half a Loaf or Simply Pie in the Sky?’ at p.212; *Kupreskic et al.*, para.525; Nagendra Singh & E. McWhinney, *Nuclear Weapons and Contemporary International Law* 2nd Rev.ed.(Dordrecht,1989) at p.47.

⁴⁷⁰ Meron, ‘The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,’ (200)94 *AJIL* 78, at p.88; Dissenting opinion of Judge Weeramantry, *Legality of the Threat or Use of Nuclear Weapons*, Advisory opinion of 8 July 1996 reproduced in (1996)17 *HRLJ* 331, at p.374, para.4; *Tadic*, Jurisdiction, para.119.

⁴⁷¹ T. Meron, *Human Rights and Humanitarian Norms as customary law* (Oxford, 1989) at p.74

⁴⁷² Art. 3(8) (c).

⁴⁷³ Arts.6, 7(c), (d)(i)(ii) and 8 of the 1999 Second Protocol to the 1954 Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict.

The establishment of the customary nature of the general principle which protects civilians from indiscriminate attack and the principle which requires to take reasonable care in attacking military objectives to avoid the bombing of civilians through negligence by the Appeals Chamber of the ICTY is remarkable in the absence of treaty law in this regard.⁴⁷⁴ The Appeals Chamber in *Tadic* however did not relate this in a concrete manner with the principle of proportionality. In *Kupreskic et al.*, the Trial Chamber specifically stated that this principle of reasonable care or precaution in attacking military objectives to avoid unnecessary damage ‘has always been applied in conjunction with the principle of proportionality.’⁴⁷⁵ It extends Articles 57 and 58 in Protocol I on precautions in attack and precautions against the effects of attacks to internal armed conflict for two reasons: that they ‘specify and flesh out general pre-existing norms’ and that they do not appear to be contested by any state.⁴⁷⁶ Therefore it can be stated that the applicability of customary principle of proportionality in internal armed conflict limits the attack on a military objective, if the foreseeable collateral loss of lives or injuries to civilians or damage to civilian objects is ‘excessive,’ outweighing the ‘concrete and direct’ military advantage anticipated by such attack. As the Inter-American Commission on Human Rights states, despite ‘the presence of some combatants within the hotel, the civilians therein did not lose their protection against direct and indiscriminate attack.’⁴⁷⁷ This is true as long as such presence does not turn the hotel into a military objective by its location or use. However, if an attack on such a military objective would cause incidental civilian losses excessive to ‘concrete and direct’ military advantage, such an attack would be cancelled or suspended. But if such incidental civilian losses can be minimized by choice of means and methods of attack, it is legitimate to carry out such attack even with some civilian losses.

If applied in the context of IDPs during displacement or in the camps, the infiltration of some members of an armed opposition group within the civilian population does not change its character and such attacks should be cancelled or

⁴⁷⁴ *Tadic*, Jurisdiction, paras. 100-101.

⁴⁷⁵ *Kupreskic et al.*, para. 524; the Statute of the ICC does not contain provisions concerning principle of proportionality.

⁴⁷⁶ *Ibid.*

⁴⁷⁷ *Third Report on Colombia*, Ch. IV b, para. 101.

suspended. However, if they launch an attack by using it as a base, then the IDPs would be at risk as the IDP camp would be considered as a military objective which may subject the IDPs to incidental losses.

However, the principle of proportionality is easier to state than to apply in practice and gives rise to conflicting interpretations. Even though it is stated that ‘very high, civilian losses and damages’ are contrary to the fundamental rules in Articles 48(1)(2) and 51, as they do not justify attacks that cause ‘extensive’ collateral civilian losses,⁴⁷⁸ the principle of proportionality does not suggest any upper limit of the acceptable civilian losses to outweigh the anticipated military advantage.⁴⁷⁹ Specification of the term ‘excessive’ civilian losses suggests that the assessment of expected civilian losses is relative and to be determined with regard to the anticipated military advantage.⁴⁸⁰ Therefore ‘[e]ven extensive civilian casualties may be acceptable, if they are not excessive in light of the concrete and direct military advantage anticipated.’⁴⁸¹ For instance, in internal armed conflict, an attack on a military camp in the vicinity of IDP camps may be justified on the ground of a ‘concrete and direct’ military advantage, despite the high civilian casualties. Because of these inherent risks in the application of principle of proportionality it is therefore important to stress the obligation of the defending party who is in control of such IDPs, not to place the military objectives in the vicinity of the IDP camps.⁴⁸²

In evaluating the foreseeable collateral injuries to civilians and damage to their objects, the impact of such attacks on civilians generally is taken into account. The collateral impact of an attack on a vulnerable group of civilians in particular on IDPs does not therefore form part of the principle of proportionality.⁴⁸³ As Hampson points out, ‘[i]f the balance is between the military advantage and the impact on civilians *generally*, that will yield one result. If, however, as part of the equation, particularly severe consequences for one group

⁴⁷⁸ C. Pilloud and J. Pictet, ‘Article 51-Protection of the Civilian Population,’ at p.626, para.1980.

⁴⁷⁹ C. Greenwood, ‘A Critique of the Additional Protocols to the Geneva Conventions of 1949’ at p.11,n. 29.

⁴⁸⁰ C.Greenwood, *ibid*.

⁴⁸¹ C.Greenwood, *ibid*; in contrary to this view C. Pilloud and J.Pictet, ‘Article 51-Protection of the Civilian Population’ at p.626, para.1980 state that, the ‘Protocol does not provide any justification for attacks which cause extensive civilian losses and damages. Incidental losses and damages should never be extensive.’

⁴⁸² See above, Section F.1 for precautionary measures imposed by customary humanitarian law on the parties to the conflict against the effects of attacks on IDPs.

⁴⁸³ F.J. Hampson, *Legal protection Afforded to Children*, at p.25.

of civilians were to be taken into account, that might yield a different result. A course of action would be more likely to be found to be disproportionate.⁴⁸⁴ Based on this reasoning, it is foreseeable that the impact of an attack generally on civilians is different from the specific impact that it causes on IDPs and in particular of wounded and sick, disabled, elderly IDPs and on children. The latter category of IDPs are vulnerable to such attacks as they are not in a position due to their physical condition to flee from an IDP camp or any other shelter to avoid deaths and injuries.⁴⁸⁵

c. Prohibition of Land Mines

Widespread and often indiscriminate use of land mines in internal armed conflicts such as Sudan, Colombia, Russian Federation and Sri Lanka, cause physical injuries as well as death of civilians during the internal displacement or return to a mined area.⁴⁸⁶ It also obstructs and endangers the return of IDPs and in certain situations, returning IDPs are the most affected category, rather than those who fled the mined areas. Mining poses a threat to IDPs during conflict situations if a party to the conflict uses it in an area of civilian concentration and continues to be a danger even after the military purpose has ceased to exist if the removal of mines is not undertaken or if the mines do not have the capability of self-destruction.⁴⁸⁷ Such indiscriminate weapons would pose dangers to IDPs in movement to such areas or if relocated by a party to the conflict or on return to such areas. In addition to the physical danger, it prevents access to effective humanitarian assistance to IDPs by posing danger to the operations of humanitarian organisations.

The restrictions in the 1996 Amended Mines Protocol II to the 1980 UN CCW regarding the direct and indiscriminate use of mines including anti-vehicle mines, booby-traps and other devices by government armed forces and insurgents in common Article 3 armed conflict situations is largely based on the indiscriminate usage of land mines as opposed to their inherently indiscriminate

⁴⁸⁴ *Ibid.*, at p.25.

⁴⁸⁵ See General Assembly Resolution 3318 (XXIX) 'Declaration on the Protection of Women and Children in Emergency and Armed Conflict.' (14 December 1974) UN GAOR, 29th Sess.Supp.No.31 (A/9631)(1975) .

⁴⁸⁶ See generally, Landmine Monitor Report 2004 (<http://www.icbl.org/lm/2004>).

⁴⁸⁷ W.Kalin, *Guiding Principles: Annotations*, at p.121, para.109.

nature.⁴⁸⁸ These restrictions rather than prohibitions on the use of anti-personnel mines, which are no more than the restatement of customary rules which would regulate the use of anti-personnel mines by all parties to the conflict, are inadequate to deal with the immense civilian casualties caused during displacement of civilians.⁴⁸⁹

The comprehensive ban on anti-personnel land mines by the 1997 Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and On their Destruction (hereafter 1997 Ottawa Convention) which results from a combination of disarmament and international humanitarian law treaty approaches, is more effective for the protection of IDPs as it not only prohibits the use of such weapons but also the production, stockpiling, or transfer of anti-personnel mines, to eradicate them from the arsenals of the State parties.⁴⁹⁰ The basis for the absolute prohibition of anti-personnel landmines as opposed to anti-vehicle mines, can be stated as qualitative, as the former causes enormous suffering to civilians compared with the latter.⁴⁹¹ The Convention obliges each state party to destroy or ensure the destruction of all existing anti-personnel mines in the 'mined areas' under its jurisdiction or control, and to take precautions upon identification of mined areas and until the clearance of all the mines emplaced therein, to mark, to fence and to monitor the mined area to 'ensure effective exclusion' of civilians.⁴⁹² The markings shall comply the minimum standards provided in 1996 Amended Protocol II to the 1980 UN CCW to ensure their distinctive and durable nature, because of the danger posed to IDPs who return or pass through such areas by the destruction or removal or non-visibility of markings. These measures would at least attenuate the imminent threat posed to the IDPs in internal armed conflicts from the effects of anti-personnel

⁴⁸⁸ Article 3(1), (7) and (8) of the 1996 Protocol II to the 1980 UN CCW.

⁴⁸⁹ See *Third Report on Colombia*, Ch. IV a, para.76 and Ch. IV b, para.82.

⁴⁹⁰ 'Never under any circumstances,' in Article 1(1) 1997 Ottawa Convention includes common Article 3 and internal strife; the benefit of such approach is that the state parties cannot resort to the defence of non-existence of a non-international armed conflict especially in 'grey areas,' to avoid the application of their obligations.

⁴⁹¹ The Preamble to the 1997 Ottawa Convention, para.1 explicitly states impediment in the return of IDPs and the casualties by killing and maiming of civilians which can include IDPs during displacement as one of the purposes to totally ban the anti-personnel mines; P. Herby & A.R. Nuiten, 'Explosive Remnants of War: Protecting Civilians Through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons' (2001)83 No.841, *IRRC* 195, at p.196; for the impact of anti-tank mines on civilians *ibid.*, pp.196-97.

⁴⁹² Article 5 of the 1997 Ottawa Convention.

mines. However, even these measures cannot change the reality of the danger posed to IDPs by still unidentified and therefore unexploded mines, such as remotely-delivered mines in the ground.⁴⁹³ For instance, an estimate made in 2003 indicated that in the Russian Federation, the clearance of mine and unexploded ordnances would take 15-20 years if ‘all means and resources are utilized.’⁴⁹⁴

As the use of anti-personnel landmines is not prohibited at this stage in customary humanitarian law, the customary principles of distinction, proportionality and precautions are relevant and important to restrict their use in internal armed conflicts by states not yet become parties to the 1997 Ottawa Convention and armed opposition groups.⁴⁹⁵ Rule 81 of the ICRC Study on Customary Humanitarian Law which states that, ‘[w]hen landmines are used, particular care must be taken to minimise their indiscriminate effects,’ has become a customary norm applicable to internal armed conflict.⁴⁹⁶ Moreover, that ‘[a]t the end of active hostilities, a party to the conflict which has used landmines must remove or otherwise render them harmless to civilians, or facilitate their removal’ is also a customary norm applicable to internal armed conflict.⁴⁹⁷

G. Reprisals Against IDPs

Prohibition of causing deaths of IDPs by reprisal attacks for an illegal act of the adversary is crucial as otherwise a spiral of similar attacks could be created. In a way, such reprisals would resemble collective punishment of IDPs for the illegal acts of an opposing party to the conflict. Civilians subjected to reprisals are ‘individuals or groups who may not even have any degree of

⁴⁹³ Remotely delivered mine means, ‘a mine not directly emplaced but delivered by artillery, missile, rocket, mortar, or similar means, or dropped from an aircraft.’ Art. 2(2) of the 1996 Protocol II to the 1980 UN CCW; J. Mathews & T. L. H. McCormack, ‘The Relationship Between International Humanitarian Law and Arms Control’, at p. 92.

⁴⁹⁴ Landmine Monitor Report 2004 (<http://www.icbl.org/lm/2004/russia>); as far as the Unexploded Ordnance are concerned (excluding landmines) clearance, removal or destruction of which after the cessation of active hostilities (does not mean after the adoption of a formal peace agreement) by both parties to the conflict in internal armed conflict is provided in the Protocol on the Explosive Remnants of War (Protocol V to the 1980 UN CCW), which is adopted on 28 November 2003 but yet not in force, see Arts.3, 4 and 5; ‘Explosive remnants of war’ is defined in this Protocol in Article 2(4) to mean, unexploded ordnance and abandoned explosive ordnance; see Article 6 of the same Protocol for the protection of humanitarian organisations.

⁴⁹⁵ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at p. 282.

⁴⁹⁶ *Ibid.*, at pp. 280-83.

⁴⁹⁷ *Ibid.*, Rule 83, at pp.285-86.

solidarity with the presumed authors of the initial violation: they may share with them only the links of nationality and allegiance to the same rulers.⁴⁹⁸ Whether a reprisal attack is an arbitrary deprivation of the right to life in internal armed conflict can only be determined by discussing the position under humanitarian law. However, a rationale for prohibiting reprisal attacks on IDPs can be found in the human rights law itself by the very fundamental principle, according to which human rights are granted to the 'human being as an individual, as distinct from his position as a member of the collectivity.'⁴⁹⁹ Therefore reprisal killings by the state party, of IDPs who are not responsible for the breach, 'more or less chosen at random, without any requirement of guilt or any form of trial' as collective punishment, violates the individualised protection offered by the fundamental principles of human rights, cannot be justified for whatever reason and is a violation of their right to life.⁵⁰⁰

Reprisals against IDPs within the power of a party to the conflict is prohibited only in international armed conflicts and neither common Article 3 nor Additional Protocol II explicitly prohibit reprisals against IDPs as civilians.⁵⁰¹ However, the absolute prohibition of certain acts in common Article 3 would not permit their violation contrary to the 'humane treatment' as required therein.⁵⁰² Therefore, it can be asserted that the protection of humane treatment offered to civilians in common Article 3 in their individual capacity as human beings excludes reprisals against the same persons on the basis of the idea of solidarity.⁵⁰³ Given the fact that Article 4 (1) and (2) of Additional Protocol II, particularly Article 4(2)(b) on collective punishment, develop and supplement the common Article 3 which is a customary norm of international law, absolutely prohibiting such acts, it can be considered that acts of reprisals against IDPs within the power of the party to the control are

⁴⁹⁸ *Kupreskic et al*, para. 528.

⁴⁹⁹ F. Kalshoven, 'Human Rights, The Law of Armed Conflict, and Reprisals,' (1971) No.121 *IRRC* p.183, at p.186.

⁵⁰⁰ *Kupreskic et al.*, Trial Chamber, paras. 528-29.

⁵⁰¹ H.P. Gasser, 'Protection of the Civilian Population' in D. Fleck (ed.), in *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford, 1995) p.209, at p.220; for the prohibition in international armed conflicts, see Art.33(3) of IV Geneva Convention of 1949.

⁵⁰² J. Pictet, *Commentary IV*, pp.39-40.

⁵⁰³ F. Kalshoven, 'Human Rights, The Law of Armed Conflict, and Reprisals,' at p. 191

prohibited in customary international law.⁵⁰⁴ This view was supported by the ICTY in *Martic* and *Prosecutor v. Kupreskic et al.*, and confirmed by the ICRC Study on customary humanitarian law.⁵⁰⁵

Attacks against civilians or civilian objects are not prohibited in Additional Protocol II.⁵⁰⁶ However, the ICTY in supporting the view that reprisals against civilians in conduct of hostilities are prohibited in internal armed conflicts, in its Rule 61 decision in the *Martic case*, referred to the General Assembly Resolutions 2444 and 2675 as declaratory of customary international law and the customary prohibition on attacks against civilians as supported by incorporation in Article 13 of Additional Protocol II, and common Article 3 and Article 4 of Additional Protocol II, in particular, Article 4(2)(b) on 'collective punishments' and stated that:

[t]herefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.⁵⁰⁷

Again in *Prosecutor v. Kupreskic et al.*, the Trial Chamber concluded that reprisals not only against those within the power of the party to the conflict but against 'civilians in the combat zone are also prohibited' in customary law.⁵⁰⁸ In support of this the Trial Chamber referred to the widespread *opinio necessitatis* as confirmed by the General Assembly Resolution in 1970 that specifically prohibits reprisals against civilians, ratification of Additional Protocol I which explicitly prohibits civilian reprisals by a high number of states, view of the Trial Chamber of the ICTY in *Martic* and the absence of any claim of reprisals against civilians by states engaged in internal and international armed conflicts in the last fifty years. It finally referred to the Comments of International Law Commission on Article 14 (d) of the Draft Articles on State Responsibility

⁵⁰⁴ M. Bothe, K.J. Partsch and W.A.Solf, *Commentary*, at p.637; L. Moir, *Law of Internal Armed Conflict*, at p.171; S. Junod, 'Commentary on Protocol II', at p.1373; Final Report of the Commission of Experts, established pursuant to Security Council resolution 780(1992), S/1994/674-27 May 1994.

⁵⁰⁵ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at pp.526-529.

⁵⁰⁶ Reprisal against civilians and their objects is prohibited in international armed conflict, Arts. 51(6), 52 of Additional Protocol I.

⁵⁰⁷ *Martic*, at p.47, para.17; *Kupreskic et al.*, paras. 528-536.

⁵⁰⁸ *Kupreskic et al.*, para. 534.

which relies on common Article 3 to the 1949 Geneva Conventions for the prohibition of reprisals in internal armed conflicts against civilians including those in the combat zone, as authoritative confirmation of the existence of the customary rule.⁵⁰⁹ According to the Trial Chamber in *Kupreskic et al.*, this view of the International Law Commission is correct.⁵¹⁰

The logical consequences arising from the prohibited nature of reprisals against IDPs during hostilities or who are within the control of the parties to the conflict is that, attacks on IDPs cannot be justified either on the *tu quoque* principle or on the principle of reprisals based on the fact that similar acts were committed by the other party.⁵¹¹ Consequently, for instance, shelling of IDPs as such is absolutely prohibited even if the reprisal act against civilians is a proportionate response to a similar violation by the other party.⁵¹²

The ICTY in *Martić* and *Kupreskic et al.*, by referring to the provisions of humane treatment of IDPs within the power of the parties to the conflict in common Article 3 and Article 4 of Additional Protocol II to justify the prohibition of reprisal against civilians in conduct of hostilities as stated in Article 13 of Additional Protocol II, (reprisals under discussion in these cases concern such reprisals) seems to blur the distinction of application between the two, which cannot be warranted. Considering common Article 3 or Article 4, in particular collective punishment in Article 4(2)(b) of the Additional Protocol II as broad enough to cover the reprisals in conduct of hostilities is simply an incorrect interpretation of existing law.⁵¹³ This is an ironic situation as the ICTY in *Kupreskic et al* explicitly recognised the different situations in which reprisals can be committed and therefore, obviously, the limited application of common Article 3 in internal armed conflicts.⁵¹⁴ However, due to this incorrect interpretation, these two cases ‘lack persuasive authority’ in particular, on the issue of

⁵⁰⁹ *Kupreskic et al.*, para.534.

⁵¹⁰ *Ibid.*

⁵¹¹ *Kupreskic et al.*, para. 765.

⁵¹² *Martić*, para.15.

⁵¹³ See F. Kalshoven, ‘Reprisals and the Protection of Civilians: Two Recent Decisions of the Yugoslavia Tribunal’ in L.C. Vohrah *et al* (eds.), *Man’s Inhumanity to Man: Essays on International Law in Honour of Antonio Cassese* (Hague, 2003) p.481, pp.488-492 nn. 21, 26, 504, 508.

⁵¹⁴ ‘As for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of adversary. With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977,’ *Kupreskic et al.*, para.527.

reprisals against IDPs who are not within the control of the parties to the conflict.⁵¹⁵ It can be derived also from the ICRC study on customary law that such a prohibition on reprisal attacks of IDPs who are not within the control of the parties to the conflict has not attained the status of a customary norm applicable to internal armed conflict, as it only deals with the reprisals of civilians within the control of the parties to the conflict on the basis of common Article 3 and Article 4(2) of Additional Protocol II.⁵¹⁶

However, given the prohibition of attack against civilians in Article 13 of Additional Protocol II, such a prohibition on reprisal can be applied through the Martens Clause for the protection of IDPs. Even if the prohibitions on reprisal attacks on civilians in conduct of hostilities were not declaratory of the customary international law as claimed in the ICRC study, they could have transformed into general rules or principles of international humanitarian law. Even though the 'principles of humanity' or 'dictates of public conscience' in the Martens clause may not be considered as independent sources of international law, as a minimum, reference to those principles and dictates whenever a rule of international humanitarian law is not sufficiently precise is possible, to define the scope of and objective of such a rule.⁵¹⁷

Cassese considers that the rule concerning reprisals against civilians has had general acceptance with regard to civil wars since the 1930's.⁵¹⁸ In the light of the development of human rights it is an abhorrent practice to attack IDPs as such even for the compliance of humanitarian law.

Moreover, the 1996 Revised Mines Protocol to the 1980 CCW which is applicable to internal armed conflicts prohibits the direction of mines, booby-traps and other devices by way of reprisals against civilians or civilian objects.⁵¹⁹ Such multilateral treaty provisions can be regarded as indicative of the evolution of legal conviction among states as to the unlawful nature of the

⁵¹⁵ F. Kalshoven, 'Reprisals and the Protection of Civilians', at p.508.

⁵¹⁶ J. M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law* at pp.526-29; but in international armed conflict such norms are customary, *ibid.*, at pp.519-523

⁵¹⁷ *Kupreskic et al.*, para.525.

⁵¹⁸ A. Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts' at p.292.

⁵¹⁹ Arts. 1(2), 3(7) 1996 Amended Protocol II to the 1980 UN CCW.

targeting of civilians and their objects in internal armed conflicts independent of treaty obligations.⁵²⁰

Despite the misinterpretation of the existing law derived from the Commentary of the International Law Commission, *Kupreskic et al* refers to instances which can point to the existence of widespread *opinio necessitates* with regard to reprisals against civilians within the combat zone. Thus, *opinio necessitates* emerged as a result of principles of humanity or dictates of public conscience may indicate emergence of a general rule or principle of humanitarian law that prohibits reprisals against civilians in combat zones.⁵²¹

H. Protection of IDPs from Being Used as Human Shields

Armed forces of both parties to the conflict often use the presence or movements of IDP as human shields to reduce or impede the attacks on military objectives. Such acts by armed forces to keep the IDPs for their own safety would obstruct the movement of the IDPs for safety to other areas of the country and expose them to death. Human rights law does not explicitly prohibit such a practice, although it is a violation of the right to life. However, such a protection can be derived from the obligation to take positive measures to protect the right to life of IDPs.⁵²² In a claim by the applicant in *Demiray v. Turkey* that her husband was used as a human shield, the European Court of Human Rights stated that Article 2 on the right to life should be interpreted in such a way as to make its safeguards ‘practical and effective.’⁵²³ Therefore, ‘in certain well-defined circumstances there is a positive obligation on the authorities to take preventive operational measures to protect an individual for whom they are responsible.’⁵²⁴

⁵²⁰ See A.Cassese, ‘The Geneva Protocols of 1977 and Customary International Law’ (1984) 3 *UCLA Pacific Basin Law Journal* 55, at p.85.

⁵²¹ See *Kupreskic et al.*, para.527.

⁵²² Human Rights Committee, ‘The Right to Life’ para.3; also from the general obligation with regard to all rights stated in respective treaties, Art.2(1) of the ICCPR, as Human Rights Committee, ‘Nature of General Legal Obligation’ paras.3 and 6 states that, ‘[a] general obligation is imposed on States parties to respect the Covenant rights and to ensure them to all individuals in their territory and subject to its jurisdiction’ and this includes both negative and positive obligations; similarly, with regard to 1(1) of the ACHR in *Velasquez Rodriguez case*, Judgment of July 29 1988, para.162, the inter-American Commission on Human Rights Stated that, ‘[t]his article specifies the obligation assumed by the States Parties in relation to each rights protected’ and such obligations include both negative and positive aspects.

⁵²³ Application no.27308/95, Judgment of 21 November 2000, para.40.

⁵²⁴ *Ibid.*, para. 41.

Using the movement or presence of IDPs within or outside a relocation camp as human shields in hostilities or intentionally placing military objectives within the concentration of IDPs to use them as human shields, to protect military objectives from attack or to impede military operations is not prohibited in Additional Protocol II.⁵²⁵ Protection against such acts can be extended by the party in control over the area in which the IDPs are in movement or IDP camps are located. As already noted, although the ‘general protection’ of civilians in Article 13 cannot be considered as broad enough to include the obligations of defending party to take precautions, it is certainly ‘broad enough to include a prohibition against the use of civilians as a shield for military objectives.’⁵²⁶ This means deliberately using IDPs itself as human shields as well as placing military camps within the concentration of IDPs which makes the principle of distinction ineffective are covered within the ‘general protection’. Such an interpretation is a necessary consequence of the prohibition of making IDPs the object of attack in Article 13 of Additional Protocol II.

As only the IDPs within the power of the party can be made as human shields, such practice can also be prohibited by virtue of common Article 3 and Article 4 of Additional Protocol II that prohibits violence to life, cruel or inhuman treatment, and taking of hostages.⁵²⁷ The practice of placing a military camp in the vicinity of a relocation camp for displaced civilians is also contrary to such protection, as it can often result in civilians being used as human shields, or attacked incidentally in an indiscriminate combat activity. Articles 17(1) and 5(2) (c) of Additional Protocol II explicitly require that IDP camps should not be placed close to combat zones.⁵²⁸ Moreover, using civilian detainees or for the purposes of this study IDPs in camps, as human shields can constitute cruel treatment or an outrage upon personal dignity prohibited by common Article 3 as customary law.⁵²⁹

⁵²⁵ See Art.28 of IV Geneva Convention of 1948 and Art.51(7) of Additional Protocol I for such prohibitions in international armed conflicts; Principle 10(2)(c) of UN Guiding Principles on Internal Displacement prohibits such activities with regard to IDPs.

⁵²⁶ M. Bothe, K. J. Partsch and W. A. Solf, *Commentary*, at p.678 ; but see S. Junod, ‘Commentary on Protocol II’, at p.1449.

⁵²⁷ M. Bothe, K.J. Partsch and W. A. Solf, *Commentary*, at p.678.

⁵²⁸ S. Junod, ‘Commentary on Protocol II’, at p.1449.

⁵²⁹ *Prosecutor v. Kordic and Cerkez*, Judgment, Trial Chamber, Case No.IT-95-14/2-T, (26 February 2001) para.264; *Prosecutor v. Aleksovski*, Judgment, Trial Chamber, IT-95-14/1-T (25

The prohibition of the use of human shields is a norm of customary law in internal armed conflicts.⁵³⁰

June 1999), para.229; such an interpretation can be used in the application of the right to be free from inhuman treatment in human rights law.

⁵³⁰ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at p.337.

6. Protection Relating to Return or Resettlement

A. The Necessity to Return or Resettlement and its Impact on the Protection of IDPs

Internal displacement gravely affects IDPs in many ways. In particular, older people and disabled find it difficult to move from place to place in conflict situations. Their already vulnerable physical conditions deteriorate and furthermore their mental health is affected by sense of alienation due to the changed circumstances of displacement. Children often miss a proper education in a secure environment, as displaced families are not able to provide even the smallest cost of books and school uniforms. This has a profound impact on their development and prospects, as they grow up uneducated and unemployable. The overcrowded conditions of IDP camps are not suitable for the education and development of children, or provide privacy for women and family life. Lack of nutritious food, quality health care, and essential drugs also gravely affects children, as they are prone to illnesses such as diarrhoea, cholera and malaria. Failure to immunise IDP children often result in childhood deceases.

Lack of suitable employment for adolescent IDPs to lead a sustainable living with other consequences of displacement, has an adverse impact on their mental health as well. For instance, a medical survey conducted in Turkey in 1998 on a group of IDPs indicate that 66 percent were suffering from post-traumatic stress disorder, and 29.3 percent had severe depression.¹ Moreover, IDPs from rural areas who depend for their livelihood on their land, livestock and other natural resources are disproportionately affected by displacement as they are mostly uneducated to do other work in their displaced areas. Protection of livelihood as opposed to survival of such IDPs means, as a first step, taking measures to facilitate access to their lands.

Living in IDP camps and temporary shelters, and in overcrowded urban areas on basic humanitarian assistance is not consistent with the right to an adequate standard of living of an IDP and his family and to the continuous

¹ Dr. Aytekin Sir, Dr. Yener Bayram and Dr. Mustafa Ozkan, 'A Preliminary Study on PTSD After Forced Migration,' 1998 *Turkish Journal of Psychiatry*, pp.173-180 as cited in *Displaced and Disregarded: Turkey's Failing Village Return Programme*, Human Rights Watch, October 2002, vol.14, No.7(D), at p.22, n.64; Global IDP Project, 'High Levels of Traumatic Stress and Suicide Among Displaced' in *Profile of Internal Displacement: Sri Lanka* (as at 1 September, 2005) at p.75.

improvement of living conditions in its full realisation, in its medium and long-term implementation. For instance, in Sri Lanka, a large number of IDPs have lived in welfare centres for well over 15 years.² The shelters are buildings or thatched roofed shelters or tents provided by international organisations, which lack space and have unhygienic conditions, leading to health problems among IDPs.³ In Colombia, many IDPs are forced to live in urban slums in unsuitable conditions or homeless as they are not able to return safely to their places of habitual residence.⁴

Thus, short-term emergency survival needs are not consistent with the right to adequate standard of living of IDPs who live in IDP camps for a long time depending on humanitarian assistance. In such situations, the core obligations of the state varies from mere provision of basic survival needs to provision of assistance to live in relatively sustained and improved conditions. The medium and long term protection needs are, safe and dignified voluntary return to their homes and reintegration or resettlement and integration in other areas within a country. Safe return can be an ideal solution for ‘displaced’ civilians as it restores them to their previous undisplaced position. However return is not always the ideal. If the IDPs cannot be voluntarily returned for a long time to their homes due to, for example, occupation of their property by security forces or unsafe conditions, they can be voluntarily resettled in other places within the country.

Therefore the state has the responsibility to establish conditions that facilitate the return and resettlement and reintegration of IDPs, such as clearance of land mines and unexploded ordnances; establishing independent judiciary and other human rights mechanisms for the protection of returnees and provision of survival needs through humanitarian assistance; restitution or compensation for lost or destroyed property, assistance in recovery or reconstruction of property damaged as a consequence of armed conflict; and reconstruction of damaged infrastructure, schools, water systems and so on. In other words such fulfilment of protection needs to be made on individual and community bases.

² The Refugee Council, ‘Sri Lanka: Internally Displaced Persons and Safe Returns, Sri Lanka Project,’ (London, 2003) at p.25.

³ *Ibid*

⁴ Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, E/CN.4/2005/48 (3 March 2005) para. 38.

As such, a question arises in this regard is whether, the protection of IDPs comes to an end with the return or resettlement of IDPs. The UN Guiding Principles do not state the cessation of protection of IDPs as it is not a binding legal instrument to provide protection to IDPs as a specific category and therefore do not contain a legal definition of IDPs, but a descriptive term for operational guidance on the ground. This raises another question whether it is desirable to have a legal definition of IDPs. It is desirable to specify when special protection of IDP ends, as it is often terminated prematurely before a durable solution, once the IDP is returned or resettled elsewhere in the country, on the basis of the description of IDPs which necessitates movement from home to become an IDP. For instance, the law concerning IDPs in Croatia considers the return of IDPs to their original residence as an adequate condition for ending the special status of IDPs.⁵

In order to provide effective protection by treaty law, it is necessary to have a legal definition or description to delineate the scope of protection of IDPs. The fact that when the special status comes to an end in its eventual course, returnees are protected by the broader human rights law and humanitarian law is a conducive factor in the special protection of IDPs as they would ensure a continuous protection to avoid any concerns involved in the cessation of protection.

The return of IDPs to their homes or their being resettled elsewhere in the country, thereby reversing their physical movement, cannot meaningfully end the protection of IDPs. Although the description of IDPs does not explicitly state lack of 'protection' as the reason for the displacement, it may be implicitly derived from the protection provided from forced and otherwise involuntarily displacement. Mere reversal of displacement by return or return would not necessarily provide a durable protection; for instance, many IDPs in Sri Lanka return to their homes only to displace several times.⁶ Moreover, returned or resettled IDPs can face numerable protection needs due to their displaced situation, such as lack of documentation, in particular, title deeds to lands and

⁵ Similar, premature ending can be found in the national laws concerning IDPs in Georgia, Colombia, Russian Federation and Bosnia and Herzegovina, see C.Beau, 'National Legislation' (2003)17 *Forced Migration Review* p.16, at pp.16-17

⁶ The Refugee Council, 'Sri Lanka: Internally Displaced Persons and Safe Returns', at p.21

personal identification, threat to life by landmines, lack of shelter, restitution of property or compensation, and assistance with other basic needs.

The specific protection needs of the IDPs due to displacement cannot abruptly come to an end. Such a situation can arise if the issue of ending IDP protection is not separated from the mandate of an organisation to provide assistance and protection. For instance, despite the end of the mandate of the ICRC at the end of conflict, IDP specific protection needs can persist as a post-conflict issue.⁷ Moreover, for instance, IDPs resettled in a non-conflict areas are not the primary targets of the protection activities of the ICRC as they are not the most vulnerable and in immediate protection needs.⁸ In such situations, considering the protection of IDPs has come to an end is not the correct approach. Therefore, even when IDPs are returned or resettled, as long as their IDP specific protection needs remain, they can be covered by such specific protection and later on by the general international human rights and humanitarian law (if the conflict exists).⁹

B. Right to return

Protection of IDPs from forced or otherwise involuntary displacement presupposes the right to return voluntarily to their homes or place of habitual residence in safety and dignity. IDPs who have been forcibly displaced and resettled in safer areas may not like to return. However, this is a significant and a preferable solution for the IDPs who stay in camps and settlements without any arrangements for resettlement in other part of the state and to those IDPs who have particular attachment and dependency to their land such as indigenous persons.¹⁰

Apart from the 1989 Indigenous and Tribal Peoples Convention which explicitly provides for a right to return of relocated indigenous IDPs to their traditional lands as soon as the grounds for such relocation cease to exist, the right to return to the places of origin or habitual residence of IDPs within the

⁷ W. Kalin, 'The Legal Dimension' (2003)17 *FMR* p.15, at p.16

⁸ See below, Ch. 7, Section, C.

⁹ There is an emerging consensus for such an integrated approach based on the criteria of solution (return or resettlement) and needs, see E. Mooney, 'Bringing the end into Sight for Internally Displaced Persons' (2003)17 *FMR* p.4, at p.6

¹⁰ C. Meindersma, 'Legal Issues Surrounding Population Transfers in Conflict Situations', at p.62; Principle 9 of the UN Guiding Principles on Internal Displacement.

country is not recognised explicitly in Article 12 of the ICCPR.¹¹ According to Walter Kalin, though ‘there is no general rule in present international law that affirms the right of internally displaced persons to return to their original place of residence,’ there is ‘[a]t least a duty of the competent authorities to allow for the return of internally displaced persons can, however, be based on freedom of movement and right to choose one’s residence.’¹² Thus, civilians who have been forced to displace as well as those who have been obliged to displace as a consequence of armed conflicts have the right to return on the basis of their right to choose their residence.¹³ Any civilians subjected to transfer on lawful grounds, namely, for military or safety reasons or otherwise displaced should be allowed to return once the grounds that caused their displacement ceased to exist. As stated by the Inter-American Commission on Human Rights in the *Miskito* Indians case, the relocated IDPs, if they desire, should be allowed to return to their original region, once the emergency is over.¹⁴

There are many resolutions by the Security Council and General Assembly which have consistently reaffirmed the right to return of displaced persons in safety regardless of the cause of displacement, whether forced or not.¹⁵ The General Framework Agreement for Peace in Bosnia and Herzegovina of 14 December 1995, Annex 7 explicitly provides for the right of voluntary return of refugees and displaced persons to their homes.¹⁶ Principles on Housing and Property Restitution for Refugees and Displaced Persons, recognises the right of all displaced persons to return voluntarily to their former homes, lands or places of habitual residence, in

¹¹ Article 16(3).

¹² W.Kalin, *Guiding Principles: Annotations*, p. 69; In *Maria Mejia v. Guatemala*, para. 65.

¹³ N.Geissler, ‘The International Protection of Internally Displaced Persons,’ at p.465; Resolution of the Sub-Commission ‘The Right to Freedom of Movement’ 1995/13 (18 August 1995) affirms that, ‘the right of refugees and displaced persons to return, in safety and dignity, to their country of origin and /or within it to their place of origin or choice.’

¹⁴ *Miskitos*, part II, para.21.

¹⁵ The right to remain in their homes and right to voluntary return of refugees and displaced persons is repeatedly acknowledged by various UN Organs, without making any distinction between the beneficiaries whether they have been displaced due to avoid the effects of conflicts or those subjected to forced movement, see S. R. Roos, ‘Right to Live and Remain’, at pp.517-18, nn.4, 5; Committee on CERD ‘Article 5 and Refugees and Displaced Persons,’ para.2(a).

¹⁶ Reproduced in (1996)35 *ILM* 89, 89, at p.136.

safety and dignity.¹⁷ In fact the right of the displaced persons to return to their homes is recognised therein as a ‘free-standing, autonomous right in and of itself.’¹⁸

The meaningful implementation of the right to return imposes an obligation on state to ‘to make good any damage for which the authorities are responsible, including water, sanitation, electricity, gas, roads, and land, where it has been damaged or destroyed.’¹⁹ Right to housing and property restitution or compensation is also important for the safe and dignified return. Moreover, it includes measures to facilitate safe return, in particular, clearing of mine and unexploded remnants, assistance to cover basic needs, provision of construction tools and materials and agricultural tools and seeds and education.²⁰

The right to return in safety emphasises the fact that the return of IDPs should be voluntary and not forced. With regard to such a right of displaced civilians, the CERD states that ‘all such ...refugees and displaced persons have the right freely to return to their homes of origin under conditions of safety.’²¹ Thus IDPs have a choice to resettle elsewhere rather than to return to their homes. Such resettlement would not affect their right to restitution of their house, land and property in their places of habitual residence.²²

As far as humanitarian law applicable to internal armed conflicts is concerned, Additional Protocol II neither provides for the right to return of IDPs who left their places due to the effects of hostilities nor for IDPs relocated by a party to the conflict in terms of Article 17(1) of Additional Protocol II. However, the right to return of children is implicit in the ‘temporary’ nature of the evacuation carried out under Article 4(3)(e) of Additional Protocol II for their safety from the effects of hostilities. Though Article 17 is based on Article 49 of the IV Geneva Convention of 1949 applicable to international armed conflicts, it does not contain a positive obligation, such as that in Article 49, to transfer them back to their original places once the grounds for displacement

¹⁷ Principle 10, of the Principles on Housing and Property Restitution for Refugees and Displaced Persons, E/CN.4/Sub.2/2005/17 (28 June 2005).

¹⁸ Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons, Final Report of the Special Rapporteur, Paulo Sergio Pinheiro, E/CN.4/Sub.2/2005/17/Add.1 (8 July 2005), para.42.

¹⁹ Resolution of the Sub-Commission on Human Rights, 2002/30, ‘Right to Return of Refugees and Internally Displaced Persons’, para.8.

²⁰ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, at p.471.

²¹ Committee on CERD, ‘Article 5 and Refugees and Displaced Persons’ para.2(a).

²² Principle 10.3 of the Principles on Housing and Property Restitution for Refugees and Displaced Persons.

cease to exist.²³ However, from the rationale on which Article 17 (1) of Additional Protocol II is based, namely, the general principle against displacement, it can be implied that relocation is only justified as long as a need exists, for the safety of IDPs or military necessary. Therefore once the grounds which prompted the relocation cease to exist, even though there is no explicit obligation on the state to transfer the relocated IDPs back to their original places, at least IDPs should be allowed to return to their habitual places of residence. Otherwise such continued displacement would become an unlawful one in terms of Article 17(1) due to denial of return.²⁴

Even the imposition of an obligation in Article 17(1) of Additional Protocol II to provide survival needs as long as the displaced are kept under enforced displacement, is not adequate to alleviate the long-term needs of IDPs, such as education of children, employment, and cultivation of such as paddy lands. Similar problems are common in situations other than enforced displacement, where civilians are displaced as a consequence of hostilities - in Sri Lanka and Burundi, IDPs' access to their land is limited, causing them to depend on food assistance.²⁵ Moreover, IDPs relocated for reasons other than that stated in Article 17(1) should be allowed to return as such return is the only just remedy for the violation of the rule against arbitrary displacement, as protected in Article 17(1) of Additional Protocol II. The right to return is thus important to address the long-term needs of displaced civilians in protracted armed conflicts where there is little chance of peace.

It is pertinent in this regard is the finding of the ICRC study on customary international humanitarian law, as according to which those who have been displaced on account of armed conflict have a right to voluntary return in safety to their homes or habitual places of residence as soon as the reasons for their displacement cease to exist.²⁶

²³ Article 49(2) of the IV Geneva Convention of 1949 explicitly requires that displaced civilians be returned back to their homes as soon as hostilities in such areas have ceased.

²⁴ See above, Chapter 3, Section, C.1.b.

²⁵ R. Cohen, F. Deng, *Masses in Flight*, at p.28.

²⁶ J.M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, Rule 132, at pp.468-72.

C. Protection of Property

As far as IDPs are concerned, protection of their property during displacement and property left behind in their habitual place of residence is important. As safe return of IDPs is necessary in order to ameliorate the displaced situation of IDPs, protection of property left behind from arbitrary deprivation or interference, is a form of protection need of IDPs. Thus, the property of IDPs such as homes, crops and livestock should be protected against arbitrary and unlawful appropriation, occupation and use by military and civilians belonging to the opposition party to the conflict, bombing or burning and theft or destruction.

Article 17 of the Universal Declaration of Human Rights, which is legally non-binding, guarantees the right to own property and prohibits arbitrary deprivation of property.²⁷ Notwithstanding the absence of a right to property in the ICCPR, Article 26 of the ICCPR which provides an independent right to equality before the law and equal protection by the law without discrimination in the enjoyment of all rights can protect the right to property as well.²⁸ As observed by the Human Rights Committee, ‘a confiscation of private property or failure by a State party to pay compensation for such confiscation could still entail a breach of the Covenant if the relevant act or omission was based on discriminatory grounds in violation of Article 26 of the Covenant.’²⁹ Though this independent right to equal protection of law is derogable during a public emergency, the essence of the right and certain elements of the right to non-discrimination cannot be derogable under Article 4(1) in resorting to derogatory measure from Article 26.³⁰

Moreover, the immovable property of IDPs is protected during displacement in the ICCPR and ICESCR in the form of homes and houses.³¹ It is to be noted that home in Article 17 of the ICCPR is broader as it is not confined to a dwelling but includes ‘a place where a person resides or carries out his usual occupation.’³² Thus home includes residential house and other

²⁷ Similarly, property is protected in, Article 5(d)(v) of the CERD; Article 14 of the 1989 Indigenous and Tribal Peoples Convention ; and Art.16(1) (h) of the CEDAW.

²⁸ C.Krause, ‘The Right to Property’ in A.Eide *et al.* (eds.), *Economic, Social and Cultural Rights*, 2nd edition., p.191, at p.197.

²⁹ *Simunek et al., v. The Czech Republic* (516/1992) A/50/40 (19 July 1995) at para.11.3

³⁰ See Art.5 of the ICCPR.

³¹ Report of the International Commission of Inquiry on Darfur, paras. 304, 318.

³² Human Rights Committee ,General Comment No.16, ‘The Right to Respect of Privacy, Family, Home and Correspondence’ para.5.

property such as shops and plot of land.³³ Destruction of houses as a punitive measure is not consistent with Art.11(1) of the ICESCR.³⁴ Therefore, homes are protected against destruction or other measures by Article 11(1) of the ICESCR.³⁵ Destruction of and arbitrary occupation and use of houses which prevent the IDPs from return to their homes to rebuild their lives in peace and security is not consistent with their right to home and adequate housing.³⁶ Moreover, The obligation of the state to *protect* the housing rights means to prevent the violations by individuals and other non-state actors.

In order to consider that the right to home under Article 17 of the ICCPR is being continuously violated, the previous situation of IDPs before displacement, namely, they had grown up and had their roots therein is adequate even if they no longer live there due to acts of state authorities.³⁷ Thus, prevention by state authorities from having access to use and enjoyment of home and property of IDPs without lawful justification could constitute a continuing violation of right to home.³⁸ Such measures do not also comply with the ‘continuous improvement of living conditions’ as required in Article 11 (1) of the ICESCR.

The legality of the derogatory measures under arbitrary interference with the right to home in Article 17 of the ICCPR during internal armed conflict be derived from international humanitarian law prohibitions on direct and indiscriminate attack on civilian objects, wanton destruction of civilian property and pillage as *lex specialis*. Article 11(1) of the ICESCR on right to adequate housing cannot be however derogable and therefore any core obligations to respect can be derived from such humanitarian law prohibitions.³⁹

Articles 1 of the Protocol I to the ECHR, 21 of the ACHR and 14 of the ACHPR contain explicit protection of the right to peaceful enjoyment of property

³³ See *Xenides –Arestis v.Turkey*, Application no.46347/99, Judgment of 22 December 2005.

³⁴ Committee on ICESCR, ‘The Right to Adequate Housing,’ para 12

³⁵ For similar protection see, Art.8 of the ECHR; Art. IX and Article XI of the American Declaration of the Rights and Duties of Man ; Art.31 of the European Social Charter(1996).

³⁶ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v.Nigeria*, p. 41, para.61.

³⁷ *Xenides –Arestis v.Turkey*, Application no.46347/99, Judgment of 22 December 2005, para. 19.

³⁸ *Ibid.*, paras.20.22.

³⁹ Committee on ICESCR, General Comment No.7: ‘The Right to Adequate Housing (Art.11.1): Forced Evictions’ (20/05/97) para.12.

and protection against deprivation of possessions which is wider in scope than the right to home since the former can involve a property where a person does not live.⁴⁰ As interpreted and applied by the Inter-American Court of Human Rights, in the case of the *Community Mayagna (Sumo) Awas Tingni v. Nicaragua*, the protection provided by Article 21 of the ACHR not only concerns the right to private property but also communal or collective forms of property in which ownership of the land is bestowed not on individuals but on the community of indigenous peoples.⁴¹ As for indigenous communities, their land is the fundamental basis of their culture, spiritual life and economic survival, protection of their property and land and perhaps their return to such land is important.⁴²

These rights are, however, derogable during internal armed conflicts and deprivation of possessions is possible in the public interest and subject to conditions provided by general principles of international law.⁴³ Derogatory measures cannot be inconsistent with the humanitarian law obligations against destruction of civilians houses and other property indispensable for their survival, such as food stuffs, crops and livestock in terms of Articles 15(1) of the ECHR and 27 (1) of the ACHR.⁴⁴ Destruction of houses and possessions of civilians was considered by the European Court in series of cases against Turkey as grave and unjustified interference and therefore an outright violation of rights to respect for home and peaceful enjoyment of possessions.⁴⁵ These were decided in the absence of derogation from Article I of Protocol I and Article 8 of ECHR by Turkey, so that the Court did not consider the compatibility of these acts under other international obligations of Turkey including common Article 3 and Protocol II.⁴⁶

⁴⁰ The European Court of Human Rights in *Loizidou v. Turkey*, Application no. 00015318/89, Judgment of 18 December 1996, para.66, observed that the notion of 'home' cannot be extended to 'comprise property on which it is planned to build a house for residential purposes. Nor can that term be interpreted to cover an area of a state where one has grown up and where the family has its roots but where no longer lives.'

⁴¹ Judgment of 31 August 2001, para.149

⁴² See *ibid.*

⁴³ Art.1 of Protocol I to the ECHR.

⁴⁴ See above, Ch.5, Section, E. 2. c.

⁴⁵ *Mentes and Others v. Turkey* (58/1996/677/867) 28 November 1997, para.73; *Selcuk and Asker v. Turkey*, paras. 86-87; *Orhan v. Turkey*, paras.379-80; *Bilgin v. Turkey*, paras.108-9; *Altun v. Turkey*, paras.62-3.

⁴⁶ A. Reidy, 'The Approach of the European Commission and Court of Human Rights to International Humanitarian Law' (1998) No.324 *IRRC* 513, at p. 521, n.34.

In *Dogan and Others v. Turkey* the question was whether the interference of the right to enjoyment of property by refusing access to their village which forced the IDPs to live in other parts of the country in poor conditions due to lack of employment, housing and health care for almost ten years was disproportionate to the aim pursued, namely, of maintaining security.⁴⁷ The European Court of Human Rights held that the right balance between the general interest and the right to peaceful enjoyment of property had not been struck as the IDPs had to bear an excessive burden for the following reasons: the government had not taken effective and adequate measures to facilitate the return of IDPs, for example, it had not reconstructed the infrastructure; and had not provided the IDPs during their displaced situation with any alternative shelter or employment or funds to ensure an adequate standard of living.⁴⁸

According to the ICRC Study on Customary Humanitarian Law, the rule that requires respect for the property rights of IDPs is a norm of customary international law applicable in internal armed conflict.⁴⁹ Destruction of or seizure of property of an adverse party imperatively demanded by the necessities of the conflict is possible in conduct of hostilities as it is a customary rule of humanitarian law applicable to internal armed conflicts.⁵⁰ Here the property of an adversary includes the property of civilians or IDPs belonging to the adverse party.⁵¹ This gives latitude to states to destroy the property of IDPs on the pretext that members of armed opposition groups are taking shelter in some homes left by the IDPs. It would not justify the destruction of houses in the entire village. The property of IDPs is further protected in conduct of hostilities as civilian objects from direct and indiscriminate attacks and by the prohibition of attack or destruction of property indispensable for the survival of civilians in Protocol II and by customary humanitarian law.⁵²

Additional Protocol II and customary humanitarian law absolutely prohibit destruction or confiscation of civilian property as a collective punitive measure.⁵³

⁴⁷ Paras.150-154.

⁴⁸ Paras.154-156.

⁴⁹ J.M.Henckaerts and L.Doswald-Beck, *Customary International Humanitarian Law*, Rule.133, at pp.472-74.

⁵⁰ Art.8(2)(e) (xii) of the Statute of the ICC; *ibid.*, Rule 50, at pp.175-177.

⁵¹ See, A. Zimmermann, 'Prohibited Destruction' in O.Triffterer (ed.), O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p.283, at p.284.

⁵² Art14 of Additional Protocol II ; Arts. 8(2)(e)(v) of the Statute of the ICC.

⁵³ Article 4(2)(b) of Additional Protocol II.

Customary humanitarian law and Additional Protocol II impose an absolute prohibition as a protective measure on the pillage of real and personal property⁵⁴ of IDPs from ‘both organized pillage and pillage resulting from isolated acts of indiscipline.’⁵⁵ In customary law, it is prohibited to deprive the owner of the property and appropriate it for ‘private or personal use.’⁵⁶ In terms of this provision, therefore an organised pillage of property belonging to an ethnic or religious group in order to prevent their returning, is prohibited. ‘The property left by IDPs in their homes when they have displaced or what they have with them in IDP camps is also protected by this provision.’⁵⁷ ‘Private or personal use’ thus excludes appropriation of property for military necessity and thus as constituting the crime of pillage.⁵⁸

D. Restitution or Compensation to Returned or Resettled IDPs

IDPs who leave their property at home when they displace or have been displaced often later find their property stolen, destroyed, appropriated, occupied or used by other IDPs, or members of the armed forces or opposition armed groups for military use.⁵⁹ For instance, in Darfur, Sudan, Arab tribes had started to settle in areas previously inhabited by displaced civilians, thus preventing their eventual return.⁶⁰ This undue interference with the enjoyment of the right to property is an impediment to return of IDPs. Therefore restitution of property or, in case of the impossibility of compensation in lieu should be provided to IDPs to facilitate return to their home or habitual place of residence as part of their protection from displacement. However, the right to housing and property restitution or in case of impossibility of restitution, to compensation, is a remedy for anyone arbitrarily or unlawfully displaced and it is not affected by

⁵⁴ Commentary to the IV Geneva Convention of 1949, at p.226; it covers state –owned property as well.

⁵⁵ Art.4(2) (g) of Additional Protocol II ; S. Junod, ‘Commentary on Protocol II’, at p.1376

⁵⁶ *Elements of Crimes*, at p.43.

⁵⁷ Civilians of opposition party to the conflict who perpetrate pillage against the property of IDPs can be made individually responsible for war crimes, see below, Ch. 7, Section, A.1.b.

⁵⁸ *Elements of Crimes*, n.61.

⁵⁹ ‘...military operations and security considerations prohibit return to village of origin and result in the loss of property and assets over time; the taking of property, specifically agricultural land and houses for military use (airports, bases and security zones)...’ World Food Programme, WFP Assistance to Internally Displaced Persons, Country Case Study on Internal Displacement, Sri Lanka: Displacement in the North and East, July 1999, p.21. (reproduced in Global IDP Survey, Norwegian Refugee Council).

⁶⁰ Report of the International Commission of Inquiry on Darfur, para.329.

the actual return or non-return of IDPs.⁶¹ Therefore IDPs who have resettled in some other place within a state have the right to restitution or compensation in lieu.

A general right to an effective remedy for victims of violations of international human rights can be found in Articles 2(3)(a) of the ICCPR and in regional human rights instruments.⁶² Although Article 2(3) (a) of the ICCPR does not specifically provide for reparation, the Human Rights Committee considers that an effective remedy cannot be provided without reparation to individuals whose rights under the ICCPR have been violated.⁶³ Moreover, in addition to explicit provision for compensation under Articles 9(5) and 14 (6) of the ICCPR, the Committee considered that the right to reparation includes compensation as well.⁶⁴ The Indigenous and Tribal Peoples Convention of 1989 explicitly provides for the right to resettlement or compensation where return is impossible, and compensation for loss or injury resulting from relocation.⁶⁵ CERD and CAT provide for a specific right to compensation whereas Article 39 of the CRC does not provide for such a right but provides measures for physical and psychological recovery and reintegration.⁶⁶

Restitution or compensation is simply a protective measure as to the enjoyment of the right to property which in turn would facilitate return of IDPs to their original place of residence.⁶⁷ Here the facilitation of return of IDPs may also be a form of restitution not only for forced displacement

⁶¹ Victims 'right to a remedy/reparation for harm suffered includes restitution by return of property and / compensation, Final Report of the Special Rapporteur, M.Cherif Bassiouni, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Freedoms*, E/CN.4/2000/62 (18 January 2000) paras.11,22,23.

⁶² Art.8 of the Universal Declaration of Human Rights; Art. 13 of the ECHR; Art. 25 of the ACHR; and Arts. 7 and 21(2) of the ACHPR.

⁶³ Human Rights Committee, 'The Nature of the General Legal Obligation' para.16.

⁶⁴ *Ibid.*

⁶⁵ Article 16(4)(5).

⁶⁶ Article 6 of the CERD;14 of the CAT; 39 of the CRC ; for cases where compensation was granted for victims of gross human rights violations under the ICCPR, regional human rights instruments and Article XI (1) of Annex 6 of the Dayton Peace Agreement for Bosnia and Herzegovina by the Human Rights Chamber, see M. Nowak, 'The Right of Victims of Gross Human Rights violations to Reparation' p.203.

⁶⁷ Right to housing and property restitution is an 'essential element of the right to return' for IDPs, Working paper submitted by Paulo Sergio Pinheiro to the Sub-Commission, *The Return of Refugees' or Displaced Persons' Property*, E/CN.4/Sub.2/2002/17 (12 June 2002) para.29; in Miskitos Indians case the Inter-American Commission on Human Rights has stated that refusal to provide compensation to relocated Miskitos is a serious obstacle for their return to the Coco River region and inconsistent with the government declaration to allow them to return at the end of emergency, *ibid.*, Part II, para.23.

but also for the peaceful enjoyment of the right to property. However, the right to restitution of housing, land and property or compensation is not affected by resettlement of IDPs and therefore realisation of it would even facilitate the sustained resettlement of IDPs elsewhere within the state.⁶⁸

There is an emerging trend to grant compensation for the breach of the right to home and property. As far as the appropriation of property is concerned, compensation for such property is not explicitly provided for in any regional human rights instruments except by the ACHR.⁶⁹ In terms of the ECHR, such a deprivation is subject to conditions provided by the general principles of international law on the right to private property, i.e., ‘the State must in all cases compensate *nationals* or foreigners when it expropriates their property.’⁷⁰ Therefore if the property of IDPs is subjected to expropriation, the state is bound to pay compensation. In *Akdivar and Others v. Turkey* the European Court of Human Rights refused a claim for loss of land due to displacement, as there was no expropriation of property and the applicants continued to remain the owners of their land.⁷¹

However, in the same case, the European Court granted compensation for loss of other property of Kurds as a result of destruction by Turkish security forces which violated Article 8 and Article 1 of the Protocol I to the ECHR.⁷² The Court granted compensation for loss of houses by destruction, loss of income from the cultivated land due to displacement and the inability to exploit it, loss of household property, livestock and the cost of alternative accommodation incurred in the place of displacement, which has a direct link with the violation of the right to home and property.⁷³ Similarly, compensation with regard to destruction of the homes, crops, livestock and other possessions of returning Miskito IDPs, which

⁶⁸ Principle 10.3 of the Principles on Housing and Property Restitution for Refugees and Displaced Persons.

⁶⁹ Art.21(2) of the ACHR.

⁷⁰ (emphasis added) Luis Valencia Rodriguez, independent expert of the UN Human Rights Commission, E/CN.4/1993/15, 18 December 1992, , pp. 69 and 89, quoted in *Annual Report of the Inter American Commission of Human Rights*, 1993, OEA/ Ser.L/V/II.85, doc.9, rev., February 11 1994, p. 465, at p. 467, n. 60.

⁷¹ 1 April 1998, 1998-II EHRR 711, para.23

⁷² *Akdivar and Others v. Turkey*, Judgment of 16 September 1996; compensation was granted in *Akdivar and Others v. Turkey*, 1 April 1998, 1998-II EHRR 711; compensation was granted in; *Selcuk and Asker v. Turkey*, Judgment of 24 April 1998; *Mentes and Others v. Turkey*, Judgment of 28 November 1998; *Bilgin v. Turkey*, Judgment of 16 November 2000; *Altun v. Turkey*, Judgment of 1 June 2004.

⁷³ *Akdivar and Others v. Turkey*, 1 April 1998, 1998-II EHRR 711.

occurred at the time of relocation, was ordered by the Inter-American Commission on Human Rights as well.⁷⁴

In *Akdivar and Others v. Turkey*,, in addition to the compensation for destruction of property, restitution by bearing the costs of repairs in the village and removal of any obstacles to return to the village from which the applicant IDPs had been obliged to leave were requested as a necessary remedy to prevent future and continuing violation of the rights, in particular, regarding property.⁷⁵ The government of Turkey's position was that return was not feasible due to the prevailing conditions of emergency. Even though the European Court recognised the legal obligation of a state to 'put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*),' it accepted the freedom of states to choose the means to comply with the judgment, if restitution is in practice impossible.⁷⁶

This is mainly due to the fact that the procedural right to enforce the remedy in the ECHR is restricted to just satisfaction to victims, which the Court interpreted as confined to monetary compensation.⁷⁷ Since the court left the restitution by facilitating return, to the discretion of the state concerned and if it was not apparently going to happen in the near future according to the reply of the government, it could have granted compensation with regard to the cost of accommodation and loss of income from the land until the restitution of property. Instead, limiting the compensation to the cost of rented accommodation from the destruction until judgment would render the IDPs exposed to continuous violation of the Convention.

If the property of IDPs is lawfully used for military necessity, such as being used as military bases, it is imperative to provide such IDPs with remedies, namely, restoration of property or, in case of impossibility of restoration, with compensation, or for the loss of income from property until

⁷⁴ Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin, OEA/Ser.L/V.II.62, doc.10 rev.3 (29 November 1983) Section, Right to Property, para.7

⁷⁵ *Akdivar and Others v. Turkey*, 1 April 1998, 1998-II EHRR 711, para.45; Committee on CERD, 'Article 5 and Refugees and Displaced Persons,' para.2(d).

⁷⁶ *Akdivar and Others v. Turkey*, *ibid.*, para.47.

⁷⁷ According to the Court it had 'neither the power nor the practical possibility of doing so itself' of the restitution. *Papamichalopoulos and others v. Greece*, (Just Satisfaction) A 330-B, Judgment (31/10/1995) para.34; see below, Ch. 8, Section B. 1.

restitution or other alternative arrangements such as resettlement or alternative sources of income are provided. Denial of return to place of residence of IDPs would make the interference with the respect for home, adequate housing and property a disproportionate measure unless alternative housing, funds or employment are provided.⁷⁸

For instance, in the northern part of Sri Lanka, a substantial part of the land belonging to IDPs is occupied by the Sri Lankan Army and Police.⁷⁹ Some areas are designated by the occupying security forces as High Security Zones (hereafter HSZ). These include many houses, schools, roads, industries and cultivable land.⁸⁰ Therefore, in 2003, 94 % of the IDPs from homes within HSZs living in welfare centres (IDP camps) were not able to return to pursue any economic activity such as agriculture or fishing within those areas or near such areas.⁸¹ Since the issues of HSZs are linked to the national security issues and thereby a final settlement, the HSZs will continue to remain for an indefinite period to the detriment of return of nearly 100,000 IDPs.⁸²

Such interference with the right to home and property of IDPs raises the issue of proportionality, i.e., whether such derogation measure is reasonable and necessary to the aim to be achieved.⁸³ Moreover, in determining the proportionality of such interference, the obligation of the state to protect the physical, cultural and economic existence of a national minority as stated in the UN Declaration on the Rights of Persons Belonging to National or Ethnic, or Religious and Linguistic Minorities, 1992 should also be taken into account.⁸⁴ Such military zones cover a substantial part of a region and thereby unduly affect the return of large number of IDPs, their enjoyment of property and income earning resources over the long term.⁸⁵ Until settlement of the ethnic problem is reached, IDPs have to bear and continue to bear an excessive burden which is a violation of their right to home, housing,

⁷⁸ *Dogan v. Turkey*, paras.154 and 159.

⁷⁹ The Refugee Council, 'Sri Lanka: Internally Displaced Persons and Safe Returns', at p.35.

⁸⁰ The Refugee Council, 'Sri Lanka: Internally Displaced Persons and Safe Returns', at pp.35-36

⁸¹ *Ibid.*, at pp.28-29.

⁸² *Ibid.*, at p.36.

⁸³ See above, Ch.3, Section C for a discussion of proportionality.

⁸⁴ Article 1; see above, Ch. 3, Section, D; Article 27 of the ICCPR may be relevant with regard to cultural identity related to the territory by engaging in traditional economic activities.

⁸⁵ 30% of the Jaffna Peninsula in Northern Sri Lanka is occupied by the security forces which impedes return of IDPs and economic activity, Global IDP Survey, 'Sri Lanka: High Security Zones Prevent IDPs from Regaining Their Property' (February 2005).

property and their freedom of movement, in particular the right to return. Regardless of the legitimacy of the aim, such an interference with the right to housing and property would not be proportionate to these rights of IDPs, unless any assistance during their displacement is provided.

Therefore IDPs must be provided with compensation for loss or destruction of houses, property, loss of income from property and from other income generating resources and for the cost of alternative accommodation or any arrangements for alternative accommodation, and their return should be facilitated by restitution of houses and property as soon as the exigencies of the situation is reduced.

International humanitarian law protects IDPs displaced by internal armed conflict as victims but is silent as to their right to reparation in national or international law.⁸⁶ The remedy of restitution or compensation is granted in the Statutes of ICTY and ICTR for humanitarian law violations.⁸⁷ The compensation for victims of violations of humanitarian law stated in the Rules of Procedure and Evidence in the ICTY and ICTR merely facilitates the claim of victims through national courts rather than providing a direct right to remedy by the order of the Court. However, the tribunals can directly make orders for restitution of property or other appropriate measures if the unlawful taking of the property is associated with a crime within the jurisdiction of the Tribunals and the property is concerned with the specific finding of the judgment. The first individual right to compensation for violations of humanitarian law is provided in Article 75 of the Statute of the ICC.⁸⁸ This right however cannot be exercised against the state but against the perpetrator of the crime.

The Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

⁸⁶ L. Zegveld, 'Remedies for Victims of Violations of International Humanitarian Law', (2003) 85, No.851 *IRRC* at p.497; but the right to compensation is provided in international armed conflicts, Article 91 of Additional Protocol I; R. Provost, *International Human Rights*, at p.48, however opines that, Article 91 of Additional Protocol I merely states a right to compensation of the parties to the conflict and not individual victims, as the latter are requested to provide a petition through their own government to press an international claim; J. de Preux, 'Article 91-Responsibility' in Sandoz, Y., Swinarski, C., and B.Zimmermann, B., (eds.), *Commentary on the Additional Protocols of 8 June 1977* p.1053, pp.1056-57.

⁸⁷ See below for detailed discussion, Ch. 7, Section, A.2.

⁸⁸ Art.75(1),(2) of the Statute of the ICC; but here the victims cannot institute claims directly but only through the prosecutor. But they can participate at the proceedings; see for detailed discussion, below, Chapter 7, *ibid*.

and Serious Violations of International Humanitarian Law do recognise the general right to remedies of victims of both human rights and humanitarian law violations, and in particular their right to reparation including restitution of property and return to one's place of residence and compensation.⁸⁹ However, it does not establish any new substantive right to remedy under international law or domestic law but only identifies 'mechanisms, modalities, procedures and methods for the existing legal obligations.'⁹⁰ This is reflected in the Basic Principles and Guidelines on the Right to a Remedy, which are stated using the term 'should,' and therefore not stated as a norm that exists *de lege lata*.

Moreover, the right to restitution of property of IDPs which they were deprived during hostilities since 1991 and to be compensated in case of impossibility of restitution, is recognised in the General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7 on the Agreement on Refugees and Displaced Persons and enforced by the Human Rights Chamber established under the same.⁹¹ A specific right of restitution to IDPs in respect of housing and property of which they were arbitrarily or unlawfully deprived, or in the event of impossibility of restoration, a right to be compensated, is provided in the UN Principles on Housing and Property Restitution for Refugees and Displaced Persons.⁹² It further notes that, '[s]tates shall demonstrably prioritize the right to restitution as the preferred remedy for displacement and the key element of restorative justice. According to this, the right to restitution exists as a 'distinct right, and is prejudiced neither by the actual return nor of non-return of refugees and displaced persons entitled to housing, land and property restitution.'⁹³ This is a significant development since the adoption of the UN Guiding Principles on Internal Displacement, as its Principle 29 (2) does not state restitution or

⁸⁹ Principles 11, 19 and 20, Annex to the Human Rights Resolution of the Commission on Human Rights 2005/35 (19 April 2005).

⁹⁰ C.Tomuschat, 'Darfur-Compensation for the Victims' (2005)3 *Journal of International Criminal Justice*, 579, at p.585 states that these Principles are 'now clearly of an aspirational nature only.'

⁹¹ Article VII, Annex 6 (1996)35 *ILM* 89, at p. 130; see for an outline of several cases decided by the Human Rights Chamber established under Dayton Peace Agreement for Bosnia and Herzegovina in this regard, M. Novak, 'Right of Victims of Gross Human Rights Violations to Reparation', at pp. 218-220.

⁹² Principle 2.1.

⁹³ Principle 2.2 of the Principles on Housing and Property Restitution for Refugees and Displaced Persons (28 June 2005); ILA Declaration on Internally Displaced Persons, Article 9.

compensation as a right of IDPs but as a responsibility of the authorities to assist them in this regard.⁹⁴

As opposed to human rights law, in humanitarian law a derivative right to restitution for violations of humanitarian law is not available as *de lege lata* but only in an emerging form.⁹⁵ However, the complementary nature of human rights and humanitarian law in internal armed conflicts would enable reparation to be obtained for violations of the protection of property in humanitarian law to the extent it overlaps with the substantive norms of the right to property.

⁹⁴ See generally for the view that the right to housing and property restitution is in existence, S. Leckie, 'Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCHR Policy and Practice' (2000) 19 *Refugee Survey Quarterly* 5, at pp.38-39; contrary view, see C.Phuong, *The International Protection of Internally Displaced Persons*, at p.64.

⁹⁵ See R. Provost, *International Human Rights*, at p.54, n.124.

Conclusion to Part III

The right to non-discrimination on the basis of displaced status of IDP, right to family reunification and right to humanitarian assistance for subsistence needs and other needs are protected by both human rights and customary humanitarian law applicable in internal armed conflict. Although the right to humanitarian assistance for subsistence needs can be derived from both laws, human rights law is broader than the humanitarian law obligations of the state in providing basic needs to all the IDPs in the territory. However, since international humanitarian law alone specifies the obligations of the parties to the conflict to refrain from certain acts that cause starvation and to respect and protect humanitarian personnel and their vehicles and goods, it can be considered as *lex specialis* in this regard.

Movement related rights as such are mainly protected by human rights law, and an obligation to refrain from obstruction of the exercise of these rights as a life saving measure during hostilities can be interpreted by resorting to non-derogable human rights norms. The right to obtain documentation, right to return and right to a remedy in the form of restitution or compensation for loss or destruction of property are only protected in human rights law. International humanitarian law can be considered as *lex specialis* as to protection from direct, indiscriminate attacks, protection from using IDPs as human shields and reprisal attacks against IDPs.

Furthermore it is important to provide the protection of return or resettlement and reintegration to IDPs in the medium and long term and to address their existing needs in that stage.

The above discussed incoherent state of international law concerning IDPs explains the importance of both human rights and humanitarian law in formulating the rights specific to the protection needs of IDPs during displacement and return in order to provide comprehensive and consistent protection to IDPs in internal armed conflicts. For that purpose, firstly, that protection needs have to be accommodated within the existing human rights law; secondly, to find an overlapping protection need in customary international humanitarian law applicable to internal armed conflicts. Although the second aspect is helpful in strengthening a specific human right norm, in particular, of certain derogable rights during internal armed conflict, absence of

or a rudimentary protection of a need of an IDP in international humanitarian law does not necessarily lead to the opposite conclusion, that such rights would be derogable to the detriment of IDPs during internal armed conflicts. Because, derogation of human rights law is subjected to necessary substantive safeguards.

Part IV

Implementation and Enforcement of International Human Rights and Humanitarian Law Pertaining to the Protection of IDPs

Introduction

The mere existence of the international normative framework which was discussed in the previous two Parts is not sufficient for the protection of persons displaced by internal armed conflict unless such laws are actually applied. Application of the laws requires effective implementation and enforcement mechanisms. Without such effective international implementation and enforcement of human rights and humanitarian law, no meaningful protection can be extended to IDPs from past, existing or future violations of such laws by the state or armed groups.

The protective functions of such international mechanisms can generally be triggered: by virtue of legal obligations of the state concerned under a relevant convention to provide information on compliance; by the initiatives attached to the mechanisms themselves; and by the victims through the avenues provided in international Conventions to reach such mechanisms. This Part, therefore, examines the extent and effectiveness of such mechanisms, specifically in the protection of IDPs in securing reparations, imposing sanctions and ensuring compliance with laws by means other than the above mentioned, on the basis of their composition, mandate, procedures and evolving jurisprudence.

7. Implementation and Enforcement of International Humanitarian Law

A. International Criminal Tribunals

1. Sanctions

Imposing criminal sanctions on individuals responsible for crimes against humanity, genocide and war crimes is an effective measure of enforcement as it ensures the enhancement of the rule of law. Enforcement, by imposition of individual criminal liability, is a reactive measure to past violations in an armed conflict that may discourage future violations of human rights and humanitarian law. As far as IDPs are concerned, they themselves may have been victims of violations such as destruction of property, pillage and so on, or/and their family members or relatives could have been killed, tortured or subjected to disappearances. Imposition of sanctions by individual criminal responsibility is one way of creating a viable climate that would encourage safe and dignified return of IDPs to their places of origin.

As far as IDPs at large are concerned, beneficial aspects of protection by prosecution and punishment of individuals responsible for international crimes are different from the protection by individual remedies available under the individual communication procedures of the human rights mechanisms. Conviction of perpetrators provides protection to IDPs against large scale violations as opposed to an individual remedy granted under the human rights mechanisms; and IDPs can be protected against violations committed by both state and non-state perpetrators. The latter aspect is of significance to the protection of IDPs against human rights violations because of the fact that unless such violations amount to crimes against humanity or genocide, in principle insurgents are not bound to adhere to human rights standards. Above all, since such crimes are committed by individuals, such as by armed forces, insurgents and military commanders of either party to the conflict and by political leaders and civilian superiors who are not abstract entities, prosecution and punishment of perpetrators of such crimes would provide justice to those displaced by armed conflicts and enhance the chances of reconciliation and ultimate peace, more effectively than by making the state responsible through the international human rights mechanisms.

However, this does not mean that remedies of both avenues cannot be sought in the same case, as imposition of individual criminal responsibility would not affect the responsibility of the states under international human rights Conventions.¹ However, judicial activity may not always be the best way to ensure ultimate peace and therefore other activities such as national truth and reconciliation commissions, which are beyond the scope of this study, should be resorted to in this regard.²

In order to assess the effectiveness of prosecution of perpetrators, not only the composition, mandate and procedures of the international Criminal Courts but also the status and the scope of the concept of individual criminal responsibility over genocide, crimes against humanity and war crimes committed in internal armed conflicts are important.

Ad hoc International Criminal Tribunals have been established by Security Council resolutions as a result of serious violations of humanitarian law that resulted in large scale displacement of civilians and extermination of IDPs in former Yugoslavia and Rwanda (ICTY and ICTR).³ In contrast, the permanent International Criminal Court (ICC) was established by a multilateral Convention.⁴ Their independent and impartial nature is confirmed by the appointment of international judges and prosecutors, unlike the mixed or internationalised Courts in Kosovo, Cambodia and Sierra Leone to which, in addition, national judges and prosecutors have been appointed.⁵ In internal armed conflicts based on discriminatory grounds such as ethnic, linguistic and religious ones, the human rights and humanitarian law violations are often committed by persons with

¹ Article 25(4) Statute of ICC states that, '[n]o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law.'

² However, such Commissions can be international in scope, for instance, the Truth Commission of El Salvador was headed by foreign nationals appointed by UN and mainly funded by international donors; see generally, L. Olson, 'Mechanisms Complementing Prosecution' (2002) 84 *IRRC* No.845, p. 173.

³ UN Doc.S/RES/808 (25 May 1993); UN Doc.S/RES/955 (8 November 1994)

⁴ Statute of the ICC(17 July 1998), UN Doc.A/CONF.183/9, (1998)37 *ILM* 999, entered into force on 1 July 2002; for a detailed study on the ICC, see generally, O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*.

⁵ The judges of the ICTR would be elected by the General Assembly by vote from the list of candidates transmitted by the Security Council from the nominations by the UN member states and non-member states maintaining permanent observer missions at UN headquarters, Arts. 13 *bis* and 12 *bis*; but for a view that the election of judges by the Assembly of States Parties would infuse a political element into the appointment system, see S.D. Bertodano, 'Judicial Independence in the International Criminal Court' (2002)15 *LJIL* 409; see generally C.P.R. Romano, A. Nollkaemper, and J.K. Kleffner, (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford, 2004)

government authority. If those perpetrators still have control over state apparatus, then the ICC is preferable to mixed Courts consisting of national judges along with international judges, as having national judges would not serve the rendering of impartial and independent justice to eradicate impunity for international crimes apparently committed by such governmental leaders.⁶

The ICTY and ICTR have concurrent jurisdiction with national courts in the prosecution of perpetrators for international crimes.⁷ However, they have primacy over national courts and therefore they can request national courts to defer cases to their competence '[a]t any stage of the procedure.'⁸ This primacy of the tribunals is broad in scope because it provides for a subsequent trial of accused in these *ad hoc* international tribunals, even if the accused has already been tried by the national court for serious violations of humanitarian law if: '(a) the act for which he or she was tried was characterized as an ordinary crime; or (b) the national court proceedings were not impartial or independent, were designed to shield the accused from international criminal responsibility, or the case was not diligently prosecuted.'⁹ Therefore, such primacy of *ad hoc* criminal tribunals is useful in the effective prosecution and punishment of perpetrators for international crimes.

In contrast, the jurisdiction of the ICC is complementary to the national courts and it can have competence over international crimes only when the national courts are genuinely 'unwilling' or 'unable' to investigate and prosecute the perpetrators and also with regard to state parties which have territorial or personal nexus with such crimes or the accused.¹⁰ Although the Security Council can make referral to the ICC of a situation involving a non-state party based on Chapter VII of the UN Charter, the jurisdiction of the ICC is still complementary to national courts and therefore Article 17 of the Statute of the ICC on admissibility has to be complied with.¹¹ For instance, when a referral was made by the Security Council by resolution 1593 (31 March 2005) with regard to the

⁶ See Report of the International Commission of Inquiry on Darfur, at para.579 (in the context of Darfur crisis).

⁷ Art. 9 of the Statute of the ICTY; Art. 8 of the Statute of the ICTR (1994)33 *ILM* 1602.

⁸ *Ibid*

⁹ Art.10 of the Statute of the ICTY; Art. 9 of the Statute of the ICTR.

¹⁰ Para.10 to the preamble and Arts.1,12(2),17 of the Statute of the ICC.

¹¹ S.A. Williams, 'Article 13: Exercise of Jurisdiction' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p.343, at p.350; Art. 13(b) of the Statute of the ICC.

situation in Darfur, Sudan, a non-State party to the Statute of the ICC, the prosecutor in deciding whether to initiate an investigation, assessed the situation in accordance with Article 53 *inter alia.*, of the issues of admissibility under Article 17 of the Statute of the ICC as to the genuine ‘willingness’ or ‘ability’ of the Sudanese authorities to carry out their own investigations.¹²

This subsidiary nature of the ICC is, in a way, a setback in the prosecution of grave international crimes. Of course the states where such international crimes have been committed might be in a better position than the ICC with regard to evidence and the presence of accused, which are essential to render justice. However, with regard to international crimes committed in ethnicity based internal conflicts, justice is unlikely to be rendered by the national courts. This is because such large scale violations against IDPs are generally carried out either by state agents or by individuals in a private capacity but with the support of state authorities.

As far as enforcement is concerned, the two tribunals and the Court do not have their own police force and, thereby, coercive powers. Therefore, to investigate crimes, collect evidence and to arrest and surrender accused, the courts rely on the cooperation of states.¹³ In the event of non-compliance by the states, the courts have the power to report that to the Security Council.¹⁴ Despite the lack of coercive powers and certain difficulties experienced in the pre-trial arrests of

¹² As the Sudanese authorities have begun investigations, the prosecutor has an obligation to evaluate these national proceedings, Press release, *Prosecutor receives list prepared by the Commission of Inquiry Darfur*, Statement of the ICC Prosecutor Luis Moreno-Ocampo 5 April 2005 ; accordingly, Prosecutor determined that ‘there is a reasonable basis to initiate an investigation into the situation in Darfur, The Sudan,’ Letter to the Presiding Judge, Pre-Trial Chamber I by the Prosecutor, 1 June 2005(www.icc-cpi.int); Art.53(1) states, ‘[t]he prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;
 (b) *The case is or would be admissible under article 17*; and
 (c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.’
 (emphasis added).

¹³ Art.29 of the Statute of ICTY; Art.28 of the Statute ICTR ; Arts.89 and 93 of the Statute of the ICC.

¹⁴ Art.87(7) of the Statute of the ICC; the court can make a judicial finding and refer the matter to the Assembly of States Parties or to the security council if the matter was referred to by the same.

indictees particularly with regard to ICTY, the functioning of these two tribunals has been in line with the expectation in combating impunity.¹⁵

a. Individual Criminal Responsibility

The Statutes of the ICTY, ICTR and the ICC impose individual criminal responsibility over war crimes, crimes against humanity and genocide in internal armed conflicts.¹⁶ However, the ICTY in the *Tadic case* was required to prove the existence of customary international law imposing individual criminal responsibility for serious violations of common Article 3 and customary rules regarding means and methods of combat in internal armed conflicts at the time of the commission of breaches, to exercise jurisdiction over war crimes committed in internal armed conflicts in compliance with the principle of *nullum crimen sine lege*.¹⁷ As neither common Article 3 nor Additional Protocol II contain the terms ‘grave breaches’ or war crimes,’ it was considered that there is no criminal responsibility for such violations in international Law.¹⁸ However, there have been opinions to the effect that criminal responsibility for the obligations of common Article 3 and other principles applicable in internal armed conflicts are implicit in those obligations. As grave breaches in international law merely obliges the State parties to prosecute the perpetrators of grave breaches in their territory or to extradite them to a relevant state, the outcome of the absence of the term ‘grave breaches’ in common Article 3 or Additional Protocol II is that the perpetrators would not be subjected to the mandatory jurisdiction attached to those breaches

¹⁵ State cooperation is tremendous in particular with the ICTR as most of the perpetrators from Rwanda were arrested in various countries and transferred to the ICTR, see A. McDonald, ‘The Year in Review’ (2001) 4 *YIHL* 255, at pp.292-3 and for arrests and surrender of accused to the ICTY including former Yugoslav President Slobodan Milosevic *ibid.*, at pp.267-270; with regard to the ICTR the ‘number of accused in completed cases and on-going cases is now fifty. They include one Prime Minister, eleven Government Ministers, four prefects, seven bourgmestres and many other high ranking officials.’ ICTR Newsletter June 2005, at p.1.

¹⁶ Articles 7, 6 and 25 respectively of the Statutes of the ICTY, ICTR and ICC.

¹⁷ In *Tadic*, Jurisdiction, para. 128, the appellant argued that customary principles applicable to internal armed conflicts do not entail individual criminal liability ; individual criminal responsibility with regard to crimes against humanity applicable in internal armed conflict was generally not contested, L. C.Green, ‘War Crimes, Crimes Against Humanity, and Command Responsibility’ (1997) *L Naval War College Review*, sequence 358, at pp.23-24 (<http://www.nwc.navy.mil/press/review/1997/spring/rtocsp97.htm>); Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/1994/674 (27 May 1994) Annex, para.75.

¹⁸ D. Plattner, ‘The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts’(1990) 278 *IRRC* 409, at p.414; L. C. Green, *ibid.*, at pp.22-23; Final Report of the Commission of Experts, *ibid.*, paras.52 and 54

‘but cannot abjure the criminality of the norms in question.’¹⁹ Non-attachment of individual criminal responsibility to common Article 3 and Additional Protocol II obligations would tend to confuse criminality with jurisdiction and penalties.²⁰ As far as criminality is concerned, there is no legal rationale for treating the perpetrators of humanitarian law violations in internal armed conflict more moderately than those who commit such violations in international armed conflicts.²¹

Therefore to find the individual criminal responsibility in customary law, the ICTY in the *Tadic* case based its decision on the conclusion of the International Military Tribunal at Nuremberg that ‘finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches.’²² It applied the principle that since international crimes are committed by natural persons and not by abstract entities, enforcement of international law is only feasible by punishing such individuals for such crimes and determined that customary international law imposes individual criminal responsibility in internal armed conflicts.²³ The customary status of individual criminal liability in internal armed conflict determined in the *Tadic* case was reiterated by the ICTR with regard to common Article 3 and Article 4 of Additional Protocol II.²⁴ Due to the confirmation of the customary status of the principle of individual criminal responsibility for war crimes committed in internal armed conflicts by the ICTY and ICTR jurisprudence and by its inclusion in the Statute of the ICC, prosecution and punishment of war crimes have become a reality in the protection of IDPs.

¹⁹ C. Meindersma, ‘Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws and Customs of War Under Article 3 of the Statute of the International Criminal Tribunal for the Former Yugoslavia’ (1995) XLII, *NILR* 375, at p.396

²⁰ T. Meron, ‘International Criminalization of Internal Atrocities’ (1995) 89 *AJIL* 554, at p.561

²¹ *Ibid.*

²² *Tadic, Jurisdiction*, para.128.

²³ *Ibid.*; the Appeals Chamber stated in *ibid.*, para.134 ‘... customary international law imposes criminal liability for serious violations of common article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife ; *Prosecutor v. Anto Furundzija*, IT-95-17/1, 10 December 1998, Trial Chamber II, para.140 ; for a detailed discussion on individual criminal responsibility asserted by the Appeals Chamber in *Tadic*, *Jurisdiction*, see L. Moir, *The Law of Internal Armed Conflict*, at pp.156-160; *Akayesu*, Trial Chamber, para. 617.

²⁴ *Akayesu, ibid* ; *Prosecutor v. Rutaganda*, para.90; *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgment and Sentence, 27 January 2000, para.242; *Prosecutor v. Kayishema and Ruzindana*, Case no. ICTR-95-I-T, Judgment and sentence, 21 May 1999, paras.156-157.

The scope of individual criminal responsibility is important to the effectiveness of the protection of IDPs. Articles 7(1) and 6(1) of the Statutes of the ICTY and ICTR respectively provide individual criminal responsibility for planning, instigating, ordering, committing or otherwise assisting in the commission of such international crimes. These provisions predominantly impose individual criminal responsibility on the perpetrator for 'physical perpetration' of a crime personally committed by himself or for the 'culpable omission' when he has a duty to act under criminal law.²⁵

To achieve the objectives of effective retribution and deterrence, in addition to those who actually committed the crimes, the superiors who planned and ordered such crimes must be punished. In addition to military commanders, the term 'superiors' includes 'political leaders and other civilian superiors in positions of authority.'²⁶ Their official capacity would in no way relieve them from criminal responsibility or mitigate punishment.²⁷ Moreover, the incumbent superiors in high ranking positions cannot claim personal or substantive immunities concerning their unlawful activities committed in their official capacity under international law, to avoid the exercise of jurisdiction by international criminal courts.²⁸ Thus, two types of responsibility can be imposed on the superiors for the purpose of prosecution for international crimes, namely, joint criminal enterprise and command responsibility.

²⁵ *Prosecutor v. Tadic*, Case No.IT-94-1A (15 July 1999) Appeals Chamber, Judgment,para.188; also see *Prosecutor v. Ntagerura, Bagambiki and imanishimwe* case No.ICTR-99-46-T (25 February 2004) Trial Chamber, para.659 for the situations in which such culpable omissions occur in terms of criminal law as a principal perpetrator; however those who have actually committed such crimes can *reduce* their responsibility on the defence of superior orders; but, Article 33 of the Statute of ICC *absolves* the subordinate from responsibility with regard to war crimes, by departing from Arts. 7(4) and 6(4) of the Statutes of ICTY and ICTR, see L. Moir, *The Law of Internal Armed Conflict*, at pp.183-88.

²⁶ *Prosecutor v. Delalic, Mucic, Delic and Landzo*, Appeals Chamber, Case No. IT-96-21-A, Judgment of 20 February 2001 (hereafter *Celebici*, Appeals Chamber) para.195, (in terms of Article 7(3) of the Statute of the ICTY), (thus the term superior is used hereafter neutrally and whenever specification is needed civilian superior or military commander is used).

²⁷ Arts. 7 (2),6 (2) and 27(1) respectively of the Statutes of ICTY,ICTR and ICC.

²⁸ Art.27(2) of the Statute of the ICC; the ICJ in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 14 February 2002, para.61 (hereafter *Arrest Warrant Case*) stated that incumbent or former foreign ministers may not enjoy immunity from criminal prosecution before international criminal tribunals.

i. Joint Criminal Enterprise

Due to the very nature of the internal conflicts, the crimes committed therein often do not result ‘from the criminal propensity of single individuals but constitute manifestations of collective criminality.’²⁹ Even though widespread or systematic violations such as murder, destruction of houses, property and forcible transfer are committed by some members of a group in pursuance of common criminal plan, the role of other members (often superiors) in the contribution and participation in the accomplishment of the commission of such crimes cannot be underestimated.³⁰ The ‘moral gravity’ involved in their participation is not less or different from that of who have actually committed such crimes.³¹ Therefore, it is crucial to make the superiors criminally responsible as co-perpetrators, rather than charging them with for a lessened form of criminal responsibility, as aiders and abettors.³²

The doctrine of joint criminal enterprise or the doctrine of common purpose or design which is established in customary international law has been derived implicitly from its Statute by the ICTY.³³ The Appeals Chamber of the ICTY in the *Tadic case*, by resorting to a purposive interpretation of Article 7(1) of the Statute of ICTY, stated that, in addition to actual commission, ‘the commission of one of the crimes envisaged in Articles 2,3,4 or 5 of the Statute might also occur through participation in the realisation of a common design or purpose.’³⁴ Therefore to the extent that a participant shares the purpose of the joint criminal enterprise with other participants it can be considered as a form of ‘commission’ as stated in Article 7(1) of the Statute.³⁵ Accordingly, a superior can be charged as a co-perpetrator, for instance, in the commission of expulsion of civilians from their places of residence, even though he has not actually committed such a crime, on the grounds of his participation in planning, ordering or otherwise aiding and abetting in the accomplishment of the crime.

²⁹ *Tadic*, (15 July 1999) para.191

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*, para.192

³³ *Ibid.*, para.220;

³⁴ *Ibid.*, para.188

³⁵ *Prosecutor v. Milutinovic, Sainovic and Ojdanic*, (*Ojdanic*, Case) Case No.IT-99-37-AR72 (21 May 2003) Decision on Dragoljub Ojdanic’s Motion Challenging Jurisdiction –Joint criminal enterprise, para. 20; *Prosecutor v. Krnojelac*, Appeals Chamber, para.73.

Individual responsibility on the basis of joint criminal enterprise was applied in internal armed conflicts in *Prosecutor v. Krnojelac* by the Trial Chamber, and it was applied in the context of an ‘armed conflict’ in Bosnia and Herzegovina for violations of Articles 3 and 5 pursuant to Article 7(1) of the ICTY Statute.³⁶ By using the mode of liability of joint criminal enterprise, superiors can be made responsible not only for the crimes committed by other participants within the common purpose,³⁷ but also for the crimes committed by them outside the common purpose, if they are a natural and foreseeable consequence of carrying out such common purpose.³⁸

The first form of joint criminal responsibility is related to ‘concentration camp cases or like situations’³⁹ where the crimes have been committed by the military or administrative units which runs the camp in pursuance of a common design.⁴⁰ If the accused is in a ‘position of authority’ within such situation and has the power to take care of the wellbeing of the inmates, he would be considered as a co-perpetrator for crimes of inhumane treatment committed therein. This form of joint criminal enterprise can be considered relevant in cases of IDP camps controlled by the government and run by their administrative units under a civilian superior. If the person in authority with other civilians who are responsible for the care of IDPs actively participates in the enforcement of the system by encouraging or aiding and abetting in the ill-treatment of such IDPs, he would be responsible as a co-perpetrator for such ill-treatment.⁴¹ Intent to further such a repressive system against IDPs can be inferred from the position of authority of the accused and the functions attached to it.⁴²

³⁶Case No.IT-97-25-T, Trial Chamber II, Judgment (15 March 2002) paras.78-87, however, the Trial Chamber did not impose responsibility on the basis of Joint criminal enterprise as the shared state of mind of the accused in the crime had not been established, *ibid.*, para.87; in the *Ojdanic* Case, the Appeals Chamber in the context of the existence of an ‘armed conflict’ in Kosovo in the Federal Republic of Yugoslavia held that the elements of joint criminal enterprise are based on customary law, paras.21,33 ; *Tadic*, Appeals Chamber, (15 July 1999) paras. 222-23.

³⁷ *Tadic*, *ibid.*, para.202

³⁸ *Ibid.*, para.204; the Appeals Chamber considered of three forms of Joint criminal enterprise but it regarded the first two as similar basic forms, paras.202-03;the forms described herein are a basic and an extended form of Joint criminal enterprise i.e., second and third forms as described by the Appeals Chamber respectively. see *ibid.*, para.220

³⁹ *Prosecutor v. Vasiljevic* Case No.IT-98-32-T, Trial Chamber, Judgment of 29 November 2002, para.64

⁴⁰ *Tadic*, Appeals Chamber, (15 July 1999) para.202

⁴¹ *Ibid.*

⁴² *Ibid.*,para.203

As far as the second form of joint criminal enterprise is concerned, the following would explain such liability:

An example of this would be a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region (to effect “ethnic cleansing”) with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of those civilians. Criminal responsibility may be imputed to all participants within the common enterprise where the risk of death occurring was both a predictable consequence of the execution of the common design and the accused was either reckless or indifferent to that risk.⁴³

In particular, such an extended criminal responsibility can be invoked with regard to a superior with *de facto* or *de jure* power as he would have significantly contributed to such joint criminal enterprise and therefore could have been well aware that certain consequences were the most likely outcome of such joint criminal enterprise and yet willingly took the risk.⁴⁴

However, such an extended criminal liability is not part of the joint criminal enterprise in the Statute of the ICC, as it requires that the contribution to the commission of the crime shall be intentional and either be made with the aim of furthering the criminal purpose or the participant must have the knowledge of the specific crime intended by the group.⁴⁵ As the Statute of the ICC does not contain any reference to the extended form of liability that requires foresight that crimes which are not within the common plan would be committed, but for the intended or known crime, extended form of the concept of joint criminal enterprise as applied by the ICTY may not be applicable. If such a restrictive approach is adopted, this would clearly reduce the scope of individual criminal liability to be applied by the ICC and thereby the protection of IDPs.

ii. Command Responsibility

Making military commanders or civilian superiors responsible for the acts or omissions of their subordinates resulting in international crimes is also another

⁴³ *Ibid.*, para.204.

⁴⁴ *Prosecutor v. Milosevic et al.*, paras.16-18.

⁴⁵ Art.25(3)(d) of the Statute of the ICC; see K. Ambos, ‘Article 25: Individual Criminal Responsibility’ in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p.475, at pp.483-86.

method of effective deterrence. The superior – subordinate relationship is implicit in ‘ordering’ an unlawful act.⁴⁶ Superiors who ‘order’ such unlawful ‘acts’ to be committed by their subordinates incur direct command or superior responsibility for commission even without actually inflicting harm on displaced civilians.⁴⁷ It is a form of commission of a crime by ordering ‘through another person’ as stated in Article 25(3)(a) of the Statute of the ICC.⁴⁸

Indirect command or superior responsibility (command responsibility *strictu sensu*) makes the commanders or superiors further liable for the failure on their part to prevent or punish the unlawful acts committed by their subordinates. Such indirect or imputed command or superior responsibility arises from the relationship between superior and subordinate and not from the direct action of ordering the subordinate. Thus, the superior would become liable for not preventing the crime from being committed in the first place and then for not punishing the perpetrators after being informed of the commission of the crime.

As such, the applicability of such doctrine of command or superior responsibility in internal armed conflicts becomes all the more important in the deterrence of international crimes. It can be a crucial safeguard in the protection of IDPs where there is lack of evidence to prove the direct command or superior responsibility. For instance, in cases of the commission of forced displacement and destruction of houses, if the evidence with regard to the ‘ordering’ of such actions by the superior is in dispute, the superior can be charged with these crimes on the basis of imputed responsibility, if he knew or had reason to know of the commission of such crimes by his subordinates but failed to prevent or punish them.

The ICTY recognised that the doctrine of command or civilian superior responsibility is applicable to internal armed conflict.⁴⁹ Moreover, it has been confirmed by the Trial Chamber of the ICTY that the following elements of the

⁴⁶ K. Ambos, ‘Article 25: Individual Criminal Responsibility’ at p.480.

⁴⁷ Arts.7(1), 6(1) and 25(3)(b) respectively of the Statutes of ICTY,ICTR and ICC.

⁴⁸ K.Ambos, ‘Article 25:Individual Criminal Responsibility’, at p.480

⁴⁹*Prosecutor v. Hadzihasanovic and Others*, Case No.IT-01-47-PT,Trial Chamber, (12 November 2002) (Decision on Joint Challenge to Jurisdiction) paras.173-4 and 179; the Appeals Chamber in the same case upheld this point, Case IT-01-47-AR72 (16 July 2003) Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, para.18; *Prosecutor v. Aleksovski*, Trial Chamber, Judgment, paras. 46,66-81.

doctrine of command or superior responsibility contain the same elements as those applicable to international armed conflicts: ‘the existence of a superior-subordinate relationship; the superior knew or had reason to know that the criminal act was about to be or had been committed; the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof.’⁵⁰

Discussion of these elements is important to assess the extent of protection afforded to IDPs. The first element concerns a relationship based on a hierarchy where the superior has ‘effective control’ of his subordinates in the sense of ‘material ability’ to issue orders to prevent unlawful acts and to sanction the perpetrators.⁵¹ It is to be noted that imputed superior responsibility is imposed for the failure of the superior to act in the above manner when crimes were being committed or about to be committed. The non-restriction of such superior responsibility to official authorities and the extension of it to anyone acting as a *de facto* superior would have the effect of broadening the responsibility of superiors as perpetrators.⁵² On this basis, the decisive criterion for superior responsibility is ‘the actual possession or non-possession, of powers of control over the actions of subordinates.’⁵³

The second element of superior responsibility is concerned with the *mens rea* of the commander or the civilian superior. The *mens rea* required by the criterion of ‘had reason to know’ means having possession of such information that would place him on notice of the risk of such crimes being committed or about to be committed, indicating the need for further investigation.⁵⁴ However, this does not mean that a superior has a ‘duty to know’ everything that happened within the scope of his jurisdiction. It is sufficient to be proven that some information is available, to warrant further investigation.⁵⁵ Therefore, a superior cannot make an excuse that the information available was not sufficient to reach the conclusion of existence of crimes and that therefore he has not failed in his responsibility.⁵⁶

⁵⁰ *Hadzihasanovic and Others*, Trial Chamber, para.174

⁵¹ *Celebici*, Trial Chamber, para.378.

⁵² *Aleksovski*, Trial Chamber, para.76

⁵³ *Celebici*, Trial Chamber, para.370

⁵⁴ *Ibid.*, para.383

⁵⁵ *Ibid.*, para.393

⁵⁶ *Ibid.*, para.393

The Trial Chamber of the ICTY consciously avoided a distinction between the standard of *mens rea* required for the responsibility of a commander and a superior even though it was aware of the high standard of *mens rea* for civilian superiors in Article 28(2) (a) of the ICC Statute.⁵⁷ The Statute of the ICC, in relation to civilian superiors, requires that '[t]he superior either knew or consciously disregarded information which clearly indicated' the commission of crimes by subordinates. This can be distinguished from the *mens rea* - 'owing to the circumstances at the time, should have known' required for the responsibility of a 'military commander or person effectively acting as a military commander' which includes the command responsibility of political leaders such as a president who is a commander in chief of the armed forces.⁵⁸

'Consciously disregarded' occurs when the superior 'simply ignores information within his actual possession compelling the conclusion that criminal offences are being committed or about to be committed.'⁵⁹ This may be the situation of 'wilful blindness' which was considered in the *Celebici Case* as criminally actionable.⁶⁰ This situation can be distinguished from the standard required from the ICTY with regard to the responsibility of commanders and superiors according to which the liability attaches to the information 'in the possession of' as opposed to 'actual possession' and thereby does not require the superior to be 'actually acquainted himself with the information.'⁶¹ Therefore the standard of *mens rea* required in the Statute of the ICC for civilian superior responsibility is stricter than the one required by the ICTY, as the former makes it difficult to prove the commission of crimes by civilian superiors. The ICTR adopted the same standard of *mens rea* as the Statute of the ICC for civilian superiors.⁶² Additionally the Statute of the ICC requires in fairness to the civilian superiors who do not have control similar to that in the military hierarchy that the superior responsibility should be imposed only with regard to 'crimes concerned activities that were within the effective responsibility and control of the

⁵⁷ *Ibid.*, para.393,n.424

⁵⁸ Art. 28(1) of the Statute of the ICC.

⁵⁹ *Celebici*, Trial Chamber, para.387

⁶⁰ *Ibid.*

⁶¹ *Celebici*, Appeals Chamber, para.239

⁶² *Kayishema and Ruzindana*, paras.227-228

supervisor.’⁶³ This element tends to restrict the duty of the civilian superior to inform himself of the activities of his subordinates only to very narrow activities.

As to the third element of superior responsibility, what constitutes ‘necessary and reasonable measures,’ to prevent and punish, depends on the material ability of the superior and therefore this element has considerable connection with the first element. The power to sanction perpetrators which is a necessary consequence of the power to order in the military hierarchy cannot be expected from civilian superiors. If such standard was expected from a civilian superior, it would absolve most of them from their imputed responsibility. The Trial Chamber of the ICTY considered that it is sufficient for the *de facto* or *de jure* civilian superior to have the power to report to the relevant authorities the crimes committed so as to make it possible that those reports would initiate any investigation or disciplinary or criminal measure.⁶⁴

The standard of *mens rea* in the Statute of the ICC with regard to civilian superiors which has been applied by the ICTR has the tendency to minimize the conviction of civilian superiors in the administrative hierarchy of a state.⁶⁵ The encouraging feature in the Statute of the ICC in the prosecution of perpetrators is that the explicit provision of at least the imputed responsibility of a political leader ‘effectively acting as a military commander’ who orders or induces the displacement of civilians would be determined by the *mens rea* standard of the military commander.⁶⁶ In contrast, the ICTY provides more protection of

⁶³ Art. 28(2)(b) of the Statute of the ICC.

⁶⁴ *Alecksovski*, Trial Chamber, para.78

⁶⁵ G.R. Vetter, ‘Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)’ (2000) 25 *YJIL* 89, at pp.142-3.

⁶⁶ M.C. Bassiouni, and P. Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (New York, 1996) at p. 368 states that the ‘issue of the command responsibility of non-military personnel [political leaders] does not rely on whether they are themselves part of the military. The proper inquiry is whether they exercised command and control as effective military commanders. Thus, a distinction has to be made between the commander-in-chief, who may be a civilian, and other civilians who may be in the military chain of command and who have effective command and control responsibilities.[such as minister of defence] The difference is essentially of an evidentiary nature. Thus, a commander-in-chief,[usually the president] despite the title, may fail to exercise the full powers of the office. Conversely, a civilian who occupies a position of military command and control actually may make decisions on strategic or tactical matters or both.’ ;Y. Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict*, (Cambridge, 2004), at p.243 states that ‘[i]t has always been acknowledged that senior politicians taking an active part in the direction of military affairs –such as Ministers of Defence–may be ‘assimilated to a military commander.’

deterrence to IDPs by treating the superior responsibility of civilians and military commanders with identical standards of *men rea*.⁶⁷

b. Limitations With Regard to War Crimes

Limitations applied by the ICTR with regard to individual criminal responsibility including superior responsibility of civilian superiors with regard to war crimes which caused massive displacement of civilians and extermination of IDPs who sought refuge in sites such as churches, Mosques and schools, have adversely affected the conviction for war crimes such as murder, cruel treatment, and rape as torture.⁶⁸ For instance, in *Prosecutor v. Kamuhanda*, IDPs who had sought shelter in the compound of the Gikomero Parish Church, which was considered as a ‘place universally recognised to be a sanctuary,’ were attacked and killed.⁶⁹ These limitations are: the class of perpetrators, which is concerned with the personal jurisdiction of war crimes under common Article 3 and Protocol II; and the nexus required between the crime and the armed conflict, which is concerned with the material jurisdiction of such crimes.⁷⁰

Although the ICTR in the *Prosecutor v. Akayesu* broadly accepted that civilian superiors can be made responsible for war crimes, it found that ‘the application of the principle of individual criminal responsibility, enshrined in Article 6(3), to civilians remains contentious.’⁷¹ Therefore it limited the application of individual criminal responsibility to those individuals ‘who were legitimately mandated and expected, as public officials or agents or persons otherwise holding public authority or *de facto* representing the government, to support or fulfil the war efforts.’⁷² In the *Akayesu case*, the very fact that Akayesu was a bourgmestre (mayor) with exclusive control over the communal police, responsible for the maintenance of law and order in the commune and with

⁶⁷ *Prosecutor v. Krnojelac*, Trial Chamber II, para.94

⁶⁸ See for instance, *Kayishema and Ruzindana*, paras.592-93; *Musema*, Trial Chamber, Judgment and Sentence, paras.360-73

⁶⁹ *Prosecutor v. Kamuhanda* Case No. ICTR-95-54A-T (22 January 2004), para.764; *Kayishema and Ruzindana*, Sentence, para.16, where the Trial Chamber, in considering aggravating circumstances, stated that his attack was on places ‘traditionally regarded as safe heavens, such as Mubuga Church.’

⁷⁰ *Musema v. The Prosecutor*, Case No. ICTR-96-13-A, (16 November 2001) Judgment Appeals Chamber, paras.244-275

⁷¹ *Prosecutor v. Akayesu*, Trial Chamber I, paras.631 –634 and para.491.

⁷² *Ibid.*, para.631; ICTR cited the example of a Tokyo trial in which the former Foreign Minister of Japan was convicted for crimes committed during the rape of Nanking, para.633.

considerable *de facto* powers and remained the ‘most important local representative of power at the centre’ demonstrated his connection with the government.⁷³ However, this stringent requirement that Akayesu should have represented the government to ‘support or fulfil the war effort’ led to his release from individual criminal responsibility for war crimes of murder, cruel treatment and rape by the Trial Chamber.⁷⁴ Similarly, in many cases concerning war crimes, this requirement resulted in the acquittal of perpetrators by the ICTR.⁷⁵

It seems, therefore, that only those civilian superiors who have some link with the *government party* to the armed conflict and ‘supported or fulfilled the war effort’ of the government can be made responsible for their acts under international humanitarian law.⁷⁶ Restricting the responsibility only to the public officials of the state apparatus as parties to the conflict is an unnecessary restriction of the scope of humanitarian law, as under humanitarian law, insurgents also have obligations to comply with.⁷⁷ As a result, IDPs would not be protected against violations of humanitarian law by civilian superiors of the insurgents. Moreover, superior responsibility for omissions can only be imposed on a civilian superior ‘where there exists a legal obligation to act’ does not necessarily mean that a legal obligation can exist on a public capacity alone.⁷⁸ Civilian superiors of a private business enterprise can also commit war crimes.⁷⁹

The position taken by the Trial Chamber of the ICTR with regard to civilian superiors in the *Akayesu case* cannot be considered as authoritative, as such a condition had not been required by those cases decided by the Nuremberg and Tokyo Tribunals.⁸⁰ Potential perpetrators should be interpreted widely in the context of an internal armed conflict, to enhance the protective purposes of

⁷³ *Akayesu*, Trial Chamber, para.60.

⁷⁴ *Ibid.*, paras.,643-44

⁷⁵ *Musema*, Trial Chamber, para.969-75; *Kayishema and Ruzindana*, paras.590-624; *Rutaganda*, Trial Chamber, paras.442-445.

⁷⁶ R. Provost, *International Human Rights*, at pp.88-89

⁷⁷ *Ibid.*, at p.89

⁷⁸ *Celebici*, Trial Chamber,para.334

⁷⁹ See R. Provost, *International Human Rights*, at pp.79-89 for detailed discussion of such cases decided by the International Military Tribunal and subsequent war crimes trials concerning civilians.

⁸⁰ See *Hirota case* in *Akayesu*, Trial Chamber, paras.490-91; similarly in *Musema* the ICTR examined the cases decided by Nuremberg and Tokyo Tribunals which have not required such a condition and came to the opposite conclusion, paras.268-275.

humanitarian law norms, as in such circumstances, not only the government and insurgents, but the whole nation, including the civilians belonging to each party, become enemies.⁸¹

The additional requirement ‘to support or fulfil the war effort’ is an undue restriction of the scope of individual criminal responsibility of civilian superiors as this incorporates the element of crimes against humanity, namely a connection between the ‘crime and a broader attack against a civilian population’ as an element of war crime.⁸² Such an element is not required in the ICTY jurisprudence or in the Elements of Crimes of the statute of the ICC.

The delimitation of civilian perpetrators as ‘public agents’ was rejected by the Appeals Chamber in the *Akayesu case*, on the basis that neither the Statute of the ICTR nor common Article 3 or Article 4 of Additional Protocol II explicitly states such a requirement.⁸³ It is true that most crimes are committed by the commanders or combatants of either party, thus reflecting the common Article 3 requirement of close nexus between the violations and the armed conflicts.⁸⁴ However, the Chamber stated that such a ‘special relationship’ is not required as a ‘separate condition’ to invoke the application of common Article 3 and therefore Article 4 of the Statute of ICTR.⁸⁵ The reason for its decision is that exclusion of certain perpetrators who do not fall within the specific category is detrimental to the minimum protection provided for victims under common Article 3 which ‘implies necessarily effective punishment’ of every perpetrator who violates it without discrimination.⁸⁶ Therefore, it is not the nexus between the civilian superior and a party to the conflict but a nexus between the acts and the armed conflict that is necessary to establish responsibility under war crimes.

However, the requirement that there must be a *direct nexus* between the actions of the perpetrator and the armed conflict further restricts the scope of

⁸¹ R. Provost, *International Human Rights*, at pp.98,102; C. Kress, ‘War Crimes Committed in Non-International Armed Conflict and the Emerging System of International Criminal Justice,’ (2000)30 *Israel Yearbook of Human Rights*, 103, at p.123 states, that requiring the perpetrators to have a link with either party to the conflict is a ‘significant restriction of the potential perpetrators of civil war crimes.’ See above, Ch.2 for the nature of international humanitarian law obligations.

⁸² R.Provost, *International Human Rights*, at pp.100-101.

⁸³ *Prosecutor v. Akayesu*, Judgment, Appeals Chamber (1 June 2001) paras.432-443.

⁸⁴ *Ibid.*, para.444

⁸⁵ *Ibid*

⁸⁶ *Ibid.*, para.443

individual criminal responsibility. Certain delimitation is necessary as otherwise, crimes committed for reasons not related to the conflict, which could be sanctioned under the penal law of the country, would also be covered by common Article 3 or Additional Protocol II, contrary to their objective of protecting only the victims of internal armed conflict.⁸⁷ The ICTR construes the requirement of a nexus between the crime and the armed conflict as meaning that the crime should have been committed ‘to support or fulfil the war effort,’ in the sense of having a ‘direct connection.’⁸⁸ The ICTY, however, applied a relatively flexible interpretation of the nexus requirement. According to the ICTY, the crime must be ‘closely related,’ rather than ‘directly connected’ to hostilities occurring in other part of the territory.⁸⁹ Therefore it is not necessary to show that the crime ‘be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict’.⁹⁰ This direct nexus is the exact requirement that was required by the ICTR.

It is to be noted that even the Elements of Crimes of the Statute of the ICC require a nexus whereby the crime ‘took place in the context of and was associated with an armed conflict not of an international character.’⁹¹ This requirement is similar to that of the ICTY and more flexible than the ICTR requirement. ‘In the context of’ means the geographical scope of a non-international armed conflict which is beyond the narrow geographical context of actual combat zone and thereby in the whole territory under the control of a party and until a peaceful settlement is reached.⁹² ‘Associated with’ means the nexus between the conduct and the armed conflict.⁹³ The difference in this requirement of the Elements of Crimes to the Statute of the ICC and that of the ICTY is that the knowledge of the perpetrator as to the existence of an armed conflict, which

⁸⁷ *Kayishema and Ruzindana*, para.189

⁸⁸ *Akayesu*, Trial Chamber, paras, 640-44, para.631; *Kayishema and Ruzindana*, para.604.

⁸⁹ *Tadic*, Jurisdiction, para.70; *Celebici*, Trial Chamber, paras.193

⁹⁰ *Prosecutor v. Dusko Tadic*, IT-94-I-T (7 May 1997) Trial Chamber, Judgment, para.573; this view was endorsed by *Celebici*, Trial Chamber, para.195.

⁹¹ *Elements of Crimes*, at p.18.

⁹² K. Dormann, *Elements of War Crimes Under the Rome Statute of the International Criminal Court: Sources and Commentary* (Cambridge, 2002) at pp 19 and 387.

⁹³ *Ibid.*, at pp. 19-20 and 388.

forms one of the four elements that explains the subject matter jurisdiction for war crimes, is additionally necessitated by the former.⁹⁴

The requirement of a direct connection and therefore that the act was to be in the furtherance of the war effort would restrict the scope of application of individual criminal responsibility and thereby the protective objective of the tribunals and the Court. Such a strict interpretation of the nexus requirement adopted by the ICTR, particularly in offences committed by civilians in positions of authority, resulted in their acquittal from conviction for war crimes until the decision of the Appeals Chamber in *Rutaganda*.⁹⁵ Since it is one of the substantive legal requirements for the applicability of the war crimes, failure to establish nexus would go to the merits of the case and consequent acquittal of the accused.

In *Rutaganda*, the Appeals Chamber agreed with the *Kunarac* Appeals judgment of the ICTY as to its nexus requirement that the acts were ‘closely related’ to the armed conflict, which can be explained as that the perpetrators ‘acted in furtherance of or under the guise of the armed conflict.’⁹⁶ It means that the armed conflict must, ‘at a minimum, have played a substantial part in the perpetrator’s ability to commit, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.’⁹⁷ The *Kunarac* judgment further explains the factors to be taken into account, *inter alia.*, in determining whether an act is in closely or sufficiently related to an armed conflict as:

the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.⁹⁸

⁹⁴ The *Elements of Crimes*, at pp.38-48 requires that ‘[t]he perpetrator was aware of factual circumstances that established the existence of an armed conflict.’ This could be proved separately or could be derived implicitly from the objective nexus requirement, K. Dormann, *Elements of War Crimes Under the Rome Statute*, at pp.20-22.

⁹⁵ *Musema*, Trial Chamber, para.969-75; *Kayishema and Ruzindana*, paras.590-624; *Rutaganda* Trial Chamber, paras.442-445; R. Kolb, ‘The Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals on Their Jurisdiction and on International Crimes’(2000)71 *BYIL* 259, at pp.271-72.

⁹⁶ *Rutaganda v. Prosecutor*, Case No. ICTR-96-3-A, Judgment, Appeals Chamber (26 May 2003) paras.569-70; *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeals Chamber, para.58.

⁹⁷ *Kunarac, Kovac and Vukovic*, *ibid.*

⁹⁸ *Ibid.*, para.59.

According to the Appeals Chamber in *Rutaganda*, ‘under the guise of the armed conflict’ does not merely mean ‘at the same time as the conflict’ or in all circumstances created in part by the armed conflict.’⁹⁹ Thus, crimes committed by a non-combatant taking advantage of the armed conflict situation to fulfil his personal hatred do not constitute war crimes under Article 4 of the ICTR.¹⁰⁰ On the contrary, for instance, ‘were combatants who took advantage of their positions of military authority to rape individuals whose displacement was an express goal of the military campaign in which they took part,’ it would constitute a war crime.¹⁰¹ To determine a ‘close’ relationship, several of the above stated factors should be present rather than one, and this is even more important when a perpetrator is a non-combatant such as a civilian superior.¹⁰² The reason for application of the ‘public agent’ requirement by the Trial Chamber in the *Akayesu* case concerning a civilian superior may have been due to the difficulties in establishing a nexus between armed conflict and crimes committed by civilian superiors, especially in the context of the genocide against the Tutsi, which was described by the Trial Chamber as having ‘occurred concomitantly with the...conflict’, but ‘fundamentally different from the conflict.’¹⁰³ However, as the special relationship of perpetrators is not required for the application of common Article 3 or Article 4 of Additional Protocol II, the ‘nexus’ requirement should be distinguished from the issue of ‘potential perpetrator.’¹⁰⁴

The flexible nexus requirement adopted by the ICTR in *Rutaganda* by the Appeals Chamber has been followed since then by the ICTR.¹⁰⁵ Such an approach is in line with the fact that humanitarian law is applicable to the whole territory and not to the combat zone alone.¹⁰⁶ However, ICTR decisions have not

⁹⁹ *Rutaganda v. Prosecutor*, Appeals Chamber, para.570.

¹⁰⁰ *Ibid.*

¹⁰¹ *Ibid.*

¹⁰² *Ibid.*

¹⁰³ *Akayesu*, Trial Chamber, para.128; *Kayeshema and Rizindana*, para.440

¹⁰⁴ H. Spieker, ‘The International Criminal Court and Non-International Armed Conflicts’ (2000)13 *LJIL* 395, at p.416

¹⁰⁵ *The Prosecutor v. Semanza*, Case No.ICTR-97-20-T Judgment and Sentence(15 May 2003) para.516-18.

¹⁰⁶ On the contrary in *Kayishema and Ruzindana*, at para.610, it was stated that ‘there were no military operations in Kibuye Town nor in the area of Bisesero in this period of time. There is

been consistent in the application of the nexus requirement, due to the uncertainty as to the nature of the policy of genocide, whether it was pursued as a policy of armed conflict between Rwandan Armed Forces (RAF) and Rwandan Patriotic Forces (RPF) or as a separate policy not related to such armed conflict.¹⁰⁷ In the latter situation, the nexus test would have to be applied strictly to find a specific nexus between the crime and the armed conflict to establish war crimes.¹⁰⁸ In the former situation, a less stringent application of the nexus requirement would be sufficient, as RPF was identified with the Tutsi ethnic minority, which gave the 'pretext' for such large scale killings and other abuses against mostly Tutsi civilians who were displaced by armed conflicts and sought refuge at sites of Mosques and churches.¹⁰⁹ The difficulty in determining the nature of the genocide policy may also have been exacerbated by the fact that almost all the violations involved civilians within the power of the party to the conflict (Article 4 of Additional Protocol II) and not the killings of civilians in hostilities.

The guilty plea made by the accused, the Prime Minister of the interim government, in *Prosecutor v. Kambanda*, concerning the widespread and systematic attack on civilians, contained admissions that would be pertinent to the relevant facts of the armed conflict in Rwanda. He indicated that high level discussions were held between the President, the Prime Minister and the Chief of Staff of the FAR to discuss FAR's 'support in the fight against the Rwandan Patriotic Front (RPF) and its "accomplices," understood to be the Tutsi and Moderate Hutu' groups that existed within military, militia and political structures which had planned and eliminated 'Tutsi and Hutu political opponents.'¹¹⁰ These facts clearly indicate that Tutsi and Moderate Hutu civilians were identified with RPF as accomplices and political opponents and their

also no evidence that the civilian population, at the four sites in question, was affected by military operations which were under way in other regions of Rwanda.'

¹⁰⁷ *Akayesu*, Trial Chamber, paras.127-8; in *Kayishema and Ruzindana*, it was stated that atrocities though committed during armed conflict, they were committed 'as a part of a distinct policy of genocide; they were committed parallel to, and not as a result of, the armed conflict.' para.621;

¹⁰⁸ Dissenting Judgment of Judge Ostrovsky, in *Prosecutor v. Semanza*, (15 May 2003) para.31-32; in *Prosecutor v. Ntagerura, Bagambiki, and Imanishimwe* Case No.ICTR-99-46-T (25 February 2004) paras.707-8, the Trial Chamber identified two types of crimes that occurred in Cyangugu: widespread attacks against Tutsi civilians and 'related systematic attack on political grounds against civilians with suspected ties to the RPF.'

¹⁰⁹ *Semanza*, (15 May 2003) para.516-22.

¹¹⁰ *Prosecutor v. Kambanda*, Case No.ICTR-97-23-S, Judgment and Sentence (4 September 1998) para.39

killings occurred as a result of the armed conflict and not distinct from it.¹¹¹ Therefore, a close nexus between the crime and the armed conflict might be established without much difficulty.

It is important that the ICTR settle the nature of the situation in Rwanda as a whole, rather than determining it on a case-by-case basis when determining the existence of a nexus between the crime and the armed conflict.¹¹² The latter approach would lead to inconsistent decisions as to the responsibility under war crimes, and perpetrators of war crimes would not be effectively punished, even by the flexible application of the nexus requirement.

2. Reparations

Where IDPs are concerned, it is axiomatic that retributive justice alone is not sufficient for the process of reconciliation but restorative justice in the form of restitution, compensation or otherwise is important for the process of reconciliation among societies affected by conflict, to encourage safe and dignified return of IDPs to their places of residence. In this regard the Statute of the ICC is significant as it provides for restorative justice by providing reparations along with the imposition of criminal responsibility.

Granting of reparations under the Statute of the ICC should be distinguished from compensation granted in pursuance of state responsibility under international human rights Conventions, which is discussed later in this chapter, because the international criminal tribunals only deal with the individual criminal responsibility of natural persons and not the responsibility of the States.¹¹³ Under the Statute of the ICC, victims can file claims for reparations, which can be awarded 'directly against a convicted person.'¹¹⁴ This is the first international

¹¹¹ Similarly, in *Niyonteze v. Public Prosecutor* and in *Public Prosecutor v. the 'Butare Four'* Tribunals of Swiss and Belgium respectively considered that genocide was committed as a result of armed conflict instead of considering them as two separate events. See L. Reydams, 'Niyonteze v. Public Prosecutor' Tribunal Militaire de Cassation (Switzerland) April 27, 2001, (2002) 96 *AJIL* 231; L. Reydams, 'Belgium's First Application of Universal Jurisdiction: the *Butare Four* Case' (2003)1 *Journal of International Criminal Justice* 428.

¹¹² See L. Van Den Herik and E. Van Sliedregt, 'Ten Years Later, Rwanda Tribunal Still Faces Legal Complexities: Some Comments on the Vagueness of Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes' (2004) 17 *LJIL* 537 at p.556.

¹¹³ Arts.6, 5 and 25 of the Statutes of ICTY, ICTR and ICC; C.P. J. Muttukumar, 'Reparations for Victims' in F. Lattanzi and W. A. Schabas (eds.), *Essays on the Rome Statute of International Criminal Court*, vol.I, (il Sirente,1999) p.303, at pp. 307-09.

¹¹⁴ .Art. 75(2) of the Statute of the ICC; See generally, I.Bottigliero, *Redress for Victims of Crimes Under International Law* (Leiden, 2004) , at pp.193-247.

Convention that allows a standing to the victim in a court to receive reparations from a convicted person, as opposed to the state.¹¹⁵ Accordingly, a victim's request for reparation under Article 75 of the Statute of the ICC shall be made in writing to the registrar and contain particulars such as the description of the injury or loss or harm; location and date of incident and 'to the extent possible' the identity of the person responsible for the harm; 'to the extent possible' any relevant supporting documentation and the claims.¹¹⁶

It is to be noted that since IDPs are often not in a position to provide documentation, due to their situation, the requirement 'to the extent possible' does not necessitate the same from them. Apart from the request of the victim for reparations, the ICC can 'on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to or in respect of, victims.'¹¹⁷ Such a power of the ICC to initiate is beneficial to the IDPs who stay in areas far from the court, because in such situations 'it seemed improbable that any coherent claim would be mounted in an international Tribunal, especially if there was evidence of State complicity in the crimes.'¹¹⁸ The whole situation is in contrast with the position under the Statutes of ICTY and ICTR, since, notwithstanding the Tribunals can order for restitution as opposed to compensation in addition to imprisonment, victims do not have the *locus standi* to request the restitution of their 'property and proceeds acquired by criminal conduct.'¹¹⁹

Under the Statute of the ICC, 'victims' means 'natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court.'¹²⁰ Since the victims include persons other than those who have directly suffered, this definition is broader than the one applied under the Statutes of ICTY and ICTR, where victim means '[a] person against whom a crime over which the

¹¹⁵ Art.75(1) of the Statute of the ICC; Art.15(3) of the Statute of the ICC states that '[v]ictims may make representations to the Pre-Trial Chamber, in accordance with the Rules of Procedure and Evidence'; also see 19(3) and 68(3) of the Statute of the ICC.

¹¹⁶ Rule 94 of the Rules of Procedure and Evidence of the ICC (9.9.2002) (hereafter Rules of the ICC).

¹¹⁷ Art.75(1) of the Statute of the ICC.

¹¹⁸ C.P.J. Muttukumau, 'Reparations for Victims' at p.309; in addition wider publicity as to the reparation proceedings before the court would be given by the registrar with the assistance of relevant state parties and inter governmental organizations, Rule 96 of the Rules of the ICC.

¹¹⁹ Arts. 24(3) and 23(3) of the Statutes of the ICTY and ICTR; according to Rule 105(A) of the Rules of Procedure and Evidence of the ICTY, IT/32/Rev.36, Adopted on 11 February 1994, (contains amendment till 21 July 2005), and ICTR Adopted on 29 June 1995, (contains amendment till 7 June 2005) either the prosecutor or the court on its own initiative would hold a hearing for the restitution of the property or proceeds thereof; see above. Ch. 6, Section, D.

¹²⁰ Rule 85(a) of the Rules of the ICC.

Tribunal has jurisdiction has allegedly been committed'¹²¹ which is precisely limited to 'direct' victims.¹²² However, the definition of the Statute of the ICC is not explicit about the collective victims and the indirect victims who would be entitled to claim reparation on the basis of the harm suffered.

The Court may award reparations which include restitution, compensation and rehabilitation,¹²³ '[t]aking into account the scope and extent of any damage, loss or injury, ...on an individualized basis or, where it deems it appropriate, on a collective basis or both.'¹²⁴ It can therefore be stated that a collective form of reparation is also possible. Moreover, an award can be made through the Trust fund 'where the number of victims and the scope, forms and modalities of reparations makes a collective award more appropriate.'¹²⁵ These provisions indicate the possibility of granting reparations for collective victims. Thus, reparation for expenses incurred by displacement of a community as a direct result of a crime might be granted.¹²⁶ Moreover, since the definition is not confined to direct victims, it would at least involve indirect victims, namely, dependants and/or members of immediate family' as stated in the UN Declaration on victims, 1985.¹²⁷

Additionally, the definition of victims in the Statute of the ICC includes 'organisations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.'¹²⁸ Granting reparation for such organisations identified as victims of intentional direction of attack and destruction against their civilian and cultural property would help to reconstruct the life of IDPs affected by conflicts.¹²⁹

¹²¹ Rule 2(A) of the Rules of ICTY and Rule 2 of the Rules of the ICTR .

¹²² D. Donat-Cattin, 'The Role of Victims in ICC Proceedings,' in F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of International Criminal Court*, vol.I, (il Sirente, 1999) at p. 251, at pp.260-61.

¹²³ Art. 75(1) of the Statute of the ICC.

¹²⁴ Rule 97(1) of the Rules of the ICC; see Rule 98 of the Rules of the ICC on Trust Fund.

¹²⁵ Rule 98(3) of the Rules of the ICC.

¹²⁶ C. Muttukumar, 'Reparations for Victims,' at p.306.

¹²⁷ Art.1 of the UN Declaration on Basic Principles of Justice for victims of Crime and Abuse of Power, UN Doc.GA Res.40/34 (1985), Annex; D. Donat-Catin, 'The Role of Victims in ICC Proceedings,' at p.262

¹²⁸ Rule 85(b) of the Rules of the ICC.

¹²⁹ Art. 8(2)(e) (iv) of the Statute of the ICC recognises such attacks as a war crime in internal armed conflicts.

Notwithstanding the seemingly effective protection of reparations for victims provided in the Statute, its success depends largely on its enforcement. To locate, identify, trace, freeze and seize the property and assets of convicted persons, the cooperation of relevant states parties is necessary.¹³⁰ This is going to be the real challenge for the Court, especially *vis-a-vis* states which are unwilling or unable to cooperate with the ICC. However, the trust fund established for the ‘benefit of victims of crimes within the jurisdiction of the Court, and of families of such victims’ might be used to provide relief for those victims awarded reparations when enforcement is not possible due to the insolvency of the perpetrator or difficulties in recovering his assets.¹³¹

B. Prosecution in the National Courts of Third States on the Basis of Universal Jurisdiction

Apart from the above discussed prosecution in the international courts, prosecution in the national courts of a third state for international crimes committed in the home state of a perpetrator on the basis of universal jurisdiction is another way of asserting international criminal jurisdiction. The need to end impunity of perpetrators in the protection of persons affected by armed conflicts is expressed by the Special Rapporteur in the Report on the Situation of Human Rights in Somalia, in which the Rapporteur encouraged the prosecution of the suspects of war crimes and crimes against humanity in Somalia in the ‘national courts in countries where such suspects are said to live or frequently to travel to, such as Djibouti, Canada, Egypt, Ethiopia, Kenya, Italy, the United Kingdom, the United States of America and Yemen.’¹³² Universal jurisdiction can be defined as ‘criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.’¹³³ Thus, asserting universal

¹³⁰ Art. 93(1) (a),(k) of the Statute of the ICC; also see Art.109 of the Statute of the ICC.

¹³¹ Article 79(1) of the Statute of the ICC; C. Ferstman, ‘The Reparation Regime of the International Criminal Court: Practical Considerations’ (2002)15 *LJIL* 667, at pp.684-85.

¹³² E/CN.4/2000/110 (26 January 2000) para.32.

¹³³ Principle 1(1) of the Princeton Principles on Universal Jurisdiction,2001 (<http://www.princeton.edu/~lapa/principles.html>) (these principles were adopted by an assembly of scholars and jurists from around the world, in 2001,in Princeton University, New Jersey. M.C. Bassiouni was the Chair of the Drafting Committee).

jurisdiction means that the alleged crime may have no connection to the prosecuting state except for its nature, which transcends territorial restrictions and thereby is subject to the common concern of the community of nations.¹³⁴

Such universal jurisdiction can be exercised by a state over one accused of international crimes subject to certain conditions. Firstly, the alleged perpetrator should be present before the judicial body for trial;¹³⁵ according to the Princeton Principles, however, absence of the accused in the territory of the prosecuting state ‘does not prevent a state from initiating the criminal process, conducting an investigation, issuing an indictment, or requesting extradition,...’¹³⁶ This is because universal jurisdiction is a manifestation of jurisdiction to prescribe, which can be extraterritorial and distinct from jurisdiction to enforce which is strictly territorial.¹³⁷ Therefore, exercising universal jurisdiction in the preliminary stage as opposed to the trial stage in the absence of the perpetrator in criminal proceedings is justified in international law in order to initiate an investigation or to gather evidence to avoid its loss.¹³⁸

Thus, according to this view, universal jurisdiction can be exercised *in personam* or *in absentia* similar to territorial jurisdiction, nationality jurisdiction and passive personality jurisdiction to prescribe *in personam* or *in absentia*.¹³⁹ The views against universal jurisdiction to prescription *in absentia* in

¹³⁴ M.C. Bassiouni, ‘The History of Universal Jurisdiction and its Place in International Law’ in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, 2004) p. 39, at p.42.

¹³⁵ Principle 1(2) of the Princeton Principles; accordingly, the accused cannot be tried *in absentia* before the judicial body of the prosecuting state as it is contrary to Article 14 of the ICCPR; the Belgian War Crimes Act of 16 June 1993 amended by the Act of 10th February 1999 had granted universal jurisdiction to the Courts of Belgium not only to prosecute but also to have trials over war crimes of Additional Protocol II, crimes against humanity and Genocide without the presence of the accused in Belgian territory. See for the Act of 16 June 1993 Concerning the Punishment of Grave Breaches of International Humanitarian Law as amended by the Act of 10 February 1999, (1999) 38 *ILM* 921; E. David, ‘Universal Jurisdiction in Belgium Law’ (2002/03) XII *PYIL* 77.

¹³⁶ S.W. Becker, ‘Commentary on the Princeton Principles’ in *The Princeton Principles on Universal Jurisdiction*, 2001, p.39, at p.44.

¹³⁷ See R.O’ Keefe, ‘Universal Jurisdiction: Clarifying the Basic Concept’ (2004)2 *Journal of International Criminal Justice* 753, at p.740 and *et seq.*, for a detailed discussion of universal jurisdiction to prescribe; for various views on universal jurisdiction see S.W. Becker, ‘Universal Jurisdiction: How Universal is it? A Study of Competing Theories’ (2002/2003) XII *Palestine Yearbook of International law* 49.

¹³⁸ D. Vandermeersch, ‘Prosecuting International Crimes in Belgium’ (2005) 3 *JICJ* 400, at p.417; S.W. Becker, *ibid.*, at p.52

¹³⁹ R.O’ Keefe, ‘Universal Jurisdiction’, at pp.750, 755; *Arrest Warrant Case*, dissenting opinion of Judge Van Den Wyngaert, paras.52-58; see for contrary views: Separate opinion of Justice Gillaume in *Arrest Warrant case*, para. 9; L. Reydams, *Universal Jurisdiction: International and Municipal Legal Perspectives*, (Oxford, 2003) at p.230; A. Cassese, ‘Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction’ (2003) 1 *Journal of*

international law to commence investigations to collect evidence and to frame charges confuses it with the jurisdiction to enforcement *in absentia* which can be a violation of territorial integrity of a state.

Universal prescriptive jurisdiction is also in conformity with the extradition procedure that has to be resorted to by the prosecuting state later on for the surrender of the accused, as for such a request of extradition it has to establish a 'prima facie case of the person's guilt.'¹⁴⁰ Moreover, it is not contrary to the rights of the perpetrators to be *tried* in their presence.¹⁴¹ Above all, such an approach is conducive to the prosecution of lower-rank officers, whose travel abroad is not publicised like that of high-ranking officials of the state and therefore to an issue of an arrest warrant and to their subsequent trial in the appropriate state.¹⁴²

According to Cassese, the notion of absolute universal jurisdiction that does not require the presence of the accused in the prosecuting state is still in the emerging process.¹⁴³ Therefore despite its non-attainment of the status of *lex lata*, a legal basis to the application of such universal jurisdiction can be asserted as finding a legal basis for a notion and establishing its status are two different things.

The second condition for the exercise of universal jurisdiction is that, the state where the crime has been committed in internal armed conflicts should not have requested his extradition from the prosecuting state where the accused is present.¹⁴⁴ However, if the request of such a state is not seemingly in the actual interest of effectively prosecuting the alleged perpetrator in its national Courts, especially where the state officials who committed crimes along with the alleged

International Criminal Justice 589, at pp.592-93; G. Abi-Saab, 'The Proper Role of Universal Jurisdiction' (2003)1 *Journal of International Criminal Justice* 596, at p.601.

¹⁴⁰ Princeton Principle 1(3); see A. Cassese, *International Criminal Law*, (Oxford, 2003), at pp.285-291 for the discussion of conditional (*in personam*) and absolute (*in absentia*) universal jurisdiction.

¹⁴¹ Article 14(3) (d) of the ICCPR.

¹⁴² A.Cassese, 'When May Senior State Officials be Tried' at p.859

¹⁴³ A.Cassese, 'Is the Bell Tolling for Universality?' at p.593; for the emerging state practice on absolute universal jurisdiction see A. Cassese, 'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) 13 *EJIL* 853, at pp.859-862

¹⁴⁴ Princeton Principle 8(a),(c).

perpetrator are still in power, the prosecuting state can initiate proceedings against the perpetrator without extraditing him to his own state.¹⁴⁵

States have asserted universal jurisdiction in accordance with the implementing legislation which gives effect to specific Conventions in the national sphere,¹⁴⁶ but this does not mean that they cannot assert jurisdiction over non-treaty based crimes prohibited under customary international law, namely, war crimes committed in internal armed conflicts and crimes against humanity, without national legislation.¹⁴⁷ However, assertion of universal jurisdiction over such crimes, in order to prosecute the perpetrators, is ultimately a decision that has to be made by individual States. Therefore, the success of such enforcement measure largely depends on the will of those States.

Among the treaties which contain universal jurisdiction, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 and the Statute of the ICC (through implementing legislation) are relevant to the protection of IDPs. The Convention Against Torture is one of the treaties which obliges State Parties in cases where the alleged perpetrator is present in the territory of those states either to prosecute or to extradite them.¹⁴⁸ Consequently, if an accused whose alleged crime has no link at all otherwise with a state, is present in its territory and no third state require his extradition, then that state where the accused is present should in accordance with the treaty obligation prosecute him for alleged commission of torture abroad. In this way, the Convention Against Torture implicitly provides for universal jurisdiction among States Parties.

States Parties have provided universal jurisdiction over war crimes including those committed in internal armed conflicts, genocide and crimes against humanity in their implementing legislation to the Statute of the ICC, even though not required to do so by their international treaty obligations or in their other national legislation.¹⁴⁹ Since the ICC functions in a complementary manner

¹⁴⁵ Princeton Principle 8(f); Report of the International Commission of Inquiry on Darfur, para.614.

¹⁴⁶ M.C. Bassiouni, 'The History of Universal Jurisdiction' at p.46.

¹⁴⁷ Princeton Principle 3; 1993 War Crimes Act of Belgium amended on 10 February 1999 to include crimes against humanity.

¹⁴⁸ Art. 5(2) and 7(1) of the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment.

¹⁴⁹ For example Australia, Canada, United Kingdom; see for the discussion of such Laws concerning universal jurisdiction, A. H. Butler, 'The Growing Support for Universal Jurisdiction in National Legislation,' in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* p.67; with regard to the Law of Belgium,

with the national courts, a state party to the ICC can assert universal jurisdiction over such crimes committed by the perpetrator, provided it is genuinely willing or able to prosecute the alleged perpetrator.

Such assertion of universal jurisdiction under specific treaties is useful, given the limited cases in which the ICC can have jurisdiction. Firstly, it can only have jurisdiction over a case which is of sufficient gravity.¹⁵⁰ The Statute of the ICC requires that the war crimes should have been ‘committed as a part of a plan or policy or as part of a large-scale commission,’ it would not have jurisdiction over war crimes which are not committed on a large scale, even though they are serious in nature.¹⁵¹ Therefore, only high-ranking perpetrators would be prosecuted in the ICC. Secondly, without a Security Council referral under Chapter VII of the UN Charter, the jurisdiction of the ICC is limited to crimes committed in the territory of a state or the state of nationality of the accused which is a party to the Statute or accepted the jurisdiction of the ICC.¹⁵² Since, in internal armed conflicts, often the territory of the crime and the nationality of the accused is the same state, most of the crimes committed against IDPs would not fall within the jurisdiction of the ICC. Thirdly, the ICC does not have jurisdiction over crimes committed before the Statute entered into force, i.e., 1st July 2002. Thus, states can prosecute and punish the perpetrators of international crimes committed before this date on the basis of universal jurisdiction, as such crimes are not subjected to any statute of limitations.¹⁵³ Therefore prosecution in third states on the basis of universal jurisdiction would provide protection to IDP by closing the gaps to increase accountability for international crimes, thereby minimizing the impunity of perpetrators.

see S. Smis, and Kim Van Der Borcht, ‘Introductory Note to Belgium’s Amendment to the Law of June 16, 1993 (As Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law’ (2003) 42 *ILM* 740 and the Amended Law of Belgium in (2003) 42 *ILM* 749; see *Military Prosecutor v. Niyonteze*, Tribunal Militaire d’appel 1A, Geneva 26 May 2000 (appeals judgment) and Tribunal Militaire de Cassation, 27 April 2001 (cassation Judgment), in L. Reydams, ‘Niyonteze v. Public Prosecutor’ for the upholding of a conviction under Switzerland-Military Penal Code for Additional Protocol II war crimes committed in Rwanda.

¹⁵⁰ Art.17(1) (d) of the Statute of the ICC.

¹⁵¹ Arts.8(1), 17(1) (d) and 53(1)(c) of the Statute of the ICC.

¹⁵² Art.13(b) of the Statute of the ICC, the Court can have jurisdiction over crimes committed in a non-state party; Art.12 of the Statute of the ICC.

¹⁵³ Art.29 of the Statute of the ICC.

Consequently, externally displaced persons who are victims of international crimes committed against them in their home state, can initiate prosecutions against perpetrators who visit a state where victims have sought asylum.

Once the jurisdiction is established, the next obstacle that has to be overcome by the prosecuting state is the defence of state immunity from such jurisdiction. The position of state immunity under the customary law is important with regard to the assertion of universal jurisdiction by a prosecuting state over a state official who has allegedly committed international crimes in his home country under an enabling legislation giving effect to a treaty or under an enabling legislation of the Statute of the ICC.

The customary international law on state immunity provides an exception to functional immunity (immunity *ratione materiae*) of state officials accused of international crimes.¹⁵⁴ Therefore ordinary state officials and former high ranking state officials, namely, heads of state or government can be prosecuted in a third state for these crimes committed by them.¹⁵⁵ Where incumbent high ranking state officials are concerned, such an international crimes exception would take effect only after they leave their office. This is because when they are in office, to ensure smooth functioning, personal immunity (*ratione personae*) applies along with their functional immunity (*ratione materiae*) to protect them from criminal prosecution until they leave their office.¹⁵⁶

According to the International Court of Justice (hereafter ICJ) in the *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* Ministers of Foreign Affairs perform functions similar to Head of State or Government and are recognised under customary international law as representatives of the State by virtue of their office and entitled for absolute immunity from criminal jurisdiction and inviolability throughout the duration of office.¹⁵⁷ In other words, they are protected by personal immunities

¹⁵⁴ S.Wirth, 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case' (2002) 13 *EJIL* 877, at p.888; M. C.Bassiouni, 'Universal Jurisdiction Unrevisited: The International Court of Justice Decision in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*' (2002/2003) XII *Palestine YearBook of International Law* 27, at pp.39-40; A. Cassese, 'When May Senior State Officials be Tried for International Crimes?' at p. 870; *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet* (No.3) (2000) 1 *AC* 147.

¹⁵⁵ S. Wirth, *ibid*; A. Cassese, *ibid.*, at p.865; Princeton Principle 5.

¹⁵⁶ For a discussion of these two types of state immunities see A. Cassese, *ibid.*, at pp.862-864

¹⁵⁷ 14 Feb 2002, paras.53-54. (www.icj-cij.org).

while in office. As such, there does not exist in customary international law any form of exception to the rule granting immunity from criminal jurisdiction and inviolability to incumbent foreign ministers for their alleged commission of war crimes or crimes against humanity.¹⁵⁸ This view of course reflects the existing customary international in this matter. Moreover, the recognition of the International Court Justice as to the personal immunity for foreign ministers similar to that of the head of state based on the nature of functions settles an obscure issue in international law.¹⁵⁹ But it may have the effect of extending such immunity to other ministers who represent the government.¹⁶⁰

Contrary to the customary international law that allows for an international crimes exception to the *ratione materiae* immunity of any state official,¹⁶¹ the Court further stated as *obiter dictum* that former foreign ministers enjoy *ratione materiae* immunity from criminal prosecution for acts carried out in a public capacity during their tenure of office except where the states they belonged to waive their immunity or they have committed such crimes in private capacity.¹⁶² However, the Court did not state whether international crimes are covered by the term private acts. Consequently, in order to prosecute such former officials for alleged international crimes committed by them in their official capacity, it must be proved that those international crimes have been committed in their private capacity.

However, such a conclusion cannot be supported for certain crimes such as genocide, because they cannot be committed without the help of the state apparatus and in pursuant of a state policy.¹⁶³ As such, they are necessarily official acts.

¹⁵⁸ *Ibid.*, paras.55-58.

¹⁵⁹ S. Wirth, 'Immunity for Core Crimes?' at p.889; A. Cassese, 'When May Senior State Officials be Tried' at p. 855; but an analogy with the Heads of State of the foreign ministers cannot be based on the similarity between their functions namely, representing the state, as foreign ministers do not 'impersonate' the state similar to the Heads of state, Dissenting Opinion of Judge Van Den Wyngaert, see paras.11 and 16.

¹⁶⁰ M.C. Bassiouni observes that, 'in present day society, all cabinet members represent their countries in various meetings. If foreign ministers need immunity to perform their functions, why not grant immunity to other cabinet members as well?... The rationale for treating foreign ministers the same as diplomatic agents and heads of state, which lies at the centre of the Court's reasoning, could potentially be extended to other ministers who represent the state officially,... . *Male fide* governments could abuse such an extension by appointing persons to cabinet posts in order to shelter them from prosecutions on charges of international crimes.' 'Universal Jurisdiction Unrevisited' at p.44 and at p.45,n.43.

¹⁶¹ A. Cassese, 'The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and Others Case*' (2003)1 *Journal of International Criminal Justice* p.437, at p.451

¹⁶² *Arrest Warrant Case*, para. 61 third situation.

¹⁶³ M.C. Bassiouni, 'Universal Jurisdiction Unrevisited', at pp.42-.43

Moreover, if such crimes were considered as committed by such officials in a private capacity in order to prosecute them, it would result in non-attribution of such crimes to the state and consequently state could not be made responsible for human rights violations in international law based on those acts.¹⁶⁴ The ICJ should have recognised an exception to the functional immunity of high ranking officials with regard to international crimes, rather than relying on the distinction between official and private acts.¹⁶⁵

The effect of the non-recognition of an international crimes exception to the functional immunity of state officials¹⁶⁶ would result not only in the non-prosecution of former foreign ministers as well as Heads of State and government but also to other incumbent senior state officials who are not entitled to personal immunity in international law.¹⁶⁷ This could have the effect of providing impunity for state officials in foreign national courts, to the detriment of IDPs. Such a conclusion cannot be supported in the light of developments that have taken place in rendering international criminal justice with regard to perpetrators of heinous international crimes.¹⁶⁸

Article 27 of the Statute of the ICC excludes any immunity, whether personal or functional, under national or international law of all state officials before the ICC.¹⁶⁹ Although there is no certainty as to the applicability of Article 27(2) in national courts of the state parties to the ICC, it may be stated on the basis of the principle of complementarity of the ICC, that states by becoming parties to the Statute of the ICC implicitly agreed not to invoke immunity for their officials even before the national courts of other state parties with regard to crimes included

¹⁶⁴ S.Wirth, 'Immunity for Core Crimes?', at p.891.

¹⁶⁵ See J. Brohmer, 'Diplomatic Immunity, Head of State Immunity, State Immunity: Misconceptions of a Notorious Human Rights Violator' (1999) 12 *LJIL* 361, at p.370.

¹⁶⁶ A.Cassese, 'Comments on the Congo v. Belgium Case' at p.865, n.34.

¹⁶⁷ M.C. Bassiouni, 'Universal Jurisdiction Unrevisited', at p.44; S.Wirth, 'Immunity for Core Crimes?' at p. 890 observes that, 'to grant immunity *ratione materiae* in cases of core crimes would mean granting it to every state official, as even the lowest-ranking state officials are protected by immunity *ratione materiae* (...there is no separate category of 'immunity of former Ministers of Foreign Affairs' in international law) .' [emphasis added by the author]

¹⁶⁸ J.Wouters and L.D.Smet, 'The ICJ's Judgment in the Case Concerning the Arrest Warrant of 11 April 2000: Some Critical Observations' (2001) 4 *YIHL* 373, at pp.380-381.

¹⁶⁹ O.Triffterer, 'Article 27:Irrelevance of Official Capacity' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, p.501, at p.512; A. Cassese, 'Comments on the Congo v. Belgium Case' at p.866; M.C. Bassiouni, 'Universal Jurisdiction Unrevisited' at p.38, n.34.

in the Statute of the ICC.¹⁷⁰ However, if the State parties to the Statute of the ICC invoke state immunity in the courts of another state party, this may then become an issue of inability of the national court to conduct proceedings under Article 17(1) (a) of the Statute of the ICC, and the case would become admissible within the exclusive jurisdiction of the ICC.¹⁷¹

The judgment of the International Court of Justice can cause problems, especially when a prosecuting state party asserts jurisdiction over a state official from a non-state party to the Statute of the ICC. Even though the decision of the International Court of Justice ‘has no binding force except between the parties and in respect of that particular case,’ it has always been influential, even in other cases.¹⁷² Therefore the non- state party to the Statute of the ICC may rely on the International Court of Justice judgment to claim functional immunity for a former or incumbent ordinary state official or a former high ranking state official for alleged international crimes committed by them in their official capacity, before the national court of the prosecuting state.

As reflected in judicial decisions subsequent to *Arrest Warrant* Case, the trend of an adoption of an international crimes exception to the rule of functional immunity in contrast to the judgment of the International Court of Justice is not consistent.¹⁷³ Therefore, the issue of international crimes exception to the

¹⁷⁰ J. Wouters and L. D. Smet, ‘The ICJ’s Judgment’ at p.381; J.K. Kleffner, ‘The Impact of Complementarity on National Implementation of Substantive International Criminal Law’ (2003)1 *Journal of International Criminal Justice* 86, at p.106

¹⁷¹ See O.Triffterer, ‘Article 27: Irrelevance of Official Capacity’, at p.514 for the exercise of the jurisdiction of the ICC under Article 17 in the context of a national state’s failure to adhere Article 27 and not prosecuting its nationals.

¹⁷² Art. 59 of the Statute of the International Court of Justice; see for the incidental effect of ICJ judgment on proceedings before ICC concerning state officials from non-state parties, A. Cassese, ‘When May Senior State Officials be Tried for International Crimes?’, at p.875.

¹⁷³ In *Samaha Abbas Hijazi and others v. A.Saron and Y.Yaron*, on 12 February 2003 the Belgian Court of Cassation in contrast to the ICJ decision applied the exception of international crimes to the rule of functional immunities of state officials by allowing prosecution against Yaron, an incumbent high-ranking state official of the Ministry of Defence who does not enjoy personal immunities. see A.Cassese, ‘The Belgian Court of Cassation’; for various views expressed by European states on the immunities of the Heads of States and others to the ICJ judgment in the *Arrest Warrant* case, see CAHDI (2002) 8, 23rd Meeting, Strasbourg, 4-5 March 2002, Meeting Report, paras.32-55 (<http://www.coe.int>); with regard to the extradition of Chad’s exiled former head of State Hissene Habre in pursuant of the international arrest warrant issued by the Belgian Court, the Senegalese Court of Appeal said on November 25, 2005 that it could not rule on the request of extradition due to his immunity as a former head of state. Human Rights Watch, ‘No Decision on Extradition of Ex-Chad Dictator: Court’s Ruling that it “has no Jurisdiction” places Justice for Hissene Habre’s Victims in Hands of Senegal’s President.’ (http://hrw.org/english/docs/2005/11/25/chad12074_txt.htm)

functional immunities in international law remains to be resolved by the ICJ in explicit terms in another case concerning immunity of state officials.¹⁷⁴

C. The International Committee of the Red Cross

In internal armed conflicts the role of the International Committee of the Red Cross (hereafter ICRC) as an ‘impartial humanitarian body’ is important not only for its humanitarian services but also for its provision of legal protection to civilians and IDPs by the implementation of humanitarian law norms. The ICRC has a right to offer its services in internal armed conflicts under common Article 3(2) of the Geneva Conventions of 1949 and this offer of the ICRC is not confined to actually providing humanitarian services but extends to legal protection as well.¹⁷⁵ This latter task of the ICRC is stated explicitly in the Statutes of the Red Cross and Red Crescent Movement as ‘to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof ’and ‘to work for the faithful application of international humanitarian law applicable in armed conflicts’.¹⁷⁶

Thus, apart from providing services to IDPs, such as construction of IDP camps, providing food relief, medical services and tracing of IDPs who have become separated as a result of conflict to reunite them with their families, encouraging adherence to international humanitarian law norms is an important aspect of its services under common Article 3(2) of the 1949 Geneva Conventions. This protection of the ICRC is applicable to armed conflicts under Additional Protocol II as well, since it develops and supplements the common Article 3.

As an IDP is not defined as a protected person in humanitarian law, the ICRC does not make a distinction between a conflict affected civilian and an IDP, to prioritise protection to the latter. Therefore an IDP affected by armed conflict is considered by the ICRC as *‘first and foremost a civilian, who as such is protected*

¹⁷⁴ In *Certain Criminal Proceedings in France (Republic of Congo v. France)* 2003, ICJ 129, concerning investigations and prosecutions against the incumbent president of the Republic of Congo by France, the International Court of Justice is provided such an opportunity.

¹⁷⁵ See G. I. A. D. Draper, ‘The Implementation and Enforcement of the Geneva Conventions of 1949 and the Two Additional Protocols of 1978’, (1979)III *Recueil des Cours*, p.9, at p.27.

¹⁷⁶ Art.5(2)(g) and (c) respectively of the Statute, reproduced in (1987) No.256 *IRRC*, pp.25-59; this role of the ICRC is accepted by the States party to the Geneva Conventions by participating in the adoption of the Statute at the international Conferences of the movement.

by international humanitarian law.¹⁷⁷ Protection is, thus, not provided on the basis of the pre-defined status of IDPs, but on the basis of their vulnerability as civilians affected by conflict.¹⁷⁸ IDPs are considered as civilians who are often but not always in a most vulnerable situation and need to be primarily targeted by the ICRC protection activities. Sometimes other conflict affected civilians who cannot move beyond the area of conflict may be in a more life-threatening situation than those who have been displaced from the area. The ICRC strives to protect such civilians and IDPs who stay closer to the combat zones and are in need of immediate protection. However, due to the vulnerability of displaced civilians in unfamiliar areas to violence related to the conflict, such as arbitrary arrests and detention, the ICRC extends its protection activities to those IDPs as well.¹⁷⁹ In such situations the ICRC acts according to the principle of impartiality and targets such civilians as the main beneficiaries of its protection work.¹⁸⁰

The ICRC employs ‘bilateral confidential representations’ and ‘public condemnation’ as its working methods in the implementation of IHL.¹⁸¹ In order to prevent violations or to help those affected by violations, it promotes knowledge of and respect for the law by disseminating the humanitarian law principles.

By disseminating the rules of combat among armed forces and armed groups, the ICRC encourages them to comply with those rules. The importance of giving such training to the armed forces, with possible international assistance, was expressed by the Special Rapporteur on Extrajudicial Executions in her report on the situation in the Darfur region in Sudan, in the context of forced displacement carried out by grave violations to the right to life of civilians.¹⁸² Educating the parties to the conflict about the rules of international humanitarian law would

¹⁷⁷ ICRC, ‘Internally Displaced Persons :The Mandate and Role of the International Committee of the Red Cross’ (2000) No.838 *IRRC* p.491, at p.492. [emphasis added in the original]

¹⁷⁸ F. Maurice, and J.de Courten, ‘ICRC Activities for Refugees and Displaced Civilians’,(1991) No.280, *IRRC*, p.9 at p.10

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*

¹⁸¹ ICRC, ‘Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence’, (2005)87 No.858 *IRRC* 393, at pp.395-398; L. Moir, *Law of Internal Armed Conflict*, at pp.250-51; see generally P. Bonard, ‘Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity’, 1999 (available at <http://www.icrc.org>) ; the other working method of substitution which is used to provide actual protection by the ICRC for defaulting authorities in armed conflict situations by the ICRC is not relevant for the purposes of legal protection of this study.

¹⁸² Report of the Special Rapporteur on Extra Judicial Executions, E/CN.4/2005/7/Add.2 (6 August 2004) para.59.

prevent or reduce such violations and there by any large-scale displacements or protects the IDPs who have already been displaced against abuses. In such training activities, the ICRC would teach the rules of combat applicable as customary humanitarian law in any armed conflicts. However, the success of such dissemination with armed groups would generally depend on their attitude to gaining legitimacy, reciprocal benefits and public image. As far as the government is concerned, the ICRC would encourage the State party involved in an internal armed conflict to accede to Additional Protocol II (as almost all states are parties to the Geneva Conventions of 1949) and to adopt national legislation, to punish war crimes and for the respect and use of the Red Cross, Red Crescent and other emblems and to ratify other conventions regulating the use of weapons, such as the Ottawa Treaty on land mines. As adoption of such legislation is important for the effective implementation of humanitarian law, the unit of the ICRC called the Advisory Service on International Humanitarian Law provides technical assistance and advice in this regard to countries, including those engaged in internal armed conflicts.¹⁸³

Apart from the parties to the conflict, the dissemination activities of the ICRC extend to the public at large, notably to IDPs.¹⁸⁴ This includes educating the IDPs on their rights, the obligations owed to them by the parties to the conflict and the accountability of the parties for serious violations of international humanitarian law and awareness of mines and unexploded ordnance to make them vigilant and responsive to situations as much as the conditions permit.

The monitoring function of the implementation of humanitarian law in the field is carried out by the ICRC by its primary working method of confidential dialogue with the parties to the conflict in case of violations. For instance, in Colombia, '[i]n addition to the hostage cases and complaints registered from persons in detention, the ICRC annually registers over 1,500 individual complaints from victims of breaches of IHL committed by the various actors of the armed conflict. These complaints may concern extrajudicial executions, non restitution of bodies, and threats against life and property. In many instances, ICRC delegates

¹⁸³ Technical assistance was provided in countries such as Sri Lanka, the Russian federation, and Colombia, ICRC *Annual Report* 1999, at p.352; see generally, P. Berman, 'The ICRC' s Advisory Service on International Humanitarian Law: the Challenge of National Implementation' (1996) No.312 *IRRC* 338.

¹⁸⁴ ICRC, *Annual Report* 1999 (Geneva, 1999) at p.171

transmitting such complaints can help to establish authorship of the violations, demand and sometimes obtain reparation, clarify the seriousness of threats and at times obtain the retraction thereof, identify location of graves, and negotiate the restitution of corpses. The ICRC also regularly submits confidential reports on such complaints and reminders of prevailing provisions of IHL to the government, the insurgents, and the *autodefensas* [with regard to the latter the AUC - paramilitary arm of the armed forces, the ICRC directly contact them instead of the government, for pragmatic reasons of implementation of humanitarian law].¹⁸⁵

Such a working method avoids public debate of the problems and creates an environment of trust which enables the ICRC not only to have candid dialogues with the authorities to find solutions but also to gain access to detainees and to maintain a presence in areas close to the conflict. The success of its working method is indicated in its ability to gain access to the detainees in internal armed conflicts, even in the absence of a mandate to visit detainees as in international armed conflicts.¹⁸⁶ Consequently, it directly supervises the conditions and treatment of detainees by visiting all places of detention, asking for the list of detainees, speaking to them in private, and repeating such visits and informing the detaining parties of its concerns about any violations.¹⁸⁷ It also tries to establish a 'permanent presence on the ground' with close proximity to the conflict affected victims, to monitor whether their rights under humanitarian law are being violated and reports its observations to the relevant authorities to prevent or to put an end to the violations.¹⁸⁸ In all these supervisory tasks, the ICRC would not openly criticise the violations but rather reminds the parties by written and oral representations of their obligation to respect the physical and moral dignity of persons arrested.¹⁸⁹ ICRC provides confidential reports to the parties to the conflicts recommending improvements to the prison conditions and the extent to which civilians are protected in the conduct of hostilities.¹⁹⁰

¹⁸⁵ P. Gassmann, 'Colombia: Persuading Belligerents to Comply with International Norms' in S. Chesterman (ed.), *Civilians in War* (London, 2001) p.67, at p. 90, n.16.

¹⁸⁶ For example, Liberia and Sri Lanka.

¹⁸⁷ M. Veuthey, 'Implementation and Enforcement of Humanitarian Law and Human Rights Law,' at p.93.

¹⁸⁸ ICRC, 'Internally Displaced Persons :The Mandate and Role,' at pp.491-500.

¹⁸⁹ ICRC, *Annual Report* 1999, at p.169.

¹⁹⁰ J. Kellenberger, 'Speaking Out or Remaining Silent in Humanitarian Work', (2004) 86, No.855, *IRRC* 593, at pp.603-604; ICRC however publishes information of the number of detainees and places of detention visited by it in the Annual Report.

By confidentially persuading the parties to adhere to the rules of humanitarian law, rather than publicly criticizing the violations, the ICRC is generally able to gain the confidence of both parties to the conflict to work in a volatile situation like an internal armed conflict, to gain access to the civilians within the control of the parties to the conflict or those who stay closer to the combat zone than any other humanitarian Organisation. For instance, in Rwanda in 1994, the ICRC was able to assist the Tutsi IDPs with aid and shelter in its protest against mass killings without referring to them as genocide.¹⁹¹ On such occasions ‘the field operatives of Medecins Sans Frontieres (MSF) had to be incorporated into the ICRC delegation in Rwanda to Survive. Far from being able to denounce human rights or IHL violations while remaining operative in the field, MSF representatives had to don the ICRC emblem and keep a relatively low profile in order to avoid being attacked. MSF personnel agreed to the ICRC terms of engagement, namely, to exercise public caution in order to be perceived as neutral.’¹⁹²

To meet the situational demands, the ICRC in its capacity as a neutral intermediary makes every effort to extend the international humanitarian law standards of international armed conflicts to internal conflicts, to enhance the protection of civilians. The representatives of the ICRC, through negotiations, persuade the government and the rebel sides to enter into agreements by virtue of common Article 3 (2) of the Geneva Conventions to ensure compliance of humanitarian law to protect civilians. Examples include the purposes of creating safety zones or hospital zones to protect them from effects of hostilities, making cease fires, evacuating wounded and sick civilians, providing immunisation to IDP children and providing humanitarian assistance.¹⁹³ For instance, in an intensified armed conflict during 1999 in Sri Lanka, when medical and food supplies and the movements of civilians to the rebel controlled area of Vanni were blocked, the ICRC helped to reach an agreement between the Sri Lanka Armed forces and the LTTE to resume the delivery of food and medical supplies and medical evacuation to and from the Vanni area.¹⁹⁴

¹⁹¹ D.P. Forsythe, *The Humanitarians: The International Committee of the Red Cross* (Cambridge, 2005) at p.122.

¹⁹² *Ibid.*, at pp.122-3

¹⁹³ Common Art.3(2).

¹⁹⁴ ICRC, *Annual Report 1999*, at p.169.

Despite the fact that the parties do not very often agree to enter into such agreements, successful agreements bring greater protection to displaced civilians. Such an implementation of law has become possible for the ICRC due to its working method of confidential persuasion, by which it builds trust among the parties to the conflict to perceive it as a neutral intermediary, operating only in the protection of the civilians and not to the advantage of one of the parties to the conflict. For instance, in Colombia, in order to enable the return of IDPs to the village of Bajo Grande in Atlantic coast, the ICRC obtained undertakings from the guerrillas and paramilitaries to refrain from military operations near the village in future, which could not have been attained without gaining the confidence of the parties to the conflict.¹⁹⁵

The policy of confidentiality of the ICRC is not absolute in all circumstances. If the confidential approach does not work to put an end to or to prevent recurrence of violations, then the ICRC would use its other subsidiary modes of action, namely, a discreet humanitarian mobilization through third states and public declaration on the quality of its confidential dialogue with a party to the conflict.¹⁹⁶ It would publicly denounce the violations of international humanitarian law, when the following four conditions are met: the violations are grave and persistent; such dialogues and confidential approach fail to result in the expected outcome; and the ICRC representatives who are present in the field happen to witness any violations or otherwise come to know any such violations through reliable sources and such a public statement would serve the interests of the victims.¹⁹⁷ Even in such public statements, the ICRC does not make ‘one-sided or at least too explicit condemnations of individual parties to the conflict,’¹⁹⁸ because there is a possibility that such public condemnations would hamper the humanitarian activities of the ICRC on the ground. Moreover, specific mention of violations by one party could be used by the other to justify its own violations and this in turn would weaken the protection of civilians. Therefore the ICRC believes that publicizing such details would not often improve the protection of victims.¹⁹⁹

¹⁹⁵ T. Jenatsch, ‘The ICRC as a Humanitarian Mediator in the Colombian Conflict : Possibilities and Limits’ (1998) No.323 *IRRC* 303, at pp.312-313.

¹⁹⁶ ICRC, ‘Action by the International Committee of the Red Cross’ at pp.395-397.

¹⁹⁷ *Ibid.*, at pp.397-98.

¹⁹⁸ J.Kellenberger, ‘Speaking Out’ at p.600

¹⁹⁹ D.P. Forsythe, ‘Humanitarian Protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees’, (2001)83, No. 843 *IRRC* 675, at p.687.

In its view, 'actual protection' is needed by all the victims of armed conflict²⁰⁰ and that requires access to victims. Since access to the victims is for the ICRC a 'higher priority' than any other considerations except the security of its own staff, it adopts a discreet approach in public denunciation of the violations committed by a party to the conflict.²⁰¹

Consequently, its public statements or condemnations are of a general nature, involving all concerned parties to the conflict. For example, in Somalia the ICRC urged 'all forces involved in the conflict to comply with international humanitarian law, and in particular to spare the civilian population.'²⁰² In grave situations, the ICRC will specify the violations and make public appeals to all parties to the conflict to refrain from such violations of armed conflict. For instance, in the conflict in Kosovo, the ICRC made such a public statement, first outlining the violations and then specifically addressing the parties to the conflict, namely, Serbian authorities and the Albanian political representatives and the UCK(Kosovo Liberation Army) calling on them to end violations of humanitarian law. It stated that,

[f]rom a humanitarian perspective, it has become apparent that civilian casualties are not simply what has become known as "collateral damage." In Kosovo, civilians have become the main victims-if not the actual targets-of the fighting. The core issue to be addressed immediately is that of the safety of, and hence respect for, the civilian population. First and foremost, this means that every civilian is entitled to live in a secure environment and to return to his or her home in safe and dignified conditions.²⁰³

However, as a neutral intermediary between parties to the conflict, it would not criticise the legality of the policy underlying the conflict, including ethnic cleansing. The principle of neutrality as defined in the Preamble to the Statutes of the International Red Cross and Red Crescent Movement states that, '[I]n order to continue to enjoy the confidence of all, the movement may not take sides in hostilities *or engage at any time in controversies of a political, racial, religious or*

²⁰⁰ J.Kellenberger, 'Speaking Out' at p.602.

²⁰¹ *Ibid.*

²⁰² ICRC, Press Release No.1759, 7 October 1993.

²⁰³ ICRC, 'Public Statement by the ICRC on the Situation in Kosovo' (1998) no.325 *IRRC* 725; ICRC, Press release, 13 August 1992 reproduced in (1992)No. 290 *IRRC* at p.492-493.

ideological nature.' Based on the principle of neutrality,²⁰⁴ the ICRC appeals to the parties to the conflict to adhere to the rules of international humanitarian law including the one that prohibits forced displacement, even though such appeals might be viewed by the parties to that conflict, based on the policy of ethnic cleansing, as political interference rather than as an implementation of international humanitarian law.²⁰⁵ Though such urging of the parties to cease all violations of humanitarian law would not always be effective during an armed conflict based on ethnic cleansing, it can still have an impact in moderating the effects of ethnic cleansing, i.e., encouraging the forced displacement to be carried out at least in a humane manner.²⁰⁶

In such grave situations, the ICRC through public appeals tries to draw the attention of the international community to their collective responsibility by reminding them of their obligation under Article 1 of the Geneva Conventions not only to respect but also to ensure respect for these Conventions by other parties to improve the situation. An example is the public appeal made in the conflict of former Yugoslavia.²⁰⁷ Such public appeals are made to mobilise third parties to bring pressure on the parties to the conflict to protect the victims.

The implementation of humanitarian law by the ICRC is effective to the extent that it is in a position through the employment of its unique modes of action to provide protection to IDPs at least with 'minimum civilized standards under difficult conditions.'²⁰⁸

²⁰⁴ Arts.5(2)(a) of the Statute of the International Red Cross and Red Crescent Movement states that the ICRC would 'maintain and disseminate the Fundamental Principles of the Movement' and 6(4) states that the International Federation would act within the 'context of the Fundamental Principles of the Movement.'

²⁰⁵ See Y.Sandoz, *Respect for the Law of Armed Conflict: the ICRC's Observations and Experiences*, (ICRC, Geneva, 1996), at p.6

²⁰⁶ E.D. Mooney, 'Internal Displacement and the Conflict in Abkhazia: International Responses and Their Protective Effect', (1996) 3 *International Journal on Group Rights* p.197, at p.224

²⁰⁷ ICRC, Press Release, 13 August 1992.

²⁰⁸ J. Kellenberger, 'Speaking Out' at p.603; here 'minimum standards' means 'fundamental standards' concerning civil and socioeconomic necessary for human dignity, D.P. Forsythe, 'Human Rights and the International Committee of the Red Cross' (1990)12 *HRQ* 265, at p.280.

8. Implementation and Enforcement of International Human Rights Law

A. The United Nations

Implementation of human rights under the UN system is through its charter based and treaty based human rights bodies.¹ The important difference in the supervision of human rights between treaty based and Charter based human rights mechanisms is that the latter can examine allegations of human rights about any State which is a member of the United Nations, whereas under the former examination of human rights violations is confined to States which are parties to the treaty concerned.

As human rights specific to IDPs are not included in a multilateral treaty, like the rights of the child or women, there does not exist an exclusive treaty based implementing mechanism to monitor the conditions of IDPs in accordance with such treaty. The Special representative of the Secretary General on IDPs is the only charter based mechanism that exclusively deals with the problems of IDPs. Therefore, it is important to discuss the extent of the protective measures taken by the general human rights mechanisms concerning IDPs.

1. Charter Based Mechanisms

The Commission on Human Rights which is a subsidiary body established by the Economic and Social Council, creates the charter based human rights mechanisms in response to the needs of people resulting from violations of human rights. For this purpose the Commission uses three types of special procedures: confidential consideration of a situation under the 1503 procedure; public debate under the 1235 procedure which leads to the appointment of a Special Rapporteur or any other designated individual or group to investigate a situation in a state; and appointment of thematic Rapporteurs or working groups to investigate violations anywhere in the world concerning a theme.² Even though these procedures are relatively distinct from each other in their origin, mandate and result, in practice

¹ See for a detailed account of charter based and treaty based human rights mechanisms relevant to the IDPs and asylum seekers, J. Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons; A Guide to International Mechanisms and Procedure*, (New York, 2002).

² J. Steiner and P. Alston, *International Human Rights in Context*, at p.611.

they overlap substantially.³ All these special procedures are formed to deal basically with gross violations of human rights and accordingly are provided with various working methods, namely, analysing the designated theme in its various dimensions; seeking and receiving information from a variety of sources, communicating individual or general allegations of human rights to the states concerned, making visits to countries to find first hand information and making recommendations to states in this regard.

The 1503 procedure has been established for the examinations of complaints by the Sub-Commission for the Promotion and Protection of Human Rights (formerly known as Sub-commission for the Protection and Prevention of Discrimination against Minorities) and Commission on Human Rights of 'situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights.'⁴ Despite the fact, that IDPs as victims or group of victims or NGOs (on the basis of *actio popularis*) from any state can send communications under this procedure regarding violations of any type of human rights whether civil and political rights or socioeconomic rights, they cannot obtain any individual remedies. Moreover, the complete confidentiality of the 1503 procedure makes it difficult to know what is happening to the allegations of human rights sent and the basis for the determination to drop or to consider a country under this procedure until the names of such countries are published by the Commission. The length of time and the cumbersome three stage procedure, involving the working group on communications in the sub-commission and the working group on situations and Commission on Human Rights in the consideration of allegations against a State, is another serious defect of this procedure. Moreover, the outcome of the procedure is not free from political considerations due to the fact that Commission on Human Rights is formed by representatives of governments and not by independent experts. The time consuming aspect of this procedure renders it less suitable to react to situations where the lives of IDPs are in imminent danger.

The 1235 procedure is a public procedure of deliberation and debate, resulting in measures such as resolutions, condemnation of situations of grave

³ *Ibid*; as states under 1503 can be transferred to 1235 procedure and under 1235 procedure Special Rapporteurs can be appointed; moreover, different issues of the same situation can be considered under all three procedures.

⁴ ECOSOC Resolution 1503 (XLVIII) May 27 1970.

violations of human rights ranging from lenient to strong language, appointment of Special Rapporteurs to a state to make on-site investigation and submission of report and call upon the Secretary-General to appoint a special representative for the same.⁵ The public discussion of a state can have the effect of ‘shaming’ the state and influence its attitude towards the treatment of IDPs. Compared to the 1503 procedure, the 1235 procedure is more responsive to an urgent situation of grave violations of human rights as it does not involve any complex procedures. The Commission on Human Rights and its sub-commission can directly deal with the situations of massive violations of human rights once they receive information from any reliable source. However, the selection of a state depends ‘more on its [the state’s] own might or the influence of its allies than its human rights record proper.’⁶ Such preliminary political interference in the selection of a state may affect its effective response in a situation of grave violations of human rights. Because of the lack of effectiveness of Human Rights Commission, it is about to be replaced by a Human Rights Council.⁷

Problems related to internal displacement such as forced displacement and rape during displacement were discussed by the Country Rapporteurs for instance, by the Special Rapporteur to Somalia.⁸ The noteworthy feature of such reporting was the discussion of common Article 3 along with the human rights norms as applicable legal framework to the situation in Somalia.⁹ Such an approach would strengthen the protection of IDPs in internal armed conflicts.¹⁰

⁵ ECOSOC Resolution 1235(XLII) 1967; see generally, J. Steiner and P. Alston, *International Human Rights in Context*, at p.621; resolutions were adopted by the Commission on Human Rights on states involved in internal conflicts such as Burundi, Sierra Leone, Democratic Republic of the Congo, Sudan and Russia.

⁶ C. Tomuschat, *Human Rights: Between Idealism and Realism* (Oxford, 2003) at p.120.

⁷ 2005 World Summit, Fact Sheet, High-Level Plenary Meeting, 14-16 September 2005; Resolution Adopted by the General Assembly, 60/1, 2005 World Summit Outcome, 24 October 2005, paras.157-160; Draft Resolution of by the President of the General Assembly, recommended for the abolishment of Human Rights Commission on 16 June 2006 and to convene the first meeting of the Human Rights Council on 19 June 2006. (23.02.06)

⁸ Report of the Independent Expert on the Situation of human Rights in Somalia, E/CN.4/1996/14 (22 February 1996) para.17(f); Report of the Special Rapporteur, Mona Rishmawi, *Situation of Human Rights in Somalia*, E/CN.4/1999/103 (18 February 1999), para.48.

⁹ Report of the Special Rapporteur, *ibid.*, paras.33-40; see generally, D. O’Donnell, ‘Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms’ (1998) No.324 *IRRC* p.481.

¹⁰ Present country mandates covering internal armed conflict situations includes: Burundi, Liberia, Haiti, Somalia and Sudan (<http://www.ohchr.org>).

There are also thematic mechanisms relevant to the protection of human rights of IDPs.¹¹ The very specific one is the Representative of the Secretary General on IDPs, Other than that, among the thematic mechanisms, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Special Rapporteur on Extrajudicial Executions), and other Special Rapporteurs on the protection of Economic, Social and Cultural Rights, can be considered as important for the protection of IDPs. The extent of protection provided to IDPs by those thematic Rapporteurs depends on their mandate and the focus given by them in their work to issues related to IDPs.

The mandate of the present Representative of the Secretary-General on the Human Rights of IDPs is different from that of the former representative of the Secretary General on IDPs as the present representative has to focus more on the protection of human rights of IDPs. This is because the mandate of the previous Representative was concerned with the development of a normative framework for the protection of IDPs and that task was completed by the formulation of Guiding Principles on Internal Displacement. Formulation of such guiding principles, of course, can be considered as providing a legal basis for protection of IDPs, to be used in human rights cases relating to IDPs as authentic interpretative guidance of human rights.¹²

The country visits undertaken by the previous representative had been an important aspect in obtaining accurate information on the situation as a whole of IDPs in a given country and apart from bringing the IDP problems in a given country to the forefront of the international community, were widely used in studying the general pattern of violations and needs of IDPs, in order to formulate and to strengthen the standards specific to IDPs.¹³ Moreover, legal obligation of state parties to adhere to international humanitarian law norms was also mentioned in the reports produced as result of such country visits. For instance, with regard

¹¹ Working Group on Arbitrary Detention, Working group on Enforced or Involuntary Disappearances, Working Group on Minorities, Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment and Special Rapporteur on the right to education; the other Special Rapporteurs not mentioned herein are discussed in the text below.

¹² See below, Sections, B. 1. and 2.

¹³ 27 country missions have been undertaken as at 2004, Report of the Representative of the Secretary General on IDPs, Francis Deng, E/CN.4/2004/77, (4 March 2004), para.43

to internal conflicts in the Russian Federation and in Indonesia in particular, with regard to IDPs in the provinces of Aceh and Papua.¹⁴

The present mandate of the representative focuses rather on activities in the protection needs of IDPs.¹⁵ In this respect, to prevent the initial displacement and violations of the rights of IDPs after displacement, the representative promotes dissemination and acceptance of human rights and humanitarian law that underlie the Guiding Principles on Displacement in his dialogues with national authorities; in order to stop developing patterns of violations of IDP rights, the representative would intervene with national authorities, undertake country missions and issue public statements. For instance, the representative on the human rights of IDPs deplored the Darfur crisis in Sudan in his public statement as: ‘the forcible relocation of persons, whether from their homes or places of refuge, is a violation of international humanitarian and human rights law, particularly when their safety or well-being is compromised by the move. ... As the representative of a sovereign state, it is the Government of Sudan that bears the primary responsibility to ensure the protection of its own people.’¹⁶ In this regard he called the ‘government to immediately halt forced relocations and other serious violations of the rights of the displaced persons by its own officials and act to prevent such actions perpetrated by Janjaweed militia and others.’¹⁷

With regard to preventing recurrence of violations of IDP rights, the Representative identifies the patterns of recurring violations and have dialogue with national authorities and offers technical assistance in designing solutions. Finally to ensure remedies for the violations of IDPs, the representative emphasizes the need to avoid prolonged displacement without permanent solutions and to ensure safe return or resettlement as such a measure is essential in protracted armed conflicts for durable protection of IDPs.¹⁸ This emphasizes the temporary and proportionate nature of state of emergencies

¹⁴ For instance, Report of the Representative, F.M. Deng, *Profiles in Displacement: the Russian Federation*, E/CN.4/2004/77/Add.2 (24 February 2004) para. 14 ; Report of the Representative, F.M.Deng, *Profiles in Displacement: Indonesia*, E/CN.4/2002/95/Add.2 (15 February 2002) paras. 53, 64 and 67.

¹⁵ Report of the Representative of the Secretary-General on the Human Rights of Internally displaced persons, Walter Kalin, E/CN.4/2005/84 (31 December 2004), para.81.

¹⁶ *UN Human Rights Expert Deplores Ongoing Displacement in Darfur*, Press Release, 11 November, 2004.

¹⁷ *Ibid.*

¹⁸ Report of the Representative of the Secretary-General on the Human Rights of Internally displaced persons, Walter Kalin, (31 December 2004), paras. 82-89.

and the continued enjoyment of human rights of IDPs even during internal armed conflicts. However, the effectiveness of on-site visits depends on the follow-up visits to such countries and publicising the findings as a report.

The significance of the protection activities of the Representative as a human rights mechanism is the consideration of humanitarian law norms in determining the violations of the human rights of the IDPs. Such an approach enhances the protection of the IDPs in a conflict situation by the application of the normative content of customary humanitarian law to internal armed conflict situations. Moreover, it strengthens the complementary nature of human rights and humanitarian law norms during conflict situations.

The Special Rapporteur on Extrajudicial Executions can be considered as a crucial mechanism, as it deals with the most important human right which is often at stake during internal armed conflicts. The Special Rapporteur's work is guided by the international legal standards, including those in the ICCPR, the CRC and the Statute of the ICC.¹⁹ The mandate of the Special Rapporteur includes monitoring by engaging in communications in response to credible allegations; examining situations and submitting findings together with its conclusions and recommendations; and engaging in constructive dialogue with governments in country visits and the follow-up of recommendations.²⁰ As a response measure to credible allegations, the Special Rapporteur would send urgent appeals in emergency cases and in other cases of individual communications respond by communicating the details to the government and request clarification.

The crises faced by IDPs, such as attack against IDP camps and settlements and acts of violence intended to spread terror and cause further displacement, are specifically considered in the analytical reports as general pattern of violations.²¹ Moreover, reports on country visits also consider the issues relating to IDPs. For instance, in the report on the mission to Sudan made in May 2004 to verify the actual situation particularly in the Darfur region in Western Sudan, the Special Rapporteur expressed her concern over the situation of large numbers of IDPs, their extreme need for humanitarian assistance and protection and the existence

¹⁹ Report of the Special Rapporteur, Philip Alston on Extrajudicial Executions, E/CN.4/2005/7 (22 December 2004), paras. 9-10

²⁰ *Ibid.*, para.7

²¹ Report of the Special Rapporteur, Asma Jahangir, on Extrajudicial Executions, E/CN.4/2002/74 (9 January 2002) paras.53-54.

of continued serious threat to the right to life of people even after displacement.²² Such concentration emphasizes the possibility of dealing with the vulnerable situation of the IDPs which necessitates heightened protection for their lives in internal armed conflicts within the general normative framework of the right to life.

Transmission of complaints on behalf of individuals or groups whose human rights have been violated or threatened to be violated or allegations concerning general pattern in a state is another important aspect of the mandate of the Special Rapporteur on Extrajudicial Executions, which has the effect of exposing the activities of the government to the international scene. A substantial proportion of the cases concerning IDPs were communicated to the protection of this special procedure: it is reported that in the course of 2004 out of communications concerning 1799 individuals, 500 concerned IDPs.²³ For instance, in an urgent appeal made in May 2000, the Special Rapporteur on Extrajudicial Executions expressed her concern over physical protection of thousands of displaced civilians as a result of armed activity in the northern part of Sri Lanka and urged the government of Sri Lanka to 'take all possible steps to protect the safety and security of civilians ... when conducting their operations in the Jaffna peninsula, in accordance with international human rights and humanitarian law standards.'²⁴ This type of urgent appeal, which requests the government to adhere to the rules of international humanitarian law, not only has a preventive effect on the violations of right to life and thereby helps to avoid or reduce the potential for further displacement, but also contains implications concerning the complementary nature of the humanitarian law standards in the application of right to life in military operations.²⁵

However, not all governments make an effort to reply to such communications. According to the report of Special Rapporteur on Extrajudicial Executions, in the course of 2004, replies had been received from only 54 percent

²²Report of the Special Rapporteur, Asma Jahangir, on Extrajudicial Executions: Mission to the Sudan, E/CN.4/2005/7/Add.2 (6 August 2004), para.46

²³ Report of the Special Rapporteur, on Extrajudicial Executions (22 December 2004) para.18

²⁴ Report of the Special Rapporteur. Asma Jahahir, submitted pursuant to Commission Resolution 2000/31, *Summary of Cases Transmitted to Governments and Replies Received*, E/CN.4/2001/9/Add.I (17 January 2001), para. 359.

²⁵ Also see, Report of the Special Rapporteur, Philip Alston on Extrajudicial Executions, E/CN.4/2005/7 (22 December 2004) para 78 for the concluding observation of Special Rapporteur on complementary nature of International humanitarian law and human rights law.

of governments and this response rate is problematic in a long-established procedure which mostly addresses grave issues concerning right to life.²⁶ Moreover, there is no guarantee as to the accuracy of the government response unless such information is verified in a subsequent fact-finding mission to that country, or reported by NGOs.²⁷

The only driving force behind compliance with human rights norms as recommended by Special Rapporteurs would be the pressure created by the publicity in the submission of annual report by Special Rapporteurs to the Commission on Human Rights containing all communications sent and received, along with the recommendations. The state concerned would try to comply with the recommendations of Special Rapporteurs to avoid being scrutinized in a public debate of the Commission on Human Rights. If the communication does not receive a response, at all or satisfactorily, and the state provides an environment of impunity to the perpetrators and there is substantial increase in human rights violations in the country concerned, it would prompt an on-site visit by the Rapporteur to such a country.

Thematic mechanisms have dealt with economic, social and cultural rights of IDPs as well. For instance, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, observed that systematic destruction of private homes and crops and water sources resulted in displacement and homelessness in Darfur, Sudan. He further observed that as far as the return of the IDPs is concerned, the security and protection of these people must be ensured and ‘addressing security considerations must be matched with efforts to ensure the realization of the right to adequate housing, through compensation and reconstruction schemes.’²⁸

²⁶ *Ibid.*, paras.21 and 22.

²⁷ The government of Sri Lanka asserted to the concern expressed by the Special Rapporteur on Violence Against Women over allegations of gang rape and murder that ‘every case of alleged criminal conduct committed by the armed forces and police has been investigated and the perpetrators prosecuted, although there may have been unavoidable long delays.’ Report of the Special Rapporteur on Violence Against Women, *Communications to and from Governments*, /CN.4/2001/73/Add.1 (13 February 2001) paras.51-57; Amnesty International however pointed out that ‘[c]ontrary to the government’s assertion, to the Amnesty International’s knowledge, not a single member of the security forces has been brought to trial in connection to incidents of rape in custody although one successful prosecution has been brought in a case where the victim of rape was also murdered.’ ‘Sri Lanka: Rape in Custody’, AI Index: ASA 37/001/2002 (January 2002) at p.4.

²⁸ Report of the Special Rapporteur, on the Adequate Housing as a Component of the Right to an Adequate Standard of Living, E/CN.4/2005/48 (3 March 2005) para.37

Communications were transmitted to the government of Sudan by the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, and by the Special Rapporteur on IDPs and others, expressing concern about the dangerous living conditions of IDPs, as diarrhoea and fever were common, leading to increasing numbers of deaths every day, and the lack of access to medical assistance.²⁹ Similarly, with regard to the Darfur region in Sudan, the Special Rapporteur on the Right to Food stated that the ‘destruction of resources essential to survival and forced displacement are prohibited under international human rights and humanitarian law and amount to a violation of the right to food, particularly when people are displaced from their means of subsistence.’³⁰ He urged the government to stop such activities of militias and to ensure protection and assistance to displaced persons to rebuild their farms and livelihoods. None of those activities however had been that helpful in reducing violence towards IDPs in Darfur. They have been effective only to the extent they revealed the seriousness of on-going problems of massive deliberate displacement and abuses against IDPs and the failure by the governmental authorities to adopt measures to combat impunity and for the attempts to resolve the conflict through negotiations.³¹

Even though the Special Rapporteurs have dealt with the problems of IDPs that fall within their thematic or country mandates, the constraints in the system itself affect the efficiency of such measures. One such constraint is that there is ‘very little follow-up, however, to these reports and communications, and the Special Rapporteurs themselves (who serve in a volunteer, part-time capacity) are not in a position to follow up, especially on individual cases.’³²

On-site visits are important in the effective performance of the mandate of Special Rapporteurs, as they provide not only first-hand information on the actual situation but also the opportunity to make recommendations to the governments

²⁹ Report of the Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt: *Summary of cases transmitted to governments and replies received*, E/CN.4/2005/51/Add.1 (2 February 2005) para.66.

³⁰ Interim Report of the Special Rapporteur on the Right to Food, Jean Ziegler, in accordance to General Assembly Resolution 58/186, 27 September 2004, para.18.

³¹ An international Commission of Inquiry established under the Security Council resolution 1564 of 18 September 2004, strongly recommended for the immediate reference by the Security Council of the situation of Darfur to the ICC, Report of the International Commission of Inquiry on Darfur, at p.5

³² The United Nations High Commissioner for Human Rights, *The OHCHR Plan of Action: Protection and Empowerment*, Geneva, May 2005, para.103

‘that may actually lead to system-wide improvements.’³³ Since, without the consent of states concerned, country visits cannot be made, states with bad records of human rights can avoid close inspection.³⁴

Above all, any recommendations or conclusions reached by the Special Rapporteurs have no binding force on the states. However, the publicity of the findings in the Annual report or in other reports would exert pressure on the state to cooperate with the Special Rapporteur. Depending on the political will among the members of Commission on Human Rights a resolution can be adopted to condemn the human rights record of a state that generates internally displaced persons.

In sum, the special procedures are effective in revealing a problematic situation of IDPs within a country or an issue of human rights concerning internal displacement, and bringing it to the forefront of the international community in its various dimensions. Thereafter, the states concerned can no longer act as if nothing of importance to the concern of international community is occurring within its territory. To some extent, the outcome of the reports, public statements, discussions, and urgent or general communications to the states of reported violations by the Special Rapporteurs or Representatives would exert pressure on the states concerned.

2. Treaty Based Mechanisms

Under the treaty based mechanisms, the Committees concerning general treaties that contain all the important human rights³⁵ namely, committees of the International Covenant on Civil and Political Rights 1966 (ICCPR); the International Covenant on Economic, Social and Cultural Rights 1966 (ICESCR); and the Committees that deal with specific issues of human rights namely, Committees of the International Convention on the Elimination of All Forms of Racial Discrimination 1966 (CERD); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 (CAT);

³³ C.Giffard and M.Hrle, ‘The United Nations Charter Based Mechanisms’ in J. Fitzpatrick (ed.), *A Guide to International Mechanisms and Procedure*, p.137, at p.223.

³⁴ *Ibid.*

³⁵ See generally, for a critical evaluation of UN treaty bodies, P. Alston and J. Crawford, (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge, 2000); A. F. Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, Hague, 2000)

Convention on the Rights of the Child 1989 (CRC); and Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW), have often dealt with the issues of internal displacement.³⁶

The role of the committee on CERD in the protection of IDPs by way of reporting procedure is important as it has the highest number of ratifications out of all treaties and it specifically deals with the theme of racial discrimination, which is at the heart of internal displacement in the conflicts of many states such as the former Yugoslavia. A quite broad definition of 'racial discrimination' has been utilized by the Committee to include measures adopted by the state parties in the protection of national and ethnic minorities while examining reports of states.³⁷ However the reporting procedure under CERD is also affected by overdue reports, similar to other treaty bodies.³⁸ Even though the individual communication procedure of the CERD can be resorted to by individuals and groups of individuals, this has rarely been used since its establishment due to the low number of states that recognised the individual communication procedure under Article 14 of the CERD. As at 20 August 2004 only 45 States out of 169 States parties to the CERD had recognised the competence of the individual communication procedure under Article 14 and so far only 25 communications have been received since its functioning in 1984.³⁹ Out of those 41 States parties, those who are involved in internal armed conflicts are very few in number, which limits the value of the individual communication procedure under the CERD for the protection of IDPs.

The Committees of CERD, CAT and CEDAW contain procedures which can be invoked by the respective Committees on their own instead of waiting until the state party to submit reports or an individual victim to file

³⁶ Article 28 of the ICCPR; Economic and Social Council Resolution 1985/17 para(a) UN ESCOR, Supp. (No.1) at 15, UN Doc.E/1985/85 (1985); Article 8 of the CERD; Article 17 of the CAT; Article 43 of the CRC; Article 17 of the CEDAW.

³⁷ Art.1(1) of the CERD; Committee on CERD, Concluding Observations: Sri Lanka, A/56/18 (14/09/2001) paras.333,336-337; Committee on the CERD, Concluding Observations :Russian Federation, CERD/C62/CO/7 (21 March 2003) para.18.

³⁸ Sierra Leone, Liberia, Somalia and Bosnia Herzegovina are overdue by 10 years and El Salvador, Democratic Republic of Congo and Serbia and Montenegro are overdue by 5 years, Report of the Committee on the CERD, Supplement No.18.(A/59/18), 2004, paras.426-27.

³⁹Report of the CERD, supplement No.18 (A/59/18) 2004, paras.2; Report of the CERD, supplement No.18 (A/57/18) 2002, paras. 479-483 and Report of the CERD, supplement No.18 (A/58/18) 2003, para. 571.

communications.⁴⁰ The early warning and urgent action procedures of the CERD aim to address prevention and limitation of serious violations of the Convention by closely monitoring such emergency situations.⁴¹ One of the criteria for early warning is ‘significant flows of refugees or displaced persons resulting from a pattern of racial discrimination or encroachment on the lands of minority communities.’⁴² So far the committee has adopted decisions and further action with regard to countries such as Federal Republic of Yugoslavia, Russian Federation, Burundi, Rwanda and Sudan and referred to the situation of displaced persons as well.

If there is reliable information that torture is being systematically practised in the territory of a state party, then the Committee on CAT can start an urgent action in the form of confidential inquiry on the state concerned.⁴³ However, the protection of such a procedure is limited to systematic torture and therefore ‘other cruel or inhuman or degrading treatment’ practised with regard to IDPs in camps would escape scrutiny.

Despite the contribution of many treaty bodies in the protection of supervision and implementation of human rights of IDPs, the role of the Human Rights Committee can be considered as important since both of its monitoring functions namely, reporting and individual communication procedures are subjected to greater public awareness. This is partly due to the increasing number of State Parties to the ICCPR and its Optional Protocol. As at 26th July 2002, out of 149 States Parties to the ICCPR, 102 States were Parties to the first Optional Protocol to the Covenant on individual complaint procedure.⁴⁴ This means two thirds of the members of the ICCPR have become parties to the Optional Protocol, including many of those states involved in internal armed conflict.⁴⁵ According to the Human Rights Committee, this trend has led to an increase in the number of individual communications under the Optional Protocol.⁴⁶ The inter-

⁴⁰ Report of the Committee on the CERD, Supplement No.18 (A/53/18) 1998, para.18; Article 20 of the CAT; Article 8 of the Optional Protocol to the CEDAW.

⁴¹ Report of the Committee on the CERD, Supplement No.18 (A/53/18) 1998, para.18.

⁴² *Ibid.*

⁴³ Art.20 of the CAT; Art.8 of the 1999 Optional Protocol to the CEDAW provides for similar procedure with regard to ‘grave or systematic violations’ of the rights in CEDAW, reprinted in I.Brownlie and G.S. Goodwin-Gill, *Basic Documents*, at p. 224.

⁴⁴ Report of the Human Rights Committee, A/57/40(vol. I) 2002, para.1

⁴⁵ As at 26 July 2002, Report of the Human Rights Committee, *ibid.*, para.I.

⁴⁶ *Ibid.*, para.95.

state complaint mechanism has attracted only a low number of States Parties and is rarely used.

The significance of the Human Rights Committee in the implementation of the civil and political rights of the ICCPR lies in the fact of its non-political nature, since it consists of independent experts who act in their personal capacity.⁴⁷ This means the members of the Human rights committee function as members of a treaty organ and not as a subordinate of the United Nations even though the Covenant is a creation of the United Nations.⁴⁸ The mandate of the Human Rights Committee is derived from the ICCPR which provides an independent legal basis from the UN Charter. Therefore it is not a 'United Nations Committee' like the Commission on Human Rights, where the commission members serve as representatives of states.⁴⁹

According to the reporting procedure, which is mandatory for the States Parties, reports are to be submitted on the 'measures they have adopted which give effect to the rights recognized herein [in the ICCPR] and on the progress made in the enjoyment of those rights' and the 'factors and difficulties, if any affecting the implementation of the present Covenant.'⁵⁰ The 'constructive dialogue' that takes place between the Representatives of the State parties and the Human Rights Committee enables the latter to study the state report and to make concluding observations with regard to state parties.⁵¹ The reporting procedure under other treaty bodies is similar to that of the Human Rights Committee.

As far as the protection of IDPs is concerned, the reporting procedure can play an important role because the Human Rights Committee monitors the implementation of the ICCPR, which contains wide array of important civil and political rights, violations of which cause displacement. Due to the mandatory nature of the reporting procedure, all State parties are obliged to adhere to it and 'when fully activated is able to provide a more comprehensive picture, generate more useful public documentation, and attract more publicity' than the individual

⁴⁷ Art.28 (2) (3) of the ICCPR.

⁴⁸ T. Opsahl, 'The Human Rights Committee' in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, (Clarendon Press, Oxford, 1992) p. 369, at p.384.

⁴⁹ See *ibid.*, at p.385; Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.7 (4 August 2004), Rule 71 (4).

⁵⁰ Art. 40(1),(2) of the ICCPR.

⁵¹ Art.40(4) of the ICCPR.

communication procedure of the Human Rights Committee.⁵² Since the Human Rights Committee is in a position to cover the general human rights situation in a state, it can address the large scale violations of human rights and the resulting massive displacement occurring in states engaged in internal conflicts. Therefore, the Human Rights Committee is in a position to address the causes of displacement as well as the consequences of displacement in its concluding observations and make recommendations to the State Party concerned of the deficiencies to be rectified in the protection of IDPs.⁵³

Moreover the submission of reports is in principle a continuing process based on the progress of the implementation of human rights of a given State, rather than a process which requires an isolated report that is not related at all to the context in which earlier reports have been submitted. Therefore, it can function as a preventive as well as a reactive mechanism to situations of human rights violations that have the potential to cause displacement or that have caused displacement. Besides, concluding observations made in the assessment of a country situation can clarify an individual situation under the individual communication procedure and therefore can be relied on by the authors of such communications. For example, if in a case concerning enforced disappearance, there is no clue as to what happened to an IDP, the concluding observations of the Human Rights Committee on the country situation as to enforced disappearance can give insights in deciding the case.

The Human Rights Committee has dealt with the problems of torture, enforced disappearances and arbitrary arrests which are the causes of initial or secondary displacement.⁵⁴ However, there exists a noticeable failure on the part of the Human Rights Committee to identify those human rights violations as causes of internal or external displacement in an explicit manner. Emphasizing in its concluding observations of the fact that the prevention of such human rights violations would reduce displacement of civilians is imperative in the protection of IDPs.

For instance, the concluding observations of Human Rights Committee made during Sri Lanka's internal armed conflicts since 1995, failed to mention

⁵² T.Opsahl, 'The Human Rights Committee,' at p.397.

⁵³ See generally V.Dimitrijevic, 'State Reports' in G. Alfredsson et al., (eds.), *International Human Rights Monitoring Mechanisms* (Hague, 2001) pp.185-200.

⁵⁴ See Concluding Observations: Sri Lanka, CCPR/CO/79/LKA (1 December 2003) paras.9,10,13.

the vulnerability of IDPs to arbitrary arrests or enforced disappearances, even though they dealt with such problems in general.⁵⁵ However, the CERD as early in 1995 dealt with such issues relating to IDPs in Sri Lanka.⁵⁶ In addition, the 1999 Report of the Working Group on Enforced or Involuntary Disappearances on Sri Lanka, when reporting that such disappearances have primarily occurred since 1990 in the northern and eastern provinces of the country during the internal armed conflict, further observed that:

In the north-east, the persons most often reported detained and missing were young Tamil men accused or suspected of belonging to, collaborating with, aiding or sympathizing with LTTE. Tamil persons *internally displaced* owing to the conflict and staying in informal shelters such as church or school centres were particularly at risk of detention and disappearance.⁵⁷

Similarly, even in the context of significant displacement in Sudan, the Human Rights Committee in 1997 only noted the 'efforts made to resettle such persons and to assist them to return to their places of origin' as a positive factor.⁵⁸ However, the Committee on the ICESCR 'urged the State party to address the root causes of the problems of internally displaced persons and in the short and medium term, to cooperate fully with international and non-governmental organizations in the field, in order to provide for adequate (interim) measures ensuring the basic needs of this group, such as adequate basic shelter, employment, food, and health care, and the continuation of education for the children.'⁵⁹

⁵⁵ CCPR A/50/40(1995);CCPR/CO/79/LKA (2003); even though there has been an internal armed conflict since 1983 in Sri Lanka, the appointment of the Special Rapporteur on IDPs was appointed in 1992 and the problems of IDPs have only been brought to the forefront of the international community by 1995; therefore the absence of IDP issues in previous concluding observations on Sri Lanka by the Human Rights Committee in CCPR A/39/40(1984) and CCPR A46/40(1991) cannot be taken into consideration; however, in the Summary Record of the 1438th Meeting: Sri Lanka, CCPR/C/SR.1438 (28 July 1995) para.68 the issues of IDP children was mentioned by the government delegation but not as a response to a specific question by the members of the Human Rights Committee.

⁵⁶ Summary Record of the 1079th Meeting: Sri Lanka CERD/C/SR.1079 (9 March 1995) para.16 and in particular para.17.

⁵⁷ E/CN.4/2000/64/Add.1 (21 Dec 1999) para.2 (emphasis added).

⁵⁸ Human Rights Committee, Concluding Observations :Sudan,CCPR/C/79/Add.85 (19 November 1997) para.7

⁵⁹ Committee on ICESCR, Concluding Observations : Sudan , E/C.12/1/Add.48 (1 September 2000) para.37; likewise, Committee on CERD, Concluding Observations : Sudan, CERD/C/304/add.116 (27 April 2001) at paras.13-14, expressed deep concern about the forced relocation of civilians in the upper Nile region and the fact of large number of IDPs within Sudan and recommended to give effect to UN Guiding Principles on Internal Displacement.

The Committee on ICESCR can request the State party to respond to ‘any pressing issue identified in the concluding observations’ prior to the date the next report is due to be submitted.⁶⁰ Despite the committee on ICESCR’s explicit reference to the problems of IDPs, it did not however specifically request Sudan to provide the steps taken with regard to implementation of its recommendations prior to the date that the next report was due to be submitted. Sudan’s second periodic report was due on 30 June 2003.⁶¹ Until that time, which was about three years from the adoption of the above concluding observations, there would not be any follow-up as to Sudan’s implementation of the recommendations as to the conditions of IDPs, which were mostly immediate rather than progressive. This is a very unsatisfactory approach in the context of Sudan’s extensive IDP problems and in the absence of an individual communication system for the ICESCR.

The already discussed trends in the concluding observations of the Human Rights Committee indicate the lack of attention on the part of to the crisis of internal displacement. Moreover, widespread occurrence of rape and sexual assault on IDP women was not at all considered in the concluding observations of the Human Rights Committee made in 2003 pursuant to the fourth and fifth reports of Sri Lanka covering the period until 2002, despite concerns expressed during this period in this regard by non-governmental organisations. Amnesty International, noted in its report of ‘a marked rise in allegations of rape by police, army and navy personnel’ during 2001 and stated that ‘[a]mong the victims of rape by the security forces are many internally displaced women.’⁶² It highlighted the failure of prosecution by the authorities in such cases and reports additional cases of rape that are not reported in the 2002 report of the Special Rapporteur on Extrajudicial Executions.⁶³

This is understandable, because for various reasons during a conflict situation it is not possible to communicate every incident to the thematic procedures of the United Nations. In such situations, NGOs which have their own system of fact-finding are in a better position to get information on the occurrence

⁶⁰ Draft Report of the Committee on Economic Social and Cultural Rights to the Economic and Social Council in Accordance with Economic and Social Council Resolution 1985/17, E/C.12/2003/CRP.I (20 August 2003) para.38.

⁶¹ Committee on ICESCR, Concluding Observations: Sudan, 48 (1 September 2000), para.41

⁶² Amnesty International ‘Sri Lanka: Rape in Custody’, AI Index: ASA 37/001/2002 (January 2002) at p.3.

⁶³ *Ibid.*, at p.4 and Appendix 1, at pp.12-15.

of violations. Failure by the Human Rights Committee to deal with the problems of rape during the internal armed conflict situation of Sri Lanka in its concluding observations, when there is a general pattern of such crimes, particularly with regard to IDPs (although torture of detainees has been observed) is an indication of the functional defect of the Human Rights Committee. This happens as a result of failure or inadequacy in informing itself from other to independent sources of information in considering a State party's report, more than to Human Rights Committee's insensitivity to the issue of internal displacement.⁶⁴ Therefore, reaction to the problems of IDPs needs a considered approach on the part of the Human Rights Committee to the problems of IDPs and recourse to information available from the thematic procedures of the United Nations and NGOs.

The Committee on ICESCR makes relatively consistent observations with regard to issues relating to IDPs. One of the reasons for this might be the information received from the NGOs by the Committee on States concerned during pre-sessional working groups and at the beginning of each session.⁶⁵ The Human Rights Committee has not provided such an official standing to NGOs.⁶⁶ In considering the initial report on Sri Lanka, the Committee expressed its grave concern over the 'situation of an estimated 800,000 persons displaced because of the armed conflict, many of whom have been living in temporary shelters for the past 15 years' and mentioned the fact that '*Tamil families who were forced by the military to leave their ancestral villages in the Welioya region are among the displaced.*'⁶⁷ [emphasis added]

Though displacement incidental to the armed conflict has nothing to do with an IDP's right to freedom of movement, the fact of forced displacement definitely falls within the scope of Articles 12 (freedom of movement and residence), 27 (right of minorities) and probably 17 (right to home) of the ICCPR and therefore within the competence of the Human Rights Committee for assessment. Therefore, specifically drawing the attention of the state party to the fact of forced displacement of civilians and making recommendations so as to

⁶⁴ For reported cases of rape and killings of women in Sri Lanka see Report of the Special Rapporteur on Extrajudicial Executions, E/CN.4/2002/74 (9 January 2002) para.48

⁶⁵ M. O'Flaherty, *Human Rights and the UN Practice Before the Treaty Bodies*, 2nd ed., (Hague, 2002) at pp.62-65 ; C. Tomuschat, *Human Rights*, at p.151

⁶⁶ M.O' Flaherty, *ibid.*, at p.33

⁶⁷ Committee on ICESCR: Concluding Observations :Sri Lanka E/C.12/1/Add.24 (16 June 1998) para.7

ameliorate such violations by drawing attention to the responsibility of the state to facilitate their return to their places of origin or make arrangements to resettle them in any part of the country and provide restitution or compensation for loss of property is imperative for the effective protection of human rights of IDPs.

Consequences of incidental displacement by armed conflict can be subjected to the evaluation of the Human Rights Committee when they result in violation or risk of violation of human rights. For instance, the infant mortality, epidemics and malnutrition which are common in IDP camps in conflict situations, are issues relating to the right to life under Article 6 or right to be free from inhuman treatment under Article 7 in particular with regard to children and pregnant women.⁶⁸ There is a marked omission in this regard in the concluding observations of the Human Rights Committee. For example, none of the concluding observations of the Human Rights Committee on Sri Lanka dealt with these issues. In contrast, the Committee on ICESCR was alarmed by the fact that the 'incidence of under nourishment of women and children living in temporary shelters to be as high 70 per cent, and by reports that in many cases food assistance did not reach the intended beneficiaries'⁶⁹ and made strong recommendations to improve the nutritional standards and to ensure the free flow of humanitarian assistance.⁷⁰ Similarly, the Committee on CERD expressed concern about the 'situation of civilians living in the north and east of the country, and particularly about those persons internally displaced by the conflict' and recommended that the State party continue to provide assistance to such civilians and to cooperate with humanitarian agencies.⁷¹ In addition, the Committee on CRC expressed its serious concern over the 'large number of children affected by the armed conflict and especially those who have been displaced' and the 'hazardous provision of health services in areas affected by the armed conflict.'⁷² Though these observations of the Committees were made at different stages of the internal armed conflict of Sri Lanka, they emphasize the needs of the IDPs and the

⁶⁸ CRC can be considered as *lex specialis* and non-derogable.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, para.22

⁷¹ Committee on CERD, Concluding Observations : Sri Lanka, A/56/18 (14/09/2001) paras.321-342.

⁷² Committee on CRC: Concluding Observations :Sri Lanka CRC/C/15/Add.40 (21 June 1995) para.24

positive measures that would have to be taken on the part of the State party in observance of right to life under the ICCPR.

The above examples do not mean to indicate that the Human Rights Committee has not dealt with the issue of displacement at all. It has mentioned issues of internal displacement in several instances. With regard to the Russian Federation it made the following recommendation as to the forced displacement of civilians:

The State party should ensure that Internally displaced persons in Ingushetia are not coerced into returning to Chechnya, including by ensuring the provision of alternative shelter in case of closure of camps (article 12).⁷³

Moreover in its concluding observations to the special report concerning Bosnia and Herzegovina in relation to Articles 6 and 12 of the ICCPR, the Human Rights Committee recommended that ‘measures already taken by the Republic should be further intensified and systematically monitored so as to ensure that “ethnic cleansing” does not take place, whether as a matter of revenge or otherwise.’⁷⁴ However, such concluding observations or recommendations of the Committee has not been consistent or comprehensive enough to issues of internal displacement. It is even more disappointing to note, in the light of its General Comments on Article 4 of the ICCPR concerning state of emergency. It is possible for the Human Rights Committee to use these General Comments to make objective and consistent assessment of States with regard to their crises of internal displacement without being objected to by the States concerned.⁷⁵

⁷³ Human Rights Committee, Concluding Observations : Russian Federation, CCPR/CO/79/RUS (6 November 2003) para.16; also see Human Rights Committee, Concluding observations on Russian Federation CCPR/C/79/Add.54 (26 July 1999) paras.28,45; Committee requested state party to stop forced resettlement of Tajiks, citizens of Uzbekistan, from homes in violation of Articles 12, 17 and in certain situations Article 27 of the ICPR, Concluding Observations: Uzbekistan, CCPR/CO/71/UZB (26 April 2001) at para. (16); Committee recommended to ensure protection of civilians affected by displacement and evacuation , Concluding Observations: Phillippines CCPR/CO/79/PHL (1 December 2003) at para. (15).

⁷⁴ Human Rights Committee, Concluding Observations: Bosnia and Herzegovina CCPR/C/79/Add.14 (28 December 1992) para.7.

⁷⁵ Although the State parties to the ICCPR are not bound to follow the General Comments, since the Human Rights Committee is guided by these General Comments in considering state reports and individual communications, States Parties ‘have the greatest interest in carefully reviewing the general comments, voicing their opposition in cases of disagreement about the proper understanding of the CCPR.’ C. Tomuschat, *Human Rights*, at p.157 and at p.36; I. Boerefijn, *The Reporting Procedure Under the Covenant on Civil and Political Rights: Practice and Procedures of the Human Rights Committee*, (Antwerpen, 1999) at p.300; Considering the fact that the

The observations by the Human Rights Committee in the above instances of Russian Federation and Bosnia and Herzegovina with regard to IDPs are not surprising, due to the magnitude of the problems of IDPs in these states.⁷⁶ A consistent reaction to the problems of IDPs in internal armed conflict is important in situations of small scale and subtle forms of forced displacement as well, apart from large scale displacement. Only then would it be able to prevent or reduce the escalation of the crisis of internal displacement by concluding observations and their effective follow-up.

The General Comment on Article 12 of the ICCPR concerning the freedom of movement by the Human Rights Committee is not helpful as it does not deal with the situations of armed conflict or the use of humanitarian law in the determination of derogation of the right during such conflict situations. However, in the General Comment No.29 on Article 4 of the ICCPR concerning States of Emergency, the Human Rights Committee has specifically stated that crimes against humanity and international humanitarian law can be considered as relevant criteria in the application of human rights provisions of the Covenant during internal armed conflicts.⁷⁷ The General Comment on Article 4 explicitly states that the forced transfer of civilians by expulsion or other coercive means from the area in which they are lawfully present and which constitutes crimes against humanity cannot be justified as a legitimate measure to derogate from Article 12 of the Covenant.⁷⁸

However it fails to mention explicitly the international humanitarian law prohibition on forced displacement in Additional Protocol II to define the lawful limits of derogatory power of the State under Article 12 of the ICCPR in internal armed conflicts.⁷⁹ Although the Guiding Principles on Internal Displacement, the Turku Declaration of Minimum Humanitarian Standards and the study of the ICRC on customary rules of international humanitarian law applicable in international

difficulty in obtaining consensus from 18 members of the Committee who are independent experts from different geographical parts and legal background to adopt General Comments addressed to all state parties, makes it authoritative, depending on the quality of their content.

⁷⁶ See generally for such a trend in, Human Rights Committee, Concluding Observations : Colombia, CCPR/CO/80/COL (26 May 2004), para.19; Human Rights Committee, Concluding Observations: Serbia and Montenegro, CCPR/CO/81/SEMO (12/08/2004) para.18.

⁷⁷ Human Rights Committee, 'State of Emergency,' paras.3,9,11,12,13

⁷⁸ *Ibid.*, para.13(d).

⁷⁹ However it refers to fair trial guarantees of international humanitarian law, *ibid.*, para.16

and non-international armed conflicts are mentioned by the Human Rights Committee in a footnote as developments of human rights standards applicable in emergency situations, specifically stating them as evidence of the customary nature of the humanitarian law prohibition on forced displacement applicable in internal armed conflict would have reinforced the protection of IDPs.⁸⁰ Reference to the standards of humanitarian law is very beneficial and appropriate since, in armed conflict situations, they can readily be invoked to assess whether a State's act is in violation of right to freedom of movement of an individual, rather than resorting to the constitutive elements of crimes against humanity, because the human rights violations would have to become gross or systematic in order to constitute crimes against humanity.

Apart from the inadequate focus on IDPs in concluding observations, ineffective implementation of human rights in the ICCPR by the Human Rights Committee is due to the inherent defects in the treaty system and its manipulation by state parties, namely, submission of reports which are not self-critical and delaying reports or not submitting them at all. Such inherent functional defects in the treaty monitoring system affect general implementation of human rights of civilians and IDPs as well.

Although the mandatory nature of the reporting procedure can be conducive to protection in theory, during an internal armed conflict, it is not so in practice because of the necessity to indicate the measures adopted by state parties during such conflict to protect the rights of the civilians and IDPs belonging to the opposite party and the difficulties encountered in such implementation. It cannot be expected that State Parties which violate human rights during an internal armed conflict fought on ethnic, linguistic or religious grounds would be self-critical about their treaty commitments. Rather they would try to paint a favourable picture of the country's situation or to circumvent the issues at stake, by presenting unnecessary details. This trend was indicated in the Human Rights Committee's concluding observations made with regard to the fourth and fifth reports of Sri Lanka, where the Human Rights Committee noted that, 'the report contains detailed information on domestic legislation and relevant national case

⁸⁰ *Ibid.*, para.10, n.6; the completed study on the customary international humanitarian law of the ICRC suggests Article 17 of Additional Protocol II against forced displacement in its entirety has become a rule of customary international law. See J.M. Henckaerts and L. Doswald Beck, *Customary International Humanitarian Law*, at pp.459-67.

law in the field of civil and political rights, but regrets that it does not provide full information on the follow-up to the Committee's concluding observations on Sri Lanka's previous report.'⁸¹

Since the system of reporting is based on self-criticism by the States parties which are often violators of human rights in internal conflicts, the accuracy of the information on the extent of implementation cannot be guaranteed without the Human Rights Committee familiarising itself with information derived from independent sources such as NGOs and special procedures of the UN.

Moreover, submission of a report long after the due date would seriously undermine the monitoring function of the Human Rights Committee. If there were an internal armed conflict during the required period of submission and if a state party failed to submit by then, the human rights violations would not be effectively dealt with by the Human Rights Committee. According to the Human Rights Committee's annual report, as at 31 July 2004, none of the countries involved in armed conflicts namely Somalia, Democratic Republic of Congo, Angola, Burundi and Rwanda had submitted their initial or periodic report for more than five years.⁸² Such a situation would have the effect of placing the IDPs affected by those ongoing conflicts beyond the legal protection of the reporting system provided by the Human Rights Committee. In such situations the remaining hope for the IDPs under the human rights system of the ICCPR may be its individual communication procedure.

The amended Rules of Procedure of the Human Rights Committee tries to rectify the situation of non-submission of state reports. Accordingly, in cases of non-submission of initial or periodic reports, after sending reminders to the State party concerned, the Human Rights Committee may at its discretion examine the measures of implementation taken by such State party to give effect to the ICCPR in a private session and would adopt provisional concluding observations. It can later change this into final concluding observations and would make them public.⁸³ Since this strategy is new, its success in practice remains to be seen.

⁸¹ Human Rights Committee, Concluding Observations :Sri Lanka, (2003) para. 2.

⁸² Report of the Human Rights Committee, A/59/40 (vol.I) (31/10/2002) para.57.

⁸³ Rule 70(1),(3) of the Rules of Procedure of the Human Rights Committee, CCPR/C/3/Rev.7 (4 August 2004); see Human Rights Committee, General Comment 30, 'Reporting Obligations of State Parties Under article 40 of the Covenant,' CCPR/C/Rev.2/Add.12 (18 September 2002).

Effective implementation of human rights requires that reports on the human rights situation during an armed conflict must be submitted for consideration at the time of occurrence and not on the normal due date. Based on Article 40 of the ICCPR, the rules of procedure provide that the Human Rights Committee can request reports 'at any other time the Committee deems appropriate,' which can include armed conflict situations.⁸⁴ In exceptional situations like internal armed conflicts, the Committee can request such urgent reports even when it is not in session.⁸⁵ Thus, the Committee is enabled to request urgent reports from State Parties involved in armed conflicts well before the due date of their next periodic report.

Requests for such urgent reports were made with regard to countries involved in internal conflicts such as Bosnia and Herzegovina, Federal Republic of Yugoslavia and Croatia.⁸⁶ Such reports were requested from Bosnia and Herzegovina and from Croatia before their initial report and from Yugoslavia some time after the submission of the third periodic report. However, the exercise of this special reporting procedure has not been consistently followed by the Human Rights Committee, despite the fact that these armed conflict were in progress. Even though in all these cases the State Parties complied with the request and submitted their reports, this does not guarantee that every State involved in armed conflicts would submit such reports. In such situations, whether it is a periodic report or a special report, non-submission of a report by a state concerned would place the IDPs out of the international scrutiny provided by the Human Rights Committee.

Concluding observations have no binding force on State parties. The Human Rights Committee publishes the concluding observations, the names of states parties that are overdue in their reports and the follow-up to concluding observations in the annual report to the General Assembly to induce the state parties to comply. Due to the impartiality and objectivity of the Human Rights Committee, concluding observations can be an authoritative source in providing a general critical evaluation of a country's human rights situation to the international community. As a consequence, these can be used by international NGOs and other

⁸⁴ Rule 66(2) of the Rules of Procedure of Human Rights Committee (2004).

⁸⁵ *Ibid.*

⁸⁶ See M.O' Flaherty, *Human Rights and the UN Practice*, at p.39 n. 62; I. Boerefijn, 'The Reporting Procedure' at pp.266-283; Bosnia and Herzegovina submitted special report on 30/10/92 (CCPR/C/89); Croatia submitted in 30/10/92 (CCPR/C/87).

institutions to pressurise the State party concerned to implement the recommendations of the Human Rights Committee, a body that monitors the compliance with important set of international human rights.⁸⁷

The optional Protocol to the ICCPR of 1966 (hereafter OP ICCPR) allows 'individuals' who claim to be 'victims' of a violation in the Covenant to bring communication to the Human Rights Committee⁸⁸ and therefore IDPs in a camp or in a village as a whole can bring communications on their own before the Committee, against their home state which is a party to the OP-ICCPR to get redress for the violations of human rights committed by their state.⁸⁹ The main obstacle to this procedure is that the state concerned should be a party to the OP-ICCPR.

As far as IDPs are concerned, additional obstacles exist to recourse to such procedure in conflict situations. Due to the deprivation of belongings and impoverishment during displacement, internment in IDP camps or living close to conflict zones, IDPs are generally not in an economical or physical position to submit communications personally to the Human Rights Committee. Moreover, in addition to displacement related factors, widespread ignorance of IDPs in third world countries would necessitate assistance to file petitions, such as through NGOs. For the purposes of the ICCPR, IDPs would be considered as victims if the act or omission of the state has adversely affected the exercise or enjoyment of their rights or such an adverse effect is imminent, for instance, by the existing law or an administrative practice.⁹⁰ The Rules of Procedure of the Human Rights Committee provide that if the individual concerned is unable to submit the communication personally, the communication can be submitted by a representative 'on behalf of an alleged victim.'⁹¹ Thus, imprisonment of an alleged

⁸⁷ See C. Tomuschat, *Human Rights*, at p.155.

⁸⁸ Art.1 of the OP-ICCPR; Rule 96(a) of the Rules of Procedure of the Human Rights Committee, (4 August 2004) provides that the communication should emanate from an individual or individuals.

⁸⁹ In *E.W.Et al. v. The Netherlands*, Communication No.429/1990, UN Doc.CCPR/C/47/D/429/1990 (29 April 1993) Decision on Admissibility, para.6.3, the Human Rights Committee observed that, 'provided each of the authors is a victim within the meaning of article 1 of Protocol I of the Optional Protocol, nothing precludes large numbers of persons from bringing a case under the Optional Protocol. The mere fact of large numbers of petitioners does not render their communication an *actio popularis*,'

⁹⁰ *E.W.et al., v. The Netherlands*, para.6.4

⁹¹ Rule 96(b) of the Rules of Procedure of the Human Rights Committee (2004).

victim at the time of the communication can be considered as warranting submission of a communication by the victim's representative.⁹²

Therefore IDPs who stay in IDP camps under traumatic conditions such as torture, arrests, enforced disappearances, refusal of identity documents and birth certificates, infant mortality, malnutrition and epidemics may submit a communication through an NGO to the Human Rights Committee regarding the same, provided the NGO justifies its authority to submit the communication on behalf of such IDPs.⁹³ This can cause impediment in getting justice to IDPs, whose freedom of movement beyond the camp is restricted or whose access to NGOs is otherwise restricted. The ideal solution would be the *actio popularis*, similar to that in the Inter American Convention on Human Rights and African Charter on Human and Peoples Rights, which permits NGOs to engage freely in the communication procedure without the authorisation of the victims.

The other obstacle to the invocation of this remedy is the pre-requisite that the petitioner must have exhausted 'all available domestic remedies.'⁹⁴ This requirement is burdensome to IDPs in conflict situations. During forced displacement in internal armed conflicts, generally the structure of judicial or administrative procedures may become affected or become difficult to access from a combat zone or even available remedies can be ineffective. However, since there is no need to exhaust all local remedies if such local remedies are inaccessible, ineffective or unduly prolonged, IDPs can have recourse to the Human Rights Committee if they can provide evidence of inaccessibility of local mechanisms.

In a way, recourse to the Human Rights Committee may not be effective to protect the human rights of the IDPs who are exposed to real risks, because of the considerable length of time involved in the procedure to take the final views.⁹⁵ However, IDPs can seek provisional protection by interim measures prior to the reaching of a final view by the Committee, 'to avoid irreparable damage to the

⁹² *Singarasa v. Sri Lanka* CCPR/C/81/D/1033/2001 (23 August 2004) para.6.2.

⁹³ *X (a non-governmental organization) v. Uruguay*, communication No.137/1983, CCPR/C/19/D/137/1983 (25 July 1983) para.3; J. Fitzpatrick, 'A Guide to International Mechanisms and Procedures' at p.28.

⁹⁴ Art.5(2)(b) of the OP ICCPR.

⁹⁵ It takes between two to five years, A.Bayefsky, S.Farrior, K.Hanrahan and A.Langham, 'Protection Under the Complaint Procedures of the United Nations Treaty Bodies', in J.Fitzpatrick (ed.), *Human Rights Protection For Refugees, Asylum-Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedure*, (New York, 2002) p.23, at p.122.

victim of the alleged violation,⁹⁶ in case of violations of the ICCPR such as right to life and torture.⁹⁷ This is viable in situations where dangers that adversely affect the rights are imminent. As non-compliance of interim measure by State parties by taking ‘irreversible measures’ would weaken the protection of the Covenant as a whole through the individual communication procedure, it is considered by the Committee as a violation of the obligations of a State Party concerned under the OP-ICCPR.⁹⁸ The Human Rights Committee has made interim measure requests mostly to suspend the execution of persons who claim that they were not granted a fair trial, and to provide urgent medical examinations. IDPs who are in camps under appalling conditions can seek the benefit of these interim measures if and only they can prove that the harm is ‘irreparable.’ Due to the requirement of exposure to a real risk situation, only a limited number of IDPs would benefit from such interim measures.

In spite of the existence of such protective measures, unlike those of the European Court of Human Rights or the Inter-American Court of Human Rights, the Human Rights Committee’s views on violations of human rights, including its interim measure requests, are not legally binding on the state parties.⁹⁹ Since this procedure does not have an enforcement mechanism, it merely relies on the Special Rapporteur on follow-up of the Human Rights Committee’s views and the publicity given by the inclusion of the follow-up activities in the annual report of the Human Rights Committee to the General Assembly in the hope ensuring compliance.¹⁰⁰ Due to the weak implementation system, not many of the State Parties to the OP-ICCPR comply with interim measure requests, especially when non-compliance serves their own interests during armed conflict situations. In *Mansaraj et al., v. Sierra Leone and Saidov v. Tajikistan*, the state parties executed the alleged victims despite the request by the Human Rights Committee for a stay of execution prior to its final views.¹⁰¹

⁹⁶ Rule 92 of the Rules of Procedure of the Human Rights Committee.

⁹⁷ Human Rights Committee, ‘Nature of the General Legal Obligation’ para.12.

⁹⁸ *Piandiong et al v. the Philippines*, Case No.869/1999, CCPR/C/70/D/869/1999 (19 October 2000 paras.5.1-5.4.

⁹⁹ D. McGoldrick, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights*, (Oxford, 1991) at p.151; C. Tomuschat, *Human Rights*, at p.180.

¹⁰⁰ Rule 101 (4) of the Rules of Procedure of the Human Rights Committee.

¹⁰¹ No. 839-841/1998, CCPR/C/72/D/841/1998 (30 July 2001); No. 964/2001, CCPR/C/81/D/964/2001 (20 August 2004) respectively.

According to the Human Rights Committee, States which fail to implement the committee's final views or to inform the Committee of the measures taken within the requested period of 90 days have been on the increase.¹⁰² In the Committee's view, only 30 percent of the responses from States on the implementation of human rights are satisfactory.¹⁰³

The individual communication procedure under the Optional Protocol to the ICCPR may be a useful mechanism in the protection of human rights for at least to some IDPs. Especially where IDPs in Asia are concerned, the Human Rights Committee serves as an important avenue to expose the violations perpetrated by a State to the international community in the absence of a regional human rights mechanism similar to that in Europe, America and Africa.¹⁰⁴

B. Regional Human Rights Bodies

1. The European System

The European Court of Human Rights has the jurisdiction to entertain inter-state and individual communications in terms of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹⁰⁵ The extensive investigative powers of the Court to clarify the facts of the case including to carry out on-site investigation can be initiated at the request of the party or of its own motion.¹⁰⁶

Unlike the individual communication which can be used only to the rights violated with regard to an individual or individuals, inter-state communications can be resorted to by a state or states regarding 'any alleged breach' of the ECHR.¹⁰⁷ Thus, such communications can be useful in addressing large scale violations of human rights taking place within the territory of a another state, as states have a common interest in the protection against violations of

¹⁰² Report of the Human Rights Committee A/57/40 (vol.I) 2002, para.255.

¹⁰³ *Ibid*

¹⁰⁴ C. Tomuschat, *Human Rights*, at pp.33-34 opines that the vast cultural differences among the Asian countries, the prospect of having a Asian Convention on human rights is too remote.

¹⁰⁵ Arts.33,34 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950.

¹⁰⁶ Rule A1 of the Annex to the Rules of Court, Strasbourg, (March 2005).

¹⁰⁷ Art.33 of the ECHR.

human rights and to preserve the European public order.¹⁰⁸ On this basis, this procedure has been used twice in the common interest to protect human rights under the European Convention with regard to massive violations of human rights, which has not happened yet in the UN or other regional systems of human rights.¹⁰⁹ However, the reluctance to resort to this method is evident from the fact that so far none of the state parties to the European Convention has lodged any communication against the Russian Federation or Turkey with regard to large scale human rights violations occurring respectively in Chechnya and South east Turkey, which have caused massive internal displacement.¹¹⁰

There does not exist a *proprio motu* procedure under the ECHR to investigate large scale or systematic violations of human rights.¹¹¹ Thus, until complaints have been filed under the individual or inter-state communications, states are able to keep derogatory measures under Article 15 of the ECHR for a long time.¹¹² However, the Secretary-General of the Council of Europe has the power to request a state party which is allegedly committing human rights violations within its territory to provide explanations as to the extent that its

¹⁰⁸ See generally, S.C. Prebensen, 'Inter-State Complaints Under Treaty Provisions-The Experience Under the European Convention on Human Rights' in Alfredsson *et al.*, (eds.), *International Human Rights Monitoring Mechanisms*, (Hague, 2001) p.533.

¹⁰⁹ *Denmark, Norway, Sweden and Netherlands, v. Greece*, Application Nos.3321/67, 3322/67, 3323/67, 3344/67, (1968) 7 *ILM* 818; *France, Norway, Denmark, Sweden, and Netherlands v. Turkey*. Application Nos. 9940- 44/ 82, (friendly Settlement) 7 December 1985, (1986) 25 *ILM* 308.

¹¹⁰ See the Recommendation 1456 (2000) of the Parliamentary Assembly of the Council of Europe, Strasbourg, 'Urgent Appeal to Members "to make use of Art.33" ECHR (inter-state complaint) v. Russia/ Violation of Human Rights in the Chechen Republic', 6 April, 2000, para. 18, in which Assembly appealed the member states to make use of Art.33 of ECHR with regard to Russian authorities for their grave and systematic violations of the Convention in the Chechen Republic, reproduced in (2000) 21 *HRLJ* 286.

¹¹¹ However, there are non-judicial mechanisms which operate as part of Council of Europe; a limited competence to make *in situ* investigations with regard to violations of torture and inhuman or degrading treatment of people deprived of their liberty is provided under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987, reprinted in I.Brownlie and G.S.Goodwin-Gill, *Basic Documents*, at p. 493; in terms of its Articles 2 and 7 the Committee established under this Convention has the competence to visit places where people are deprived of liberty by a public authority in required circumstances in addition to its periodic visits; Commissioner for Human Rights act on any information or to the requests of the Committee of Ministers or the Parliamentary Assembly and make visit to Member states.

¹¹² M.O' Boyle, 'Reflections on the Effectiveness of the System for the Protection of human rights', in Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, (Kluwer,2000), p.169, at p.179.

internal law ensures the effective implementation of the provisions of ECHR.¹¹³

As far as IDPs are concerned, ECHR does not provide for an *actio popularis* as in the IACHR for initiating individual communications. Therefore, an individual or group of individuals or Non-Governmental Organisation must be a victim i.e., directly affected by such violations, in order to file individual communications.¹¹⁴ Due to the general vulnerability of IDPs in internal armed conflicts and their legitimate fear of reprisals from the government for resorting to international human rights mechanisms would reduce the number of individual communications to the European Court of Human Rights. As has been found in a number of communications against Turkey concerning destruction of houses, the authorities exerted some form of pressure on complainants to withdraw or modify their complaints, and the Court found such acts violated Article 34 (former Article 25) which obliges the state not to hinder in any way the effective exercise of the right of individual petitions.¹¹⁵ These are the communications that managed to reach the Court, but such pressure would discourage the IDP victims from resorting to individual communication procedure at all.

The European Court of Human Rights has dealt with numerous cases against Turkey under individual communications concerning destruction or burning of homes and displacement resulting in violations such as of Article 3 of ECHR on inhuman treatment, Article 8 of the same convention on respect for private and family life and home and Article 1 of Protocol I to the ECHR on peaceful enjoyment of property.¹¹⁶ However, the European Court has not ruled in any such cases that the burning or destruction of homes, possessions and crops which deprived the Kurds of the security of shelter and livelihood and the resulting displacement from the villages are forced expulsions. Such destruction of houses and property did not occur as collateral damage but as deliberate

¹¹³ Art 52 of the ECHR; in 15 December 1999, Secretary General made such a request for explanation from the Russian Federation as to the manner in which the Convention was being implemented in Chechnya.

¹¹⁴ Article 34 of the ECHR.

¹¹⁵ *Akdivar v. Turkey*, Judgment, 16 September 1996, paras.100-106; *Dulas v. Turkey*, paras.76-82; *Orhan v. Turkey*, paras.401-411

¹¹⁶ *Akdivar v. Turkey*, *ibid*; *Mentes v. Turkey* (58/1996/677/867) 28 Nov 1997; *Selcuk and Asker v. Turkey*; *Bilgin v. Turkey*; *Dulas v. Turkey*; *Orhan v. Turkey*; *Yoyler v. Turkey* (26973/95) 24 July 2003; *Ayder v. Turkey* (23656/94) 8 January 2004; *IPEK v. Turkey* (25760/94) 17 February 2004; *Altun v. Turkey*; *Hasan Ilhan v. Turkey* (22494/93) Judgment 9 November 2004. (<http://www.echr.coe.int>)

destruction in a consistent manner which in many cases has effectively resulted in displacement and may lead to the reasonable conclusion of forced eviction by the security forces. Such a finding would have resulted in the action being considered as a violation of right to freedom of movement, in particular of the right to remain, or right against arbitrary displacement. As far as Turkey is concerned, such a finding cannot fall within the scope of right to freedom of movement as it is not a party to Protocol IV to the ECHR. Despite the Court's acceptance of forced eviction in some cases, it decided that it was not necessary to consider whether the forced eviction *per se* was sufficient to constitute a separate violation of Article 8 of the ECHR and Article 1 of Protocol I.¹¹⁷ Such a finding might have led to a finding of the violation of Article 14 of the ECHR in conjunction with at least Article 8 and Article 1 of Protocol I.¹¹⁸

The extension of ECHR to central and eastern European states has inevitably increased the length of Court proceedings, seriously affecting the credibility of the Court.¹¹⁹ As such, in situations of urgency, getting interim or provisional measures has become very important. Interim measures, which are not provided in the ECHR but in the Rules of the European Court of Human Rights, would be granted 'in the interests of the parties or of the proper conduct of proceedings before it.'¹²⁰ These interim measures have binding force and failure to comply with such a measure by a state party to the ECHR constitutes a violation of Article 34 on the individual application of the Convention.¹²¹ Despite their binding effect, the practical value of such measures to the IDPs are restricted until today because their application under the ECHR is only concerned with the direct risk to certain rights, namely, right to life, prohibition of death penalty, and torture, inhuman or degrading treatment or punishment, unlike the provisional measures

¹¹⁷ *Orhan v. Turkey*, para.379.

¹¹⁸ Art.14 of the ECHR states, '[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'

¹¹⁹ Approximately two years are taken for a decision on admissibility and altogether five to six years from the filing until judgment on an application. M.O'Boyle, 'Reflections on the Effectiveness of the System' at p.179, n.39; Protocol No.14 to the ECHR amending the control system of the Convention has been adopted to tackle the problem of excessive case load.

¹²⁰ , Rule 39(1), Rules of Court, (March 2005) Registry of the Court, Strasbourg.

¹²¹ *Mamatkulov and Askarov v. Turkey* (46827/99 and 46951/99) European Court of Human Rights (G.C) Judgment of 5 February 2005, para.128 ; in contrast previously such measures were considered non-binding *Cruz Varaa v. Sweden* 20 March 1991; *Conka and others v. Belgium* (51564/99) 13 March 2001.

issued by the Inter-American Court which goes beyond the protection of life and limb.¹²² Most of the interim measures under the ECHR were granted with regard to expulsion or extradition and in several cases concerning severe prison conditions and health conditions of detainees exposed to the risk of irreparable damage. Thus, there is a possibility of getting the protection of interim relief in severe health conditions of IDPs that result in irreparable damage, due to lack of food, medical facilities and sanitary conditions in a camp. The satisfactory feature of this system is the high rate of compliance with these interim measures by the State parties.¹²³

The humanitarian consequences involved in internal displacement were explicitly considered by the European Court of Human Rights in *Dogan v. Turkey*. In that case the applicants lived in poor conditions during internal displacement after destruction of their homes and property by the authorities. Since the Court had confined its consideration to the denial of access to their possessions, the need to determine the justification for the interference of the right to peaceful enjoyment of one's property did not arise.¹²⁴ However, in the Court's opinion the exact cause of displacement, whether it was a forced eviction or a lawful eviction for the safety of the civilians or as a direct result of confrontations and destruction of homes, was not clear.¹²⁵ Nevertheless, the Court observed the fact that, in many similar cases, deliberate destruction of houses and possessions by the security forces deprived the civilians of their livelihood and forced them to leave their villages.¹²⁶

The Court when considering the proportionality of such measure by the state with the right to peaceful enjoyment of one's possessions by refusing access to homes and livelihood, resorted to the Principles 18 and 28 of the UN Guiding Principles on Internal Displacement as an interpretative guide. Resorting to such IDP specific Guiding Principles to determine the legitimate needs of displaced persons provides enhanced protection to IDPs, as it requires the state to provide alternative accommodation or funds for living during displacement, irrespective of the lawfulness of the interference with peaceful enjoyment of possession.

¹²² Y. Haeck and C.B. Herrera, 'Interim Measures in the Case Law of the European Court of Human Rights' (2003) 21 *NQHR* 625, at p.672.

¹²³ *Ibid.*, at p.670.

¹²⁴ *Dogan and Others v. Turkey*, at para.143.

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*, para.142

In the light of a series of cases against Turkey concerning destruction of homes of Kurds and their evacuation from villages, leading to internal displacement, and in the absence of investigation, provision of alternative accommodation and compensation or *ex gratia* payments to the displaced persons by the state, one can probably come to the conclusion that such a consistent pattern of violations of human rights indicates existence of an official policy which discriminates against Kurds.¹²⁷ In many cases, alleged violation of Article 14 on the enjoyment of the rights set forth in the ECHR without discrimination was claimed in conjunction with Articles 3, 8, 13 and Article 1 of Protocol I on the basis of applicants' status as members of a national minority. But the Court has never found a violation of Article 14, because of insufficient evidence.¹²⁸

This is mainly due to the rigid interpretation of the standard of proof, namely, 'beyond reasonable doubt', as requiring a high degree of probability, as in criminal trials, without giving due consideration to the differences in the objectives of international protection of human rights and criminal justice.¹²⁹ The former does not have the objective of punishing individuals who have committed violations, but of protecting the victims and providing reparations for damages resulting from the responsibility of the state.¹³⁰ Requiring proof beyond reasonable doubt in the evidence produced by the applicant against the respondent state cannot serve this objective. Such proof should be related 'to the facts of the case as a whole, including "the conduct of the parties."' ¹³¹ Failure to consider the context of the violation would result in the failure to identify systemic violations. The requirement of such a high standard of proof would result in the 'removal in practice of the human rights protection guaranteed by Article 14 in areas where the highest level of protection [to the minorities], rather than the highest level of proof, should be the priority.'¹³²

The high standard of proof required to establish the discriminatory motive for the destruction of homes and crops by the authorities is difficult to

¹²⁷ *Mentes v. Turkey*, para.59.

¹²⁸ *Hasan Ilhan v. Turkey*, para.130; *Altun v. Turkey*, para.79; *Bilgin v. Turkey*, para.129; but see the partly dissenting opinions of Judges Loucaides and Mularoni in *Hasan Ilhan v. Turkey* 9 November 2004.

¹²⁹ *Isayeva, Yusupova and Bazayeva v. Russia*, at p.172

¹³⁰ *Velasquez Rodriguez v. Honduras*, Judgment of 29 July 1988, para.134.

¹³¹ *Hasan Ilhan v. Turkey*, Partly dissenting opinion of Judge Loucaides.

¹³² *Ibid.*, partly Dissenting opinion of Judge Mularono.

establish in cases of internal armed conflict, where the respondent state is in control of most of the evidence. But at least the impact of such acts on the people in the context of consistent occurrence of such acts would lead to the conclusion that such acts are discriminatory. In *Orhan v. Turkey* the Court considered that the finding of violation of Article 14 in conjunction with Articles 3,8, and Article 1 of Protocol I was not necessary as it had already found violations of the latter rights.¹³³ This had the effect of removing the applicants and other people from the ‘highest level of protection’ that could be provided by Article 14 against discriminatory acts or policies of the state that generate internal displacement.

The finding of a violation of Article 14 by the Court can serve as an establishment of evidence of gross or systematic violations of certain human rights that result in displacement in a State concerned by an impartial mechanism. Even though such findings in individual communications cannot ‘realistically and effectively’ serve to correct the violations that occur as a result of deliberate state policy,¹³⁴ they can be beneficial to identify standards of conduct to be included in the political resolution, by determining the legal standards being violated and to prevent continuous occurrence of previous violations on such a level as a consequence of ‘public and authoritative exposure of the situation.’¹³⁵ Such judicial determinations will have some impact in the exertion of political pressure on the state concerned.¹³⁶ Above all, in the absence of explicit protective means in the ECHR for large scale violations of human rights with the exception of rarely used inter-state communications, a finding of violation of Article 14 can serve as a means of protection in such situations *via* individual communications.¹³⁷

The Court held in many of those cases of deliberate destruction of homes and property by the security forces, that such acts infringed the right to peaceful enjoyment of property, without recourse to the international humanitarian law

¹³³ Para.399

¹³⁴ R. Mullerson, ‘The Efficiency of the Individual Complaint Procedures: The Experience of CCPR, CERD, CAT and ECHR’ in A. Bloed, L. Leicht, M. Nowak and A. Rosas (eds.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*, (Dordrecht, 1993) at p.27.

¹³⁵ A. Reidy, F. Hampson and K. Boyle, ‘Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey’ (1997)15 *NQHR* 161, at p.163.

¹³⁶ *Ibid*

¹³⁷ However, such serious or massive violations may be considered under Article 43(2) which states that a request to decide a case that raises a ‘serious issue of general importance’ can be referred to the Grand Chamber. R. Murray, ‘Serious or Massive violations Under the African Charter on Human and Peoples’ Rights: A Comparison with the Inter-American and European Mechanisms’ (1999)17 *NQHR* 109, at p.110, n.4.

norms which explicitly prohibit the deliberate destruction of houses as civilian objects and as collective punishment. Incidental destruction of homes which is not proportionate to the military objective is also prohibited by international humanitarian law. If a massive destruction of houses occurred as a result of the confrontation between the government armed forces and PKK which is not proportionate to the military objective, then it can be considered as a violation of international humanitarian law and an unjustified interference with the peaceful enjoyment of the right to property. The Court, however, has been reluctant to use international humanitarian law explicitly as an interpretative guide in the application of the European Convention of Human Rights. Generally in the majority of cases concerning Turkey, a state of emergency existed in those regions where destruction of homes had taken place and therefore the Court had to decide the compliance of Turkey in its derogation of right to property with its other international law obligations, in particular, of relevant humanitarian law provisions.¹³⁸ The failure of the Court to resort to humanitarian law as an interpretative aid to determine the scope of derogation may be due to reluctance to brand the armed activities between government forces of Turkey and PKK as an internal armed conflict.¹³⁹ Rather, it has borrowed the language of humanitarian law, language namely, 'precautions', 'means and methods' and 'incidental loss of civilian life,' without explicitly acknowledging them in the judgment.¹⁴⁰

Again in two cases concerning IDPs in the internal armed conflict in the Russian Federation, the European Court did have the right opportunity to resort to international humanitarian law as an interpretative guide. In the case of *Isayeva, Yusupova and Bazayeva v. Russia*, the applicants who were IDPs from Chechnya, when fleeing to escape from the military activity in Grozny to Ingushetiya, sustained injuries, their children were killed and their cars and possessions were destroyed in indiscriminate bombing by Russian Military

¹³⁸ *Dogan and Others v. Turkey*, para.142.

¹³⁹ Human Rights Watch, 'Displaced and Disregarded' at p. 15 considers that the conflict in south eastern Turkey during 1984-99 was an internal armed conflict; L. Zegveld, *The Accountability of Armed Opposition Groups in International Law*, (Cambridge, 2002) at p.4 considers the situation in Turkey since 1983 as internal armed conflict; Hans-Joachim Heintze, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' at p.812 states that the reason for non-application of humanitarian law by the European Court until now is by political grounds.

¹⁴⁰ In *Ergi v. Turkey* (66/1997/850/1057) 28 July 1998 para.79 and in *Ozkan v. Turkey* (21689/93) 6 April 2004, para. 297.

planes on the civilian convoy at the administrative border between Chechnya and Ingushetiya. The European Court, in finding a violation of right to life of applicants, however, did not have recourse to humanitarian law as an interpretative aid, despite the fact that the applicants and third party submissions cited common Article 3 of the Geneva Conventions of 1949 in this regard. In this case the Court indicated the effect of the ‘extremely powerful’ nature of the weapon’ i.e., 12 S-24 non-guided air-to ground missiles, its creation of several thousand pieces of shrapnel and its excessive impact beyond 300 metres, causing mortal danger to anyone on the road at the time.¹⁴¹ It was clearly an indiscriminate attack not only because of the indiscriminate effects caused by the nature of the weapon but also due to the target against which such weapon was used, namely the civilian convoy.¹⁴²

Similarly, in *Isayeva v. Russia* the applicant was injured by indiscriminate bombing by the Russian military while escaping from fighting. In this case the European Court in its finding of violation of the right to life resorted to the language of humanitarian law, namely, the use of ‘indiscriminate weapons within a populated area.’¹⁴³ It further stated that,¹⁴⁴

using this kind of weapon in a populated area, *outside war time* and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body, in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention. *The operation in question therefore has to be judged against a normal legal background.*

In the above discussed two cases decided by the Court, since the Russian Federation has not made any derogation under Article 15(2) of the ECHR requires that derogations from Article 2 shall be made ‘in respect of deaths resulting from lawful acts of war.’ This is not the position in terms of the corresponding provisions in other human rights Conventions. Therefore without specific derogation, it is not technically possible to resort to international humanitarian law to interpret that clause. Despite the existence of an internal armed conflict in

¹⁴¹ Para.195.

¹⁴² The other factors that make such attack clearly illegal are: four hours duration of the attack; good visibility of the conditions on the road by the descending planes; and the absence of any retaliation from the ground.

¹⁴³ Paras.189,191.

¹⁴⁴ Para.191 (emphasis added).

Russian Federation at the time of the facts of the case, the Court's insistence on adherence to derogation from Article 2 on the right to life excluded the possibility of using humanitarian law as *lex specialis*, particularly in the existence of substantial body of customary rules of humanitarian law applicable to the conduct of hostilities in internal armed conflicts.

It is to be noted that rigid application of the requirement of derogation is not convincing in an intensive internal armed conflict. This is evident from the reasoning of the court that it is impossible to reconcile, the use of weapon 'outside war time,' because there was an internal armed conflict actually taking place at that time in Chechnya. Moreover, declaration of the state of emergency has no bearing on the existence of an armed conflict. A recalcitrant state can choose to remain without declaring a state of emergency in order to avoid such interpretation of the right to life.

The application of human rights law alone would tend to provide more protection than humanitarian law to IDPs as it does not permit the use of lethal force in policing operations (and therefore even against combatants) except when it is absolutely necessary and therefore as a last resort.¹⁴⁵ Therefore in principle very few incidental loss of civilian lives would be permissible.

The principle of proportionality in human rights law is concerned with the effect on the individual and therefore the use of minimum force is permitted and lethal force can only be used as a last resort.¹⁴⁶ Conversely, in humanitarian law, a combatant can be targeted even if he does not pose any immediate threat. The principle of proportionality in humanitarian law is concerned with the incidental loss of civilian lives and objects rather than the effect on combatants. Due to such fundamentally different approaches, branding the conduct of hostilities as law enforcement operations by the application of human rights law is flawed as that would be obviously inconsistent with the application of international law most directly relevant to an internal armed conflict, namely, humanitarian law as *lex specialis*. Such an overstretched application of human

¹⁴⁵ Art.2(2) of the ECHR.

¹⁴⁶ N. Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict', Conference to Mark the Publication of the ICRC Study on "Customary International Humanitarian Law", The Hague, 30-31 May 2005; Code of Conduct for Law Enforcement Officials, UN GA Resolution 34/169 of 17 December 1979, Article 3 and Commentary; Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990, Principles 9-11.

rights law to internal armed conflicts would weaken it as a protective regime applicable in peace times and internal disturbances.¹⁴⁷

As the Court implicitly accepted the existence of an armed conflict in the Russian Federation by stating that it had not derogated from Article 2 ‘in respect of deaths resulting from lawful acts of war’ under Article 15(2) of the ECHR, it acknowledged at least the applicability of international humanitarian law as an independent regime along with human rights law. The European Court could therefore have observed the existence of humanitarian law norms that prohibit direct and indiscriminate attack on civilians and civilian objects that correlate with the right to life in the ECHR, in the context of such a serious violations of right to life of IDPs. This would reinforce not only the right to life but the relevant norms of international humanitarian law applicable to internal armed conflicts as well.¹⁴⁸

As far as IDPs are concerned, the court has granted monetary compensation for loss of their houses, cultivated land, livestock and non-pecuniary damages for seriousness of violations in respect of Articles 3, 8 and Article 1 of Protocol I. However, as regards the *restitutio in intergrum* ie., to restore the IDPs to their previous position before breach by reconstructing their houses and villages for their return, even though the court accepted the respondent state’s legal obligation to put an end to the breach, it decided that if restitution is practically impossible then it is a matter within the state’s discretion to choose the means by which to comply with the judgment, subject to the supervision of the Committee of Ministers.¹⁴⁹ In *Orhan v. Turkey*, the applicant requested the Court to rule

¹⁴⁷ See for a contrary view, W. Abresch, ‘A Human Rights Law of Internal Armed Conflict’.

¹⁴⁸ Judge Sergio Garcia Ramirez in his separate concurring opinion in *Bamaca-Velasquez v. Guatemala*, Series C. No.70 (25 November 2000) para.25, states that, ‘[t]he Court can go further in its application of this matter, [resorting to humanitarian law] even when it is not strictly required to under the terms of the application, [to interpret the human rights norms] and observe the presence of norms of *jus cogens* resulting from the evident correlation –which shows an international consensus-between the provisions of the American Convention, the Geneva Conventions, and “other international instruments”-as is indicated in para.209 of the judgment-regarding “non-derogable human rights ([sic]such as the right to life and the right not to be submitted to torture or cruel, inhuman and degrading treatment.”’ ; the African Commission on Human Rights had referred to the application of international humanitarian law in a similar manner with regard to right to life in 48/90 *Amnesty International v. Sudan*, 50/91 *Comite Loosli Bachelard v. Sudan*, 52/91 *Lawyers Committee for Human Rights v. Sudan*, 89/93 *Association of Members of the Episcopal Conference of East Africa v. Sudan*, 13 *th Annual Activity Report of the African Commission on Human and Peoples’ Rights*, 1999-2000, AHG/222 (XXXVI) p. 124, para.50 (hereafter *Amnesty International v. Sudan*)

¹⁴⁹ *Selcuk and Asker v. Turkey*, paras.123-25;*Orhan v. Turkey*, paras.450-51.

that, ‘for the benefit of the Committee of Ministers, that there is no evidence to suggest that it would be impossible for the village to be re-built and for the applicant and his surviving relatives to return to their homes.’¹⁵⁰ But such a request was rejected by the Court. This is in contrast to the position of the Inter-American Court, where other forms of reparation such as resettlement have been directly specified by the Court. Specifically ordering individual and general measures other than monetary compensation in the judgment is preferable for the effective protection of IDPs as it would avoid the discretion of the state concerned in providing restitution and other remedies for non-repetition of similar violations.¹⁵¹

Apart from supervising the enforcement of ‘just satisfaction’ ordered by the court, the Committee of Ministers has the task of supervising the individual measures to ensure that the violation has ceased and the injured party being restored, as far as possible to his previous position and the general measures to prevent new violations, or to put an end to continuing violations.¹⁵² The enforcement of judgment has been generally positive, even though it takes an excessive length of time in some cases. The factors that contribute to the relatively successful enforcement of judgments are *inter alia.*, the legally binding nature of the final judgment of the European Court on the state parties in any case to which they are parties, and the involvement of a political body of the Council of Europe i.e., the Committee of Ministers.¹⁵³ Moreover, the Committee of Ministers are supported in their close monitoring by another political organ of the Council of Europe, namely, the Parliamentary Assembly.¹⁵⁴ Therefore it can be stated that European Court of Human Rights is in a position to provide effective remedies to IDPs.

¹⁵⁰ Paras.450-51.

¹⁵¹ See above, Chapter 6, Section D.

¹⁵² Rule 3(b) of the Rules adopted by the Committee of Ministers for the Application of Article 46, para 2 of the European Convention on Human Rights (10 January 2001).

¹⁵³ Art. 46(1)(2) of the ECHR; the Protocol No14 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention (adopted in 13 May 2004) which has to enter into force yet, grants power to Committee of Ministers to refer a situation to the Court of a refusal by a state to abide by a final judgment, to decide fulfilment of its obligation under para. 1 of Article 46 of the ECHR under which the state party has undertaken to abide by the final judgment in any case to which it is a party.

¹⁵⁴ In case of persistent refusal by a government to implement the measures, the Parliamentary Assembly may recommend in terms of its Rules of Procedure, June 2005, to the Committee of Ministers to take action to suspend a State’s rights of representation in the Council of Europe under Article 8 of the Statute of the Council of Europe, London 1949 (<http://conventions.coe.int>).

2. The Inter-American System

The Inter-American Commission on Human Rights is the main supervising body in the protection of human rights in the American Continent of the States which are members of the Organisation of American States (OAS) in accordance with the American Declaration of the Rights and Duties of Man of 1948 and the American Convention on Human Rights of 1969.¹⁵⁵ All the members of the OAS which was created by the Charter of the Organisation of American States are ‘indirectly’ bound by the American Declaration of the Rights and Duties of Man by the human rights obligations in the Charter of the OAS, which incorporates the former.¹⁵⁶ However, the Inter-American Court of Human Rights, which was established by the American Convention on Human Rights of 1969 (ACHR), does not have jurisdiction to consider cases against states not parties to the Convention. Moreover, not all of the member States of the OAS have ratified the American Convention on Human Rights. As the Commission was created prior to the Court, the function of the Inter-American Commission is significant as it has the power to monitor human rights obligations of States parties to the American Convention on Human Rights and the human rights obligations of all the members of the OAS which are not parties to the Convention, in accordance with the American Declaration of the Rights and Duties of Man¹⁵⁷ Consequently, it can monitor the human rights obligations of states that are parties to the American Convention on Human Rights in terms of both the Inter-American Convention and the Declaration. Moreover, unlike the Inter-American Commission, which can consider individual communications, *locus standi* before the Inter-American Court of Human Rights is only provided to states parties to the American Convention on Human Rights and the Inter-American Commission. Because of its broader subject matter jurisdiction and *locus standi*, the Commission is in an important position to protect civil and political rights as well as socioeconomic

¹⁵⁵ Art.1(2) of the Statute of the Inter-American Commission on Human Rights. (Approved by Resolution No.447 taken by the General Assembly of the OAS at its ninth regular session in October, 1979). (<http://www.cidh.oas.org>)

¹⁵⁶D. J. Harris, ‘Regional Protection of Human Rights :The Inter –American Achievement’ in D.J. Harris and S. Livingstone, *The Inter-American System of Human Rights* (Oxford, 1998) 1, at pp.4-5; however, the United States has often objected to the fact that it has legally binding obligations under the Declaration, D. Harris, *ibid.*, at p.6.

¹⁵⁷ The Commission was created in 25 May 1960; Article 1 of the Statute of the Inter-American Commission on Human Rights.

rights in all the OAS member states.¹⁵⁸ This is useful especially with regard to displaced persons in Latin American states affected by internal armed conflicts.

The Commission has the competence to entertain individual and inter-state communications and to undertake studies in situations of gross violations of human rights to prepare country reports.

Individual communications can be submitted to the commission by 'any person or group of persons or nongovernmental entity legally recognised in one or more of the Member States of the OAS' concerning them or third persons regarding alleged violations of human rights recognised in the Declaration and the Convention.¹⁵⁹ Such a provision of *actio popularis* does not require a petitioner to be a victim to submit petitions to the commission. Thus, it is advantageous to the protection of IDPs simply for the reason that many IDPs in third world countries lack knowledge of their rights or how to access the international human rights protection mechanisms, or are in a difficult position as a result of their displacement including fear of reprisals. In such situations, either IDPs can file petitions as a group or NGOs can file petitions of alleged violations on behalf of specific groups of IDPs.

The Commission is equipped with a wide range of powers to carry out its protection activities effectively under individual communications in serious and urgent cases: to disregard the normal admissibility procedures; request the promptest reply from the state by using most expeditious means; on its own initiative or at the request of the party to grant precautionary measures against the state concerned to prevent irreparable harm to persons; to request the Inter-American Court in cases that have not yet been submitted to the Court for consideration to adopt provisional measures; and to conduct on-site investigation in cases it considers necessary.¹⁶⁰ In serious and urgent cases the Commission would disregard the admissibility procedure and proceed with the on-site investigation only with the presentation of a case that meets the requirements of admissibility.¹⁶¹ Such powers, coupled with the flexible *locus standi* provision,

¹⁵⁸ As American Declaration of the Rights and Duties of Man contains both types of human Rights unlike the ACHR.

¹⁵⁹ Art.23 of the Rules and Procedures of the Inter-American Commission on Human Rights (2003) (<http://www.cidh.oas.org>) ; Art.44 of the ACHR.

¹⁶⁰ Arts.30(4),25,74,40 Rules of Procedure of the Inter-American Commission on Human Rights (2003)

¹⁶¹ Article 40(2) *ibid.*

place the individual communications under the Inter-American system in a better position to respond effectively to the gross violations of human rights of IDPs, unlike the UN system under the ICCPR or the European system under the ECHR.

Under the individual communications procedure, precautionary measures have often been granted by the Commission to protect the lives and safety of IDPs in Latin American countries. Precautionary measures are effective in *preventing* imminent threats to lives of displaced persons rather than providing reparations for the *violation*, at the end of lengthy proceedings. Many such precautionary measures were requested from Colombia, which has the second highest number of IDPS in the world.¹⁶²

For instance, on January 2, 2002, the Commission granted precautionary measures on behalf of *Afro-Colombian Communities in 49 hamlets in the Naya River in Buenaventura* regarding the threats and violence against them by the paramilitary members- United Self-defence Forces of Colombia (AUC) to make the inhabitants leave the area. The Commission requested Colombia to provide unarmed civil protection to prevent armed incursions in that area; to take preventive measures including to have the presence of law enforcement to prevent illegal actors entering into the hamlets; to strengthen its early warning system by implementing an effective communication system; and to investigate the alleged acts of violence and to impose sanctions against perpetrators.¹⁶³ Similarly, precautionary measures were granted to protect lives, to prevent forced displacement and for the return of displaced families to the humanitarian areas established by the communities in the case of *515 families of Afro-Colombian descent (2,125), members of the Jiguamiando Basin Community Council*.¹⁶⁴

These measures provide protection to individuals or unquantifiable groups of persons such as communities.¹⁶⁵ The Commission has granted such measures in favour of a large number of Haitians and Dominicans of Haitian origin who could not be individually identified, from massive expulsions from Dominican Republic in November 21 1999. However, according to the reasoning of the

¹⁶² On January 11 2002 on behalf of *110 members of the La Balsita living and working community in Debeiba*; on March 15,2002, on behalf of *Embera Chami indigenous persons*. Annual Report of the Inter-American Commission on Human Rights 2002, OEA/Ser.L/V/II.117, Doc.1 rev.1 (7 March 2003) Ch.III, paras.22,25.

¹⁶³ Annual Report of 2002, *ibid.*, Ch III, para.21.

¹⁶⁴ *Ibid.*, Ch.III,para.45.

¹⁶⁵ *Ibid.*, Ch.III, para.10.

Inter-American Court, such protection cannot be extended to the general protection of IDPs in a country, even though they seem to share the status of displaced by armed conflicts. This is because of the impossibility of individualising IDPs scattered in various geographical locations. To the Commission's request for a provisional measure to the same persons, the Court stated that individual identification of persons in danger of irreparable harm is essential and therefore without specific names or individualization, 'protecting generically those in a given situation or those who are affected by certain measures' through provisional measures is not feasible.¹⁶⁶ In its view, to extend the protection of precautionary measures to a community of persons, the members must be identifiable, constitute an organised community and situated in a specific geographic location and affected by similar risks of violence.¹⁶⁷ In that sense, even in individual cases, the protection against gross or systematic violations of human rights can at least be extended to identifiable group of IDPs in a specific geographical location rather than the general protection of IDPs in a country who share the status of being displaced by armed conflicts. Such an approach seems to be adopted to keep the protective measures a feasible remedy to prevent an urgent irreparable harm by limiting the protective functions of a state to a specific identifiable group of persons. On the other hand, in the light of the effectiveness of certain provisional measures, it is to be noted that in a country where the IDPs are generally targeted in a systematic manner, such identification of certain groups might make such groups vulnerable to reprisals.

As such, as far as gross or systematic violations of human rights are concerned, a mechanism that would be able to make on-site observations and to publish such violations in country reports is better than the individual communications procedure since, even though the victims involved are a group of persons in the latter procedure, consideration of facts would be restricted to the individual cases rather than the general situation in a country. Moreover, even though a series of similar cases can give an inference on the general state policy as to the violations, if a forum such as the European Court of Human Rights is reluctant to consider the subsequent cases in that general context of the

¹⁶⁶ *Case of Haitians and Haitian Origin in the Dominican Republic* 18 August 2000, (Ser.E) 'Considering' section, para.8.

¹⁶⁷ *The Case of the Communities of the Jiguamiando and the Curbarado*, 6 March 2003, Inter-American Court of Human Rights (Ser.E) 2003. 'considering' section para.9.

discriminatory state policy, an individual mechanism would not serve to protect victims from massive violations of human rights.¹⁶⁸ However, as far as the Inter-American Commission is concerned, this commonly stated view is not relevant, as investigation of an individual may result in a special country report on the human rights situation, with or without an on-site visit by the Commission.¹⁶⁹ For instance, the petition presented before the Inter-American Commission by an Indian Rights Organisation on the forced relocation of Indian Miskito people resulted in on-site investigation and a special Report of the Commission on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin.¹⁷⁰

The Commission's competence to prepare and issue country reports is the better way of addressing immediately an urgent and serious general situation, where civilians or displaced persons are subjected to widespread violations of human rights, due the specific features involved:¹⁷¹ the active role of the Commission to begin the procedure on its own motion without any third party involvement when it gets information as to the widespread violations of human rights in a country;¹⁷² power of the Commission to use all sources of information without any restriction; on this basis its ability to complete the report within a short period and with a flexible procedure with its preliminary recommendations and a set period for compliance; if necessary, the power to make on-site investigation with the consent of the state; and issue recommendations to States concerned to be complied with.¹⁷³ For instance, in its Third Report on Colombia based on its on-site visit to Colombia, the Commission was able to observe and report the 'difficult living conditions' in IDP camps such as overcrowded conditions, lack of privacy, inadequate food assistance, water, symptoms of advanced malnutrition among children and women and to make recommendations

¹⁶⁸ A. Reidy, F. Hampson and K. Boyle, 'Gross Violations of Human Rights' at p.172 (in the context of European Commission and the Court)

¹⁶⁹ C.Cerna, 'The Inter-American Commission on Human Rights: its Organization and Examinations of Petitions and Communications' in D.J. Harris and S. Livingstone, *The Inter-American System of Human Rights* (Oxford, 1998) 65, at p.97.

¹⁷⁰ OEA/Ser.L/V.II.62, doc.10 rev.3 (29 November 1983)

¹⁷¹ Art.41(c) ,(d) of the ACHR; See C. M. Quiroga, *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, (Dordrecht,1988)at p.320.

¹⁷² Article 18(c) of the Statute of the Inter-American Commission on Human Rights (1979); one of the political organs of the OAS such as general assembly can request the Commission to carry out an on-site visit to a country and report to it regarding the human rights situation therein.

¹⁷³ C.M. Quiroga, *The Battle of Human Rights*, at pp.320-21

in this regard.¹⁷⁴ Because of this procedure of country reports, failure of states to resort to the inter-state communications in situations of widespread violations of human rights in the member states of the OAS could not be considered as a major lapse in the protection of human rights in Americas.¹⁷⁵

In country reports, the Commission has dealt extensively with the problems of internal displacements covering both civil and political rights as well as economic, social and cultural rights. Since the Convention does not contain the economic, social and cultural rights, the international obligations of the States parties to the Convention with regard to IDPs in this regard can be examined according to the Declaration on the Rights and Duties of Man, to the extent that they are not covered by the Convention.¹⁷⁶ The Guiding Principles on Internal Displacement was considered by the Commission as a comprehensive restatement of norms on IDPs and provides authoritative guidance to the Commission in the application of general provisions of the American Convention.¹⁷⁷ On that basis, in its 1999 Third Report on Colombia, the Commission examined the problem of internal displacement in a separate Chapter and recommended *inter alia* that: the parties to the conflict should observe the UN Guiding Principles on Internal Displacement to prevent internal displacement; and priority should be given to alleviate the difficult economic, social and cultural situations of IDPs.¹⁷⁸ Similarly UN Guiding Principles were used in the fifth report on Guatemala where the Commission discussed the problems of reintegration of IDPs who have returned to their places of origin or resettled in other areas.¹⁷⁹ It recommended in this regard that efforts be made to facilitate the legalization of land titles and resolution of legal disputes over the ownership of lands; basic infrastructure be provided for access to potable water and sanitary facilities, assistance be provided in housing;

¹⁷⁴ *Third Report on Colombia*, Ch.VI, 'Recommendations' section, paras. 45-46.

¹⁷⁵ Art.45 of the ACHR, Art.48 of the Rules of Procedure of the Inter-American Commission on Human Rights; moreover, inter-state communication is of limited use in the protection of human rights as it is only available against the parties to the Convention and only if both states concerned have recognised the competence of the Commission in this regard by a declaration.

¹⁷⁶ Article 26 of the ACHR is the only (general) provision on economic, social and cultural rights ; see C. Medina, 'The Role of Country Reports in the Inter-American System of Human Rights' in D.J. Harris and S. Livingston (eds.) *The Inter-American System of Human Rights* (Oxford, 1998) p.115, at p.131; there are brief general or special reports on the human rights situations of countries involved in internal armed conflict in the Annual report of the Commission. Art.57(1)(h),(2) of the Statute of the Commission.

¹⁷⁷ *Third Report on Colombia*, Ch. VI, paras.5-10.

¹⁷⁸ *Ibid.*, Ch. VI, 'Recommendations' section, Ch. III recommendations section.

¹⁷⁹ *Fifth Report on the Situation of Human Rights in Guatemala*, 2001, OEA/Ser. L/V/II.III, doc.21.Rev, (6 April 2001),Ch. XIV, para.12

the provision of identity documents to all IDPs be ensured ; and the completion of de-mining efforts be ensured.¹⁸⁰ Such recommendations indicate the guidance derived by the Commission in particular from the UN Guiding Principles 28 through 30 in the application of the general provisions of the American Convention and Declaration to the IDPs.

Moreover, in country reports and individual communications the Commission dealt not only with violations of human rights but also violations of humanitarian law that result in detriment to displaced persons. For instance in the 1999 Report on Colombia it expressed concern that:

‘[h]uman rights violations and infringements of provisions of humanitarian law allegedly committed by members of the military and security forces against the civilian population go unpunished. This situation both encourages the continuation of such abuses and helps to protract and increase displacement itself.’¹⁸¹

Such an approach of the Commission to draw the attention of the causes of displacement markedly differ from the approach of the Human Rights Committee with regard to concluding observations under the ICCPR.

In the Commission’s view, to aptly resolve the specific claims in individual petitions, either ‘it is necessary at times to *directly apply* rules of international humanitarian law, i.e. the law of armed conflict, or to inform its interpretations of relevant provisions of the American Convention by reference to these rules.’¹⁸² However, the Commission’s competence for direct application of international humanitarian law norms was rejected by the Court on the basis that under the American system, neither the Commission or the Court has competence to attribute responsibility to a state concerned pursuant to humanitarian law treaties.¹⁸³

Regarding effectiveness of compliance with recommendations by the Commission in individual Communications, the figures indicated by the Commission in its Annual Report 2004 provide a relatively impressive picture, given the fact that the Commission’s recommendations do not have binding force on member states. According to the report, out of 70 cases decided during the

¹⁸⁰ *Ibid.*, para.42

¹⁸¹ *Third Report on Colombia*, 1999, Ch. VI, para.89.

¹⁸² *Ibid.*, Ch. IV, para.8.

¹⁸³ See for detailed examination of the competence of the Court and the Commission to use international humanitarian law norms in the context of individual communications, L. Moir, ‘Decommissioned? International Humanitarian Law and the Inter-American Human Rights System,’ (2003) 25 *HRQ* 182.

previous three years, the recommendations of the Commission were fully complied with in 5 cases, partially complied with in 42 and non-compliance was in 23 cases. Therefore, in two thirds of cases, the recommendations of the Commission were complied with in some way.¹⁸⁴ Compliance with individual cases is different from the compliance of recommendations of the Commission in the Country reports, as in the latter states often tend to deny that gross or systematic violations of human rights are taking place in their territory. Publicizing the violations would induce some states to correct their conduct within their territory, as they do not like getting their image tarnished at the international level. The Commission submits such reports to the General Assembly of the OAS to draw the attention of states and non-governmental organisations through public debate and this method has been proved successful in some cases. In many cases of gross violations of human rights, actions by political organs of the OAS would provide effective protection. Unfortunately, due to the lack of political will on the part of the OAS members, discussion of the contents of the report and the passing of resolutions with the recommendations to the state concerned or/and other joint actions of the OAS member states to pressurise compliance by the state concerned have rarely taken place to date.¹⁸⁵

The Inter-American Court's provisional measures, decisions on the merit, and decisions on reparations are binding on the parties to the Convention.¹⁸⁶ The Court has granted provisional measures with regard to the IDPs to protect right to life and right to humane treatment, to ensure humanitarian assistance and freedom of movement in particular to remain in and to return to their habitual places.¹⁸⁷ The Court has adopted such measures on the basis that they are not only precautionary in preserving the outcome of a pending case but also protective as they protect human beings from imminent violation of human rights and therefore in situations of extreme gravity and urgency they become a 'true preventive

¹⁸⁴ Annual Report of the Inter-American Commission on Human Rights 2004, OEA/Ser.L/V/II.122, Doc.5 rev.1 (23 February 2005), Ch. III, paras.58-59.

¹⁸⁵ C. Medina, 'The Role of Country Reports', at pp.126-127.

¹⁸⁶ Arts. 63(1) (2) and 68 of the ACHR.

¹⁸⁷ *The Case of the Communities of the Jiguamiando and the Curbarado*, (Colombia) March 6 2003, (Ser.E) 2003, 'Decides' section paras. 3-5; *Peace Community of San Jose de Apartado Case* (Colombia) (Ser.E), June 18 2002, 'Decides' section, paras.1-5; *Giraldo Caraldo case*(Colombia) February 5 1997, 'Considering' section, para.5.

jurisdictional guarantee' to the IDPs.¹⁸⁸ As such, similar to the jurisdictional guarantee of ensuring the enjoyment of a right and providing appropriate remedy to an injured party in contentious cases, providing provisional measures is a jurisdictional guarantee of the Court for fundamentally protecting human beings and therefore certainly they have binding force on the State party concerned.

The Court has often mentioned the relevant humanitarian law norms such as common Article 3 of the 1949 Geneva Conventions, along with human rights provisions of the American Convention, in cases concerning violations committed in internal armed conflicts.¹⁸⁹ However, relevant humanitarian law norms can be resorted to by the Court only for the purposes of interpretation of the rights in the American Convention and not for the application of the former to attribute international responsibility to the state for such violations of international humanitarian law.¹⁹⁰ In that sense, the Court stated that those acts that violate the human rights in the American Convention, 'also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions and, in particular, Common Article 3.'¹⁹¹

As a step forward, the Court has granted provisional measures in the light of the provisions of the American Convention and relevant humanitarian law norms.¹⁹² For instance, in granting provisional measures for providers of foodstuffs to the Peace Community of San Jose de Apartado who were subjected to attacks affecting their lives and their right to humane treatment on the basis of the general provisions of ACHR that provides protection to all within the jurisdiction of the state concerned, the Court also mentioned the international humanitarian law as it has specific provisions on the protection of personnel providing humanitarian assistance against attack.¹⁹³ In the light of the observations of the Court that the provisional measures are a 'jurisdictional guarantee,' although the Court does not have the competence to apply the humanitarian law, it definitely has the

¹⁸⁸ *Peace Community of San Jose de Apartado Case*, Order of the Court of 18 June 2002,(ser. E)2002,'Considering' section para.4.

¹⁸⁹ *Bamaca Velasquez* November 25, 2000, para.207.

¹⁹⁰ *Las Palmeras Case*, Preliminary Objections, Judgment of February 4, 2000, paras.32-34.

¹⁹¹ *Bamaca Velasquez*, Judgment of November 25 2000, para.208.

¹⁹² *Peace Community of San Jose de Apartado Case*, June 18, 2002, 'Considering' section, para.11; *The case of the Communities of the Jiguamiando and Curbarado*, March 6, 2003, 'Considering' section, para. 11, and 'decides' section, para.4, also see concurring opinion of judge Cancado Trindade, paras.5,6.

¹⁹³ *Peace Community of San Jose de Apartado Case*, *Ibid.*

competence to interpret the human rights provisions of the ACHR in consultation with relevant humanitarian law norms to provide provisional measures.

The Court has the broad power under Article 63 (1) of ACHR to grant reparations namely, pecuniary compensation and other forms of reparation.¹⁹⁴ In a reparation judgment against Guatemala, the Court stated that Guatemala ‘must adopt the legislative and any other measures required to adapt the Guatemalan legal system to international human rights norms and humanitarian law... . Specifically, the State must adopt the *national measures to apply international humanitarian law*, as well as those for protection of human rights that ensure the free and full exercise of the rights to life, to personal liberty, to humane treatment, to judicial protection and to a fair trial,’¹⁹⁵ It is to be noted that even though such reparation as a preventive measure against future violations was granted in a context not related to IDPs, this indicates the possibility that the Court can extend such measures even with regard to IDPs, for the effective protection of human rights (by the recommendations to apply humanitarian law) in the American Convention.

The outcome of resorting to humanitarian law norms as elements in the interpretation of general human rights provisions in the American Convention, in the course of finding out violations of human rights, in granting provisional measures and in providing reparations, would be the improved protection to the IDPs in conflict situations.

3. The African System

The African Commission and the Court on Human and Peoples’ Rights are the main protective mechanisms for the protection of human rights stipulated in the African Charter on Human and Peoples’ Rights of 1981 and its Protocol on the Establishment of an African Court of Human and Peoples’ Rights of 1998. The Protocol which establishes the Court entered into force on 25 January 2004 and the Court is not yet in operation.

The protection activities of the African Commission are invoked through inter-state communications, and other communications from any individuals or

¹⁹⁴ Jo. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights*, (Cambridge, 2003) at p.233.

¹⁹⁵ *Bamaca Velasquez v. Guatemala* Reparations February 22, 2002, para.85 (emphasis added by the Court)

NGOs concerning any violations of the African Charter and reports from state parties every two years as to the legislative or other measures taken to give effect to the rights in the Charter.¹⁹⁶ Inter-state communications has rarely been used in the African system, despite its particular usefulness in massive or systematic violations of human rights that produce refugees and IDPs, which is a characteristic of the conflicts in many states in the African Continent.

The individual communications provide for *actio popularis* similar to the Inter-American system, so that any individual or NGOs can communicate with the commission on their own behalf or on behalf of other individuals. The provision of *actio popularis* with regard to individual communications is important and relevant to the realities of the African Continent, as the IDPs in African states are often in a vulnerable position to access to international legal mechanisms on their own behalf due to their lack of knowledge of their rights, poverty, fear of reprisals and above all, physical impossibility of access to any help to communicate with such mechanisms, as they are constantly on the move from one place to another as a result of violence or fear of violence. This is evident from the communications to the Commission, as most of them are from NGOs on behalf of other victims.

Unlike the other two regional Conventions, the African Charter explicitly refers to ‘serious or massive violations of human and peoples’ rights’ and distinguish them from individual Communications.¹⁹⁷ The Charter is not specific about the determination of individual communications, but with regard to special cases ‘which reveal the existence of a series of serious or massive violations of human and peoples’ rights,’ it requests the Commission to inform the Assembly of Heads of State and Government.¹⁹⁸ The latter body may request the Commission to undertake an in-depth study of these cases with its findings and recommendations.¹⁹⁹ In practice, however, the Commission treats both individual violations and serious and mass violations of human rights under the individual communications procedure by adapting this procedure to deal with

¹⁹⁶ Arts.45(2),49 ,55 and 62 of the ACHPR.

¹⁹⁷ Arts.55, 58(1) of the ACHPR.

¹⁹⁸ Art.58(1) of the ACHPR.

¹⁹⁹ Art.58(2) of the ACHPR.

serious or massive violations.²⁰⁰ As problems of internal displacement often involve serious or massive violations of human rights, this is a useful mode of protection for IDPs.

In cases of serious violations of human rights, the Commission does not require strict adherence to the provision on exhaustion of local remedies, as it is impossible for the complainants to identify or name the victims, and given the great number of people involved, such remedies are unavailable or unduly prolonged.²⁰¹ The possibility of filing communications by NGOs concerning a great number of individually unidentifiable victims is also a beneficial feature of the system, as otherwise reprisal actions could be taken against those victims by the state.²⁰²

The major disadvantage of dealing with massive violations of human rights through individual communication is that whenever there are such violations, the Commission has to wait until an individual or an NGO submits a communication for its consideration.²⁰³ This is not a viable mode of protection for IDPs, when such problems need to be addressed immediately. There is a possibility for the Commission to initiate an in-depth study or investigation on its own motion in situations of massive violations under Article 46 of the ACHPR.²⁰⁴ Such a reporting measure in dealing with massive violations of human rights can be seen in the Inter-American Commission on Human Rights.

Because of the holistic approach to human rights found in ACHPR, in individual communications, the Commission has been able to apply and make justiciable the economic, social and cultural rights, similarly to civil and political rights.²⁰⁵ In *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, even without explicit protection on

²⁰⁰ R. Murray, 'Serious or Massive Violations Under the African Charter on Human and Peoples' Rights,' at p.118.

²⁰¹ *Amnesty International v. Sudan*, paras.30,38,39.

²⁰² Amnesty International reports about such reprisals in Russia against those who have been submitted cases to European Court of Human Rights, AI, press release, AI index:46/006/2005 (24 February 2005).

²⁰³ C.S. Odinkalu, 'Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights', in MD.Evans and R.Murray, (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge, 2002) p. 178, at p. 215 observes that 'the communications procedures are still severely underutilized.'

²⁰⁴ R. Murray, 'Serious or Massive Violations Under the African Charter,' at p.118; Article 46 of the ACHPR states that the 'Commission may resort to any appropriate method of investigation; it may hear from the Secretary –General of the Organisation of African Unity or any other person capable of enlightening it.'

²⁰⁵ Para 7 of the Preamble to the ACHPR.

housing, food and protection against forced eviction in the ACHPR, the Commission implicitly derived these rights from other rights in the ACHPR and found that Nigeria had violated such rights.²⁰⁶ Such an active interpretation is crucial and beneficial for the protection of IDPs, particularly in the African region affected by poverty and lack of basic human needs such as clean water, food, shelter and medical health care, which would become heightened during armed conflicts. Even though this case was concerned with forced displacement of Ogoni people in connection with oil production operation in Ogoniland and not during an armed conflict, due to the non-derogable nature of such human rights in the ACHPR, core obligations of socio-economic rights must be applied with regard to IDPs in armed conflict situations.

Thus, perhaps, the practical effect of non-derogable nature of the rights in the ACHPR even in armed conflict situations is that there is no need for the complementary protection of the humanitarian law during armed conflicts to determine the permitted criteria of derogability of each right. However, given that these rights contain limitation clauses, the general nature of economic, social and cultural rights, and the inevitable need for the interpretation of 'arbitrary' deprivation of during armed conflict, humanitarian law can be used by the Commission.²⁰⁷

In fact the Commission, when dealing with extra-judicial killings during the civil war in Sudan, observed that since the 'civilians in areas of strife are especially vulnerable,' it is the responsibility of the government to take all possible measures to ensure the treatment of civilians in terms of international humanitarian law.²⁰⁸ This indicates the willingness of the Commission to resort to humanitarian law in the interpretation of the provisions of ACHPR, apart from its frequent mentioning in the resolutions concerning the armed conflict situations of state parties.²⁰⁹

Notwithstanding the Commission's broader interpretation of the provisions of the ACHPR to provide normative protection, it provides remedy to the victims

²⁰⁶ 155/96, 15 th Annual Activity Report of the African Commission, 2001-2002, paras.60-65.

²⁰⁷ The ACHPR unlike the ECHR does not contain any guidance as to the situations that cannot be considered as arbitrary deprivation of life even in the normal situations, and therefore resorting to humanitarian law norms becomes important for the interpretation of right to life in the former.

²⁰⁸ *Amnesty International v. Sudan*, para.50.

²⁰⁹ Res.8 (xv)94: Resolution on the Situation in Rwanda (1994) '3.Calls on all parties to respect the African Charter on Human and Peoples' Rights, the principles of international humanitarian law...'; Res.7(XIV)93:Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples' Rights (1993)

only by means of recommendations, because, it does not have effective powers to make legally binding awards of compensation to the victims of human rights.²¹⁰ Even though it recommends to the state concerned to: ensure protection of health and livelihood; conduct investigations; ensure adequate compensation including relief and resettlement assistance; restore property looted at the time of expulsion; and amend the legislation in accordance with the Charter,²¹¹ and these can be considered as providing some form of remedy to the victims, they cannot be enforced as there is no enforcement mechanisms provided for in the Charter.²¹²

Notwithstanding the lack of power of the Commission to make binding decisions, the ‘impartiality and integrity of the process’ and in the process of finding violations, the use of credible and impartially collected reliable information from on-site missions may provide some authority to the recommendations reached by the Commission and could positively impact the compliance rate of the States.²¹³ Although the Commissioners are expected to serve in their individual capacity,²¹⁴ the close associations of some commissioners with their home governments ‘has compromised their ability to remain objective and independent.’²¹⁵ The Commission’s on-site missions for protective purposes cannot be considered as convincing, due to the lack of a set of guidelines to conduct an independent and impartial investigation and information gathering.²¹⁶ Above all, since the Commission acts as a subsidiary to the political organ, it can publish

²¹⁰ A.P. Van der Mei, ‘The New African Court on Human Rights and Peoples’ Rights: Towards an Effective Human Rights Protection Mechanism for Africa?’ (2005) 18 *Leiden Journal of International Law* 113, at p.117; C. Tomuschat, *Human Rights*, at p.167

²¹¹ See *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, at pp.43-44 ; 54/91,61/91,98/93,164/97 and 196/97,210/98, *Malawi African Association v. Mauritania*, 13th Annual Activity Report of the African Commission on Human and Peoples’ Rights, 1999-2000, AHG/222(XXXVI), at p.161 ; 228/99, *The Law Office of Ghazi Suleiman v. Sudan*, 16th Annual Activity Report of the ACHPR, 2002-2003, at p.55.

²¹² V.O. Orlu Nmehielle, *The African Human Rights System: Its Laws, Practice, and Institutions* (Hague, 2001) at p.239.

²¹³ R. Murray, *The African Commission on Human and Peoples’ Rights and International Law* (Oxford, 2000) at p.57.

²¹⁴ Art.31(2) of the ACHPR.

²¹⁵ For example, they serve as ministers and ambassadors to their home governments, R. Murray, *The African Commission on Human and Peoples’ Rights* .at pp.11-12,nn.27-29; A.P. Van der Mei, ‘The New African Court on Human Rights and Peoples’ Rights’ at p.117.

²¹⁶ R. Murray, ‘Evidence and Fact-finding by the African Commission’ in M.D. Evans and R. Murray, (eds.), *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2000* (Cambridge, 2002) p.100, at p.108

the Annual report only with the authorization of the Assembly of Heads of State and Government of the OAU/AU.²¹⁷

The reporting procedure in Article 62 of the Charter is useful for the protection of IDPs, only if the state parties choose to submit reports to the Commission. State parties are not only required to report on the implementation measures taken generally to give effect to the human rights in the Charter, but in some individual cases the Commission has required the states concerned to report back under Article 62 of the specific measures taken in accordance with the Commission's recommendation.²¹⁸ Because of non-compliance with the reporting procedure by many states and of the periodic nature of the reports, this procedure cannot be an effective way of monitoring compliance to protect IDPs as their vulnerability requires immediate addressing of their needs.²¹⁹ As individual communications and the recommendations of the Commission are published in the Annual report on the activities of the Commission, one can hope that the publicity of such findings of violations would influence the compliance by African states, even though it is not an effective relief.

A Special Rapporteur on Refugees, Asylum Seekers and internally displaced persons in Africa has been appointed by the Commission in June 2004 to examine the situations of IDPs in a particular country by making fact-finding missions, investigations and visits to IDP camps and submit reports to the Commission on the situation of IDPs in Africa at its ordinary session.²²⁰ This can be useful in the monitoring the human rights of IDPs in Africa under the prevailing conditions of overdue and unsatisfactory reporting and an underutilized individual communication procedure. One of the issues of concern in this appointment, similar to the previous appointments of three Rapporteurs on different themes, is that the Rapporteur is a member of the African Commission

²¹⁷ Art.59 of the ACHPR

²¹⁸ 211/98 *Legal Resources Foundation v. Zambia* para.73, 14th Annual Activity report of the ACHPR, 2000-2001, AHG/229(XXXVII).

²¹⁹ As at May 2003 the number of states that have not submitted any report are 19. This means about one third of the member states of the African Union (out of 53 member states) have been failing in their obligation to report; even those states submitted reports had not been regular in their reporting; therefore such reports were submitted by combining all overdue reports. (www.achpr.org)

²²⁰ Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum seekers and Internally Displaced Persons in Africa (7th December 2004).

on Human and Peoples Rights as well.²²¹ The previous experience with such appointments had been that the Commission ‘found it difficult and uncomfortable to have to reprimand its own members for any short comings.’²²² Furthermore, due to the Commissioners’ function on a part-time basis in the African Commission on the Human and Peoples Rights, acting in the capacity of Rapporteur would not be practically effective in Africa, where IDP problems are endemic in the majority of states parties.²²³ As much will depend on the personality of the Rapporteur and the forcefulness of his working method, it remains to be seen whether the Special Rapporteur will function effectively in the protection of IDPs in Africa.

As far as the African Court is concerned, even though it is possible for individuals and NGOs to directly institute *actio popularis*, the optional status of such provision requiring separate declaration for the acceptance of the competence of the Court to receive such cases under Article 5(3) of the Protocol, would be an obstacle for IDPs seeking protection.²²⁴ Moreover, it is not possible for all NGOs to file actions, since only NGOs with observer status before the Commission can directly institute cases. This can be an impediment for individuals or the NGOs to readily have access to the Court, which would be able to provide more effective protection than the African Commission, as the Court is able to deliver binding judgments with remedies including compensation and reparation on respondent states;²²⁵ and has the back up of a political organ, namely, the Council of Ministers of the African Union to supervise the execution of the judgment.²²⁶

²²¹ The three Rapporteurs deal with summary, arbitrary and extrajudicial execution, rights of women and prisons in Africa.

²²² M. Evans and R. Murray, ‘The Special Rapporteurs in the African System’ Commission’ in MD. Evans and R. Murray, (eds.), *The African Charter on Human and Peoples’ Rights: The System in Practice, 1986-2000* (Cambridge, 2002) p.280, at p.299.

²²³ *Ibid.*

²²⁴ Art.34(6) of the Protocol to the ACHPR, 1998’

²²⁵ Arts.27, 30 of the Protocol to the ACHPR of 1998; F. Viljoen and E. Baimu, ‘Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples’ Rights and the African Court of Justice’ (2004)22 *NQHR* 241, at pp.249-50; F. Ouguergouz, ‘The Establishment of an African Court of Human and Peoples’ Rights: A Judicial Premiere for the African Union’ (2003)II *African YearBook of International Law* 79, at pp.104-106; N. J. Udombana, ‘Toward the African Court on Human and Peoples’ Rights: Better Late than Never,’ (2000)3 *Yale Hum.Rts. & Dev. L.J* 45, at pp. 90-91.

²²⁶ Art.29 (2) of the Protocol to the ACHPR of 1998; the Constitutive Act of the African Union of 11 July 2000 entered into force on 26 March 2001 and replaced the Charter of the OAU of 1963, includes the protection of human rights as one its objectives and contain the right of the African Union to intervene in grave circumstances of war crimes, genocide and crimes against humanity

The material jurisdiction of the Court in contentious cases is much wider than that of the Commission, as the latter can only apply the ACHPR, whereas the Court can interpret and *apply* additionally 'any other relevant Human Rights instrument ratified by the States concerned.'²²⁷ This means that IDPs or NGOs filing cases on behalf of the IDPs would be able to invoke any violation of their rights, not only under the ACHPR but also under the African Charter on the Rights and Welfare of the Child 1990 and Africa's mostly ratified UN Covenants, namely, ICCPR and ICESCR of 1966.²²⁸ As IDP children displaced by internal armed conflict are specifically protected by the African Charter on the Rights and Welfare of the Child with regard to reunification with the family and humanitarian assistance and generally as a child from the effects of hostilities, the Court under its extensive jurisdiction, would be able to provide a binding judgment with remedy to the benefit of those children, which cannot be provided by the Committee of experts responsible for the implementation under the African Charter on the Rights of the Child.²²⁹

However, as individual communications in the Protocol to the African Charter on Human and Peoples' Rights are optional and therefore the normal way for individual communication to the Court is through the Commission, whose material jurisdiction is limited only with regard to the ACHPR.²³⁰ It is therefore likely that the Court would consider cases within the scope of the African Charter alone.²³¹

and to impose sanctions on member states that fail to comply with the decisions and policies of the African Union. It can be expected that the Assembly of the Head of States and Government would support the Council of Ministers in an effective enforcement of the judgment of the Court. See Arts.3(h),4(h),9(1)b, e, 23(2) and 30 of the Constitutive Act of the African Union.

²²⁷ Art.3(1), 7 of the Protocol to the ACHPR

²²⁸ A.P. Van der Mei, 'The New African Court on Human Rights and Peoples' Rights' at p.119.

²²⁹ Arts.22,23(4),25(2) (b) of the African Charter on the Rights and Welfare of the Children,1990.

²³⁰ A.P. Van der Mei, 'The New African Court on Human Rights and Peoples'

Rights' at p.121, n. 62 states that out of 15 states that ratified the Protocol to the African Charter only one state was willing to accept the optional jurisdiction for cases by individuals and NGOs.

²³¹ F. Viljoen and E.Baimu, 'Courts for Africa', at p.250, n. 50.

Conclusion to Part IV

The approaches of the various international mechanisms to the problems of IDPs indicate the extension of an *ad hoc*, inconsistent and incomplete protection as opposed to a comprehensive protection. The main reason for this is that none of the mechanisms are specifically designed to deal with the problems of IDPs; rather, they have the competence to deal with the violations generally against civilians or certain categories of civilians within a state. Therefore, as far as the human rights of the IDPs are concerned, under the UN treaty system, particularly in the Human Rights Committee, the protection of IDPs depends on the sensitivity with regard to the IDP issue of the particular treaty body. Such consideration has occurred only in massive displacements. Moreover, since each treaty deals with a specific set of human rights, both the civil and political rights as well as economic, social and cultural rights of IDPs are not covered by a single treaty. Despite the relatively comprehensive normative framework of the CERD, it also suffers from the inherent defects of the treaty system and the inadequate publicity of its concluding observations unlike the Human Rights Committee.

Charter based mechanisms deal with the problems of IDPs better than the Treaty based system due to the broader mandate provided to the Special Rapporteurs and the associated political pressure, not only with regard to reporting of the general situation of large scale violations in a state but also in receiving communications as to violations or threat of violations. Regional systems, especially under the ECHR and ACHR, effectively deal with the problems of IDPs by providing tangible relief to them. However, the European System is not capable of dealing with large scale or systematic violations of the human rights of IDPs, like the Inter-American system. The effectiveness of the protection of these regional systems to the IDPs depends on their continued use of the UN Guiding Principles on IDPs and the humanitarian law for the interpretation of those rights in the relevant conventions. The African Commission on Human Rights provides some relief; though not effective, its existence can be considered as better for the protection of IDPs at least to bring the problem of internal displacement to the forefront of the international community.

As far as the enforcement of humanitarian law is concerned, the ICC can provide effective remedy by way of imposing sanctions and reparations

that would break the cycle of impunity in a state, even during an on-going armed conflict. Again this depends on the cooperation of the states, particularly in the arrest and surrender of the indictees and seizure of assets of the convicted perpetrators. Moreover, it only provides an effective remedy with regard to large scale violations that constitute international crimes.

Although the assertion of universal jurisdiction by third states over perpetrators of international crimes is also an effective measure of protection, it largely depends on the willingness of the state concerned. However, it can be expected that under the Statute of the ICC, the national courts would show more willingness to assert universal jurisdiction, as the Preamble to it recognises the legal 'duty of every state to exercise its criminal jurisdiction over those responsible for international crimes.'¹

¹ Para.6 of the Preamble to the Statute of the ICC.

9. Adopting an International Treaty Relating to the Protection of IDPs

Attempts to focus on the legal protection of IDPs have been subjected to criticisms that it is an 'unfair and inappropriate privileging of a subset of internal human rights victims.'¹ The reason stated in this regard is that those who have not moved during armed conflicts may be in a worse situation than those who have displaced from their homes and providing specific protection to IDPs would undermine the protection of non-displaced conflict affected civilians.² Moreover it has been considered that an IDP specific legal protection would reinforce containment policies and therefore undermine the protection of asylum.³ Proponents of this view rely heavily on the refugee law to argue that a specific legal regime would provide a legal status to the IDPs similar to refugees and this is not warranted as the protection needs of both are different and necessitates different approaches.⁴ According to them, therefore, there is no need for a specific legal regime for IDPs (or a legal definition of IDPs) as the protection of IDPs can be derived from the promotion of existing human rights law;⁵ and 'a legal definition for internally displaced persons cannot create rights and obligations similar to those contained in the 1951 Refugee Convention.'⁶

To begin with, it is not necessary to confer a special legal status on the IDPs in the same way as refugees.⁷ Unlike IDPs who are still within their own state and entitled for human rights as citizens, refugees externally displace to a foreign state and therefore as aliens they need special legal status and protection to enjoy the socio-economic rights and protection of asylum.⁸ Providing specific international legal protection to IDPs means setting out

¹ M. Stavropoulou, 'The Question of a Right not to be Displaced' (1996)90 *ASIL Proceedings* 549, at p.562; M. Barutciski, 'Tensions Between the Refugee Concept and the IDP Debate' (1998) 3 *Forced Migration Review* 11, at p.12

² J.P.Lavoyer, 'Protection Under International Humanitarian Law' in J.P.Lavoyer (ed.), *Internally Displaced Persons*, Report of the Symposium, 23-25 October 1995, (Geneva, 1996), p.26, at p.35

³ M. Barutciski, 'Tensions Between the Refugee Concept' at p.14; C. Phuong, *The International Protection of Internally Displaced Persons*, at p.27

⁴ C.Phuong, *ibid.*, at pp.27-28

⁵ M. Barutciski, 'Tensions Between the Refugee Concept' at p.13 ; C.Phuong, *ibid.*, at pp.26-28

⁶ C. Phuong, *ibid.*, at p.28; M. Barutciski, *ibid.*, states, 'some groups may sometimes be more vulnerable in particular scenarios is a matter for operational priorities, not for legal or conceptual development.'

⁷ E. Mooney, 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005)24 *Refugee Survey Quarterly* 9, at p.13.

⁸ See above, Ch.2 section, B. Definition of IDPs.

objective standards for the adherence of states with regard to the treatment of their own citizens displaced due to internal armed conflicts including by seeking and receiving international protection in the form of assistance.

In fact, in certain circumstances, the plight of non-displaced civilians such as those who have been besieged is worse than that of displaced civilians. But those who have displaced and become homeless are in a different and more vulnerable situation than those who stay in their homes. Moreover, as in present day internal armed conflicts displacing civilians has become an objective of the armed conflicts, protection of civilians is seriously undermined. Conferring special protection based on the existing international human rights and humanitarian law norms adapted to the situation of IDPs does not mean excluding the non-displaced from the protection of human rights and humanitarian law. Inclusion of all the violations of human rights which are generally protected in other human rights conventions rather than IDP specific ones in the UN Guiding Principles on Internal Displacement, is also a reason for misconception that providing specific protection for IDPs would exclude the protection of non-displaced civilians.⁹ Mentioning such general human rights violations as protection needs specific to IDPs is redundant for the protection of IDPs.

Above all, becoming an IDP is often the first step before becoming a refugee. As refugees who are a subset of internal human rights victims have already been provided with international legal protection, there is no logic in arguing against the legal protection of IDPs. Placing more emphasis on refugees without addressing the problems of internal displacement legitimizes the status of IDPs and the human rights abuses of states that cause such displacement.

That IDPs are already entitled to the protection of human rights does not mean that they should not be provided with specific protection by the improvement and codification of the same law, similar to the protection that has been already granted specifically to children or women in the Convention on the Rights of the Child and Convention in the Elimination of All Forms of Discrimination Against Women. The specific protection provided for children and women has not caused any operational difficulties in providing effective protection to other conflict affected civilians. In fact, the increasing protection to IDPs by the

⁹ Examples, Principle 10 (1) on disappearances, genocide, murder, arbitrary execution, Principle 11 on rape, and slavery, Principle 12 (3) (4) on arrest and detention, Principle 13 recruitment of children to armed forces or groups.

UNHCR does not seem to have reduced the protection of returnees.¹⁰ Therefore providing specific protection does enhance the protection of IDPs as a special category but would not result in the exclusion of other non-displaced civilians affected by conflicts. Rather, it is a response by the international community to the pressing necessity to address the specific protection needs of IDPs caused by their displacement.

Furthermore, providing protection to IDPs cannot be stated as undermining the protection of asylum, as the right to seek asylum is the necessary corollary of the enjoyment of the rights to remain in safety and dignity or to relocate to a safer part of the country, whenever such rights become impossible. An explicit provision of the right to seek asylum in a IDP specific framework would remove such concerns.

Consequently, the adoption of a legal instrument in order to improve the rights of IDPs and responsibilities of States cannot be rejected by unduly relying on the different protection needs between refugees and IDPs, as adoption of a legal definition or description of IDP does not need to grant the same rights and obligations as in the 1951 Refugee Convention. Because, although generally both are vulnerable due to their socioeconomic conditions, the protection needs of IDPs are unique to their internal displacement. Similarly to the legal status granted to children due to their vulnerability, legal status can be granted to IDPs due to their vulnerability during displacement, in addition to existing human rights and humanitarian law. A specific legal status to IDPs would underscore their plight and ensure human rights protection specific to their situation. Just as, by 18 years of age, a person would not be considered as a child entitled to the specific protection of the CRC, IDPs would also cease to get any specific protection once their specific protection needs end.¹¹

It has been claimed despite the non-binding nature of UN Guiding Principles that it is 'much harder than many well-known soft law instruments,' as its contents 'reflect and are consistent with international human rights law and international humanitarian law.'¹² As discussed earlier, the UN Guiding Principles

¹⁰ See generally, UNHCR, 'Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees', 6 March, 2000.

¹¹ Article 1 of the CRC.

¹² W. Kalin, 'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework', Presentation at Roundtable Meeting Ralph Bunche Institute for International Studies CUNY Graduate Centre, New York, December 19 2001, at

on Internal Displacement specifically articulates and clarifies the existing norms of human rights and humanitarian law to the protection needs of IDPs. For instance, the right to request and require humanitarian assistance from national authorities, right to be protected against being arbitrarily displaced and the right to *non-refoulement*.¹³ Therefore it can be considered as an improvement on existing law and cannot be regarded as creating new human rights norms, even though some of these principles may be considered as on the emergence in particular, right to restitution of property at the time of its adoption in 1998.

Despite its usefulness as a document which clarifies the protection of IDPs at normative level, its over- and under - inclusiveness affect its value as a protective instrument of a vulnerable category of persons and authority even if it is relatively harder than any other soft law instrument.

UN Guiding Principles on Internal Displacement is under inclusive, in the sense that it does not contain the right to remain (in the positive sense) and the right to return, which are important to provide protection against the displacement *per se* in a comprehensive manner as a protective instrument.

It is over inclusive as it deals with variety of situations that occur in both armed conflicts and peace which is not consistent to the convergence of international human rights and humanitarian law norms for instance, ‘generalised violence.’¹⁴

Moreover, the extension of applicability of Guiding Principles to ‘all authorities, groups and persons’ *vis a vis* IDPs, is also clearly incompatible with the adoption of a human rights convention in this regard, as human rights law binds only states.¹⁵ Such an extension of human rights to armed groups would also blur the distinctions and specificities of each system, weakening their application as protective tools. This is evident for instance, with regard to issuance of personal documents, as this can be done only by the state authorities.

p.6; UN Guiding Principles on Internal Displacement, Introductory paragraph 3.

¹³ Principles 3, 6 and 15 of the UN Guiding Principles on Internal Displacement.

¹⁴ See above, Chapter 1.

¹⁵ D. Thurer, ‘The “Failed State” and International Law’ (1999) No.836 *IRRC* 731, at p.741; L.Zegveld, *Accountability of Armed Groups*, at p.52; however, in certain occasions Special Rapporteurs have requested armed groups to comply with human rights law; for instance, even though the mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution ‘only allows her to intervene when the perpetrators are believed to be government agents or have a direct or indirect link with the state,’ expressed concern ‘over atrocities committed by non-state actors, which constitute serious violations of basic humanitarian and *human rights* principles.’ Report of the Special Rapporteur, on Extrajudicial Executions, E/CN.4/2002/74 (9 January 2002), para.71

The San Jose Agreement on Human Rights concluded between Salvadorian State and FMLN provided for the provision of 'identity documents required by law' to the inhabitants in the areas of conflict, which was interpreted by the United Nations Observer Mission in El Salvador as one of the tasks of the government, although both parties have obligations under the agreement.¹⁶ These issues have to be addressed in the adoption of an international treaty on the protection of IDPs in internal armed conflicts based on the UN Guiding Principles on Internal Displacement.

¹⁶ Cited in L. Zegveld *Accountability of Armed Groups*, at p.186,

General Conclusions

Due to the unprecedented increase in the number of IDPs and the suffering they undergo as a consequence of displacement, especially by internal armed conflicts in the world today, internal displacement is ever more viewed as a harm. This is because IDPs remain within the territory and control of the parties to the conflict who caused their internal displacement, unlike refugees who have crossed the frontiers of the territory, and they are therefore more vulnerable than refugees. Because of the conceptual similarities between refugees and IDPs, the latter are in need of international legal protection that specifically meets their protection needs. Therefore devoting attention to the legal protection of IDPs should not be viewed as undermining the protection of the right to seek asylum in foreign countries which provides a more effective protection than the internal one. Rather, it should be considered as an attempt to provide legal protection of the pressing needs of vulnerable persons trapped within the confines of their country of origin which is unable or unwilling to extend protection to them.

The examination of international human rights law, international humanitarian law, and international criminal law applicable to internal armed conflicts indicates that a comprehensive normative protection of IDPs exists in international law in spite of the fact that the provisions are quite general and not straightforward as to the specific needs of the IDPs. Based on these general norms by the 'the use of analogy, by reference to context, by analysis of the alternative consequences,' rights and obligations relating to specific needs of IDPs can be derived for their international protection.¹

Addressing the protection of IDPs in internal armed conflicts as a human rights issue necessitates for a cross-fertilization among international human rights, humanitarian and criminal law (as secondary norms) to provide an effective and comprehensive normative framework, in particular in the light of the derogable nature of the human rights law in public emergency situations that constitute internal armed conflict. It is increasingly viewed that human rights and

¹ See R.Higgins, *Problems and Process: International Law and How We Use it* (Oxford, 1994) at p.10

humanitarian law are complementary and therefore not mutually exclusive.² The disadvantage of dealing with both systems as mutually exclusive is that certain protection needs of IDPs in internal armed conflict cannot be effectively dealt with by human rights law alone. Therefore to provide effective human rights protection during an internal armed conflict which is also a state of emergency, resorting to definitive standards of international humanitarian law is necessary. For instance, displacement is categorically prohibited by humanitarian law except on two grounds. This does not mean that human rights law cannot deal with the problem on its own. For instance, destruction of houses in the internal armed conflict in Turkey as a method of war was considered by the European Court of Human Rights as a violation of the right to property and home without recourse to international humanitarian law. However, the explicit prohibition in humanitarian law against the destruction of civilian objects would strengthen such prohibition, render it as an internationally acceptable human right standard and facilitate the coherent application of human rights law in a state of emergency in internal armed conflict.³

Due to the convergence between human rights and humanitarian law their complementation of each other to enhance the protection of IDPs during armed conflicts becomes viable. As human rights norms are derogable in public emergency situations which constitute an internal armed conflict, they may not provide effective protection to IDPs during such times. In such situations, even though the principle of proportionality functions as a safeguard to limit the derogatory measures by the state, it depends on the nature and intensity of the situation and to some extent is subject to the margin of appreciation of the state. Thus, there is a need to specify core obligations or rights that function as non-derogable norms to the derogable human rights relevant to the protection of IDPs during internal armed conflict. This would provide credible standards or obligations which are internationally acceptable in the protection of IDPs rather

² See generally, Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law by Françoise Hampson and Ibrahim Salama, E/CN.4/Sub.2/2005/14 (21 June 2005)

³ See for example, Principle 5.3 of the Principles on Housing and Property Restitution for Refugees and Displaced Persons, which states that 'States shall prohibit forced eviction, demolition of houses and destruction of agricultural areas and the arbitrary confiscation or expropriation of land as a punitive measure or as a means or method of war.'

than an inconsistent application of the human rights law by states during states of emergency in internal armed conflicts.

However, the possibility of convergence between them does not mean that they can be merged to the extent of losing their distinctions. In a human rights approach to the protection of IDPs in internal armed conflicts, many humanitarian law obligations can be considered as human rights law obligations. However, the scope of protection of human rights is much broader in application than the humanitarian law which is only applicable to armed conflict situations, not even to the lesser situation of internal disturbances.

To derive a set of internationally acceptable human rights standards of protection to IDPs, relevant international humanitarian law (and international criminal law) norms should be of a customary nature, for the reason that not all states are parties to Additional Protocol II and also for the reason that the protection provided in Additional Protocol II, especially relating to conduct of hostilities, is rudimentary in nature. The establishment of *ad hoc* international criminal tribunals and their jurisprudence has clarified the norms of human rights and humanitarian law with regard to crimes against humanity, genocide and war crimes. Moreover they have contributed to the confirmation of the existence of customary humanitarian law applicable in internal armed conflicts. This trend has been reaffirmed by the adoption of the Statute of the ICC in relation to international crimes and by the ICRC study on the customary humanitarian law applicable to internal armed conflicts. Therefore, an endeavour to formulate internationally acceptable human rights standards of protection to IDPs has become viable due to the emergence of substantive rules of customary humanitarian law and international criminal law applicable to internal armed conflicts, as this removes any concern as to their applicability in such situations.

The significant aspect of human rights law is that almost each and every obligation of humanitarian law can be covered within either the civil and political rights or economic, social and cultural rights. For instance, protection against using IDPs as human shields or reprisal attacks against IDPs can be accommodated within human rights law. However, due to the broader scope of human rights law than humanitarian law, the latter cannot be considered as *lex specialis* to human rights law as a whole, but only with regard to

certain civil and political rights and some aspects of obligations of certain socio-economic rights.

Two broad trends have been noted from the examination of human rights law in convergence with humanitarian law. Firstly, as far as certain non-derogable and derogable human rights are concerned, humanitarian law can be resorted to as a *lex specialis* in order to interpret authoritatively the scope of protection in armed conflict situations in pursuance of the principle of consistency of Article 4(1) of the ICCPR, such as the right to life in conduct of hostilities or freedom of movement in armed conflict situations. Secondly, it can be used as reference to a corresponding human rights norm applicable in internal armed conflict, such as in situations of indiscriminate attack on IDPs or rape of IDPs, to strengthen their normative protection.

Existence of protection against arbitrary displacement in human rights law indicates forced displacement as a harm, apart from its prohibition as genocide, crime against humanity and war crime. Total prevention of displacement resulting as a by-product of other human rights violations such as rape, disappearances and arbitrary arrest is not possible in internal armed conflicts. Therefore the significance of indirect protection from initial or secondary displacement provided by the other human rights provisions should not be underestimated. Excessive displacement as a collateral effect of armed conflict is not prohibited in international humanitarian law. Therefore, indirect protection against displacement provided by prohibition on indiscriminate attack and other prohibitions of humanitarian law would be useful.

Apart from the causes of displacement, the consequences of it can be dealt with by the complementation of both systems of law or by human rights law alone. Instances of the latter type of formulation of human rights standards caused by the absence of humanitarian law norms in the protection of IDPs are the need for documentation, movement-related needs and the right to restitution of property. In defining the obligations of states during internal armed conflicts as to the protection of IDPs, humanitarian law is useful as *lex specialis* with regard to humanitarian assistance, needs of family reunification, protection of property and protection from direct and indiscriminate attacks, prohibition against being used as human shields and reprisal attacks.

It is to be noted that viewing the protection needs of IDPs as a human rights issue would only provide accountability for the acts of state parties to the conflict and therefore excludes the accountability of armed opposition groups for their acts against IDPs. However, the practical value of such protection measures should not be underestimated, as most of the IDP problems in internal armed conflicts are due to the discriminatory practices of the state parties against ethnic groups and minority IDPs.

Moreover, at the theoretical level, adopting a human rights approach to the protection of internal displacement through mutual complementation would cover almost all the violations of humanitarian law pertinent to IDPs by the government armed forces, due to the broad nature of human rights.

Even those issues protected only by international humanitarian law can almost be related to human rights law, for instance, prohibition against reprisals and using IDPs as human shields. However, this does not mean that international humanitarian law has to be resorted to as *lex specialis* for every issue concerned with IDPs, as with regard to some protection issues, human rights law offers much broader protection than the former. For instance, the primary obligation of a state to provide basic survival needs as assistance to all IDPs within the state including those within the control of the armed opposition groups can be seen in terms of economic, social and cultural rights which are non-derogable during armed conflicts. It can therefore be stated that convergence with international humanitarian law as *lex specialis* is useful in order validly to identify and reinforce the minimum human rights standards applicable to the protection of IDPs in internal armed conflicts and to use the more specific obligations regulating the conduct of hostilities to elaborate the obligations in respect of the state which are provided only in international humanitarian law.

The acts of armed groups against the IDPs, however, can be addressed by humanitarian law. It should not be forgotten that IDPs by internal armed conflicts are first and foremost victims of armed conflicts and therefore entitled to the protection of international humanitarian law which now contains an extensive body of customary law applicable to internal armed conflicts. Therefore IDPs can receive the protection of both of these systems of law at the same time, as their implementation and enforcement are different in nature.

The examination of implementation and enforcement of human rights and humanitarian law indicates two problems: firstly, issues relating to IDPs are not dealt with consistently and comprehensively in the reporting systems of UN human rights mechanisms; secondly, those IDP issues which have received the scrutiny of the monitoring bodies, however, have not been complied with due to the inbuilt defects in the implementation and enforcement mechanisms of human rights law, which generally affect compliance. The very specific defect is the absence of an individual communication procedure in the ICESCR, as most of the IDP specific rights are based on economic, social and cultural rights.

Moreover, due to the convergence of both systems of law, humanitarian law violations against IDPs have been considered indirectly as human rights violations by regional human rights mechanisms, notably by the Inter-American Commission and Court of Human Rights. Such indirect implementation or enforcement of humanitarian law is possible to the extent that the human rights mechanisms candidly refer to a situation as an internal armed conflict.

The enforcement of human rights and humanitarian law through the ICC and by the assertion of universal jurisdiction in national courts of third states against those who have committed or are behind the planning of displacement of civilians and other crimes against IDPs can be strengthened through the cooperation of states. However, such enforcement is only effective in large scale violations.

It is important, therefore, to strengthen such human rights mechanisms and to sensitise the treaty bodies and other regional human rights enforcement bodies to use international humanitarian law, the UN Guiding Principles on Internal Displacement and Principles on Housing and Property Restitution for Refugees and Displaced Persons as authoritative interpretation guides and as reference in the application of human rights to IDPs.

The examination of human rights law with regard to the protection of IDPs indicates the existence, mostly, of general human rights norms that can be formulated into IDP-specific human rights. Therefore, adoption of a legally binding treaty containing IDP-specific human rights that integrates the humanitarian law obligations and a monitoring body is preferable to the UN Guiding Principles on Internal Displacement, to make states accountable for such human rights violations. In fact, such a treaty resulting from convergence among

human rights law, humanitarian law and criminal law could be an innovative one.⁴ However, such a human rights approach cannot be considered as an impediment to the adoption of a treaty, as the UN Guiding Principles have generally found acceptance by states in their national application and as an authoritative interpretation guide by several international human rights monitoring bodies.⁵

At present, the problems of IDPs are dealt with by the human rights monitoring mechanisms in a selective and inconsistent manner. This is clearly an inadequate response to a pressing human rights and humanitarian problem of internal displacement in the world today. An international treaty and a monitoring body would improve to some extent the problems of IDPs, in particular those in Asia and Africa.

Apart from all these protective measures in terms of international law, caution needs to be expressed with regard to the problems of internal displacement in the effective exercise and enjoyment of these rights by the IDPs. Internal displacement cannot be prevented without resolving the root causes of internal armed conflict since internal armed conflict is only a proximate cause of internal displacement. Internal displacement can be precisely described as a problem embedded in the social and economic structural marginalisation of minorities that caused the internal armed conflict. International legal protection would indeed remove some surfacing discriminatory practices towards IDPs but it would not resolve the underlying structural inequalities. In such a context, addressing the proximate causes and consequences of internal displacement by international law would only provide a short-term protection.

Without resolving internal armed conflict, the vicious cycle of internal displacement would never come to an end. Therefore any protection provided by international law cannot afford a durable and sustained solution for IDPs. A long-term or a durable protection that strengthens their physical and livelihood

⁴ The 1989 CRC adopts a similar approach (Article 38) though not as elaborative as the UN Guiding Principles on Internal Displacement; another soft law instrument that adopts such an approach is, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Annex to the Human Rights Resolution 2005/35 (19 April 2005).

⁵ See Report of the Special Representative of the Secretary-General on Internally Displaced Persons, *Protection of and Assistance to Internally Displaced Persons*, A/53/393 (26 September 2003); Resolution Adopted by the General Assembly, 60/1, 2005 World Summit Outcome, 24 October 2005, para. 132 recognises the UN Guiding Principles on Internal Displacement 'as an important international framework' for the protection of IDP.

protection depends on their ability to exercise their right to remain or return in safety and dignity and equal enjoyment of other civil, political, economic and social rights. This could only be provided to IDPs by addressing the root causes of the internal armed conflicts through a negotiated political settlement that accommodates the aspirations of minority IDPs and IDPs belonging to ethnic groups. Only by resolving the underlying causes of internal displacement to prevent internal armed conflicts, will the effective protection of the rights of IDPs be guaranteed.⁶

⁶ Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia, E/C.12/1/Add.74 (30/11/2001) para.30

Bibliography

Books and Articles

Abi-saab, G., 'Non-International Armed Conflicts' in UNESCO, *International Dimensions of Humanitarian Law* (Henry Dunant Institute/UNESCO/Martinus Nijhoff, Dordrecht, 1988), 217

'The Proper Role of Universal Jurisdiction' (2003)1 *Journal of International Criminal Justice* 596

Abi-saab, R., 'Humanitarian Law and Non-International Armed Conflicts', paper presented at the ICRC-Graduate Institute Training Seminar on International Humanitarian Law for University Teachers, Geneva, 10-15 August 1998

Abresch, W., 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005)16 *European Journal of International Law* 741

Abtahi, H., 'The protection of Cultural Property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia' (2001) 14 *Harvard Human Rights Journal* 1

Adelman, H., 'The Place of IDP Research in Refugee Studies' (http://www.idp.ntnu.no/conference/conference_papers.asp?page=literature&literaturid=76...) Researching internal displacement: State of Art, International Conference on IDPs, Trondheim, Norway, 7-8 February 2003

Alston, P., and Crawford, J., (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge, 2000)

Ambos, K., 'Article 25: Individual Criminal Responsibility' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), 475

Ambos, K., and Wirth, S., 'The Current Law of Crimes Against Humanity': An Analysis of UNTAET Regulation 15/2000, (2002) 13 *Criminal Law Forum* 1

Amnesty International, 'In Search of Safety: the Forcibly Displaced and Human Rights in Africa,' AFR 01/05/97 (20 June 1997)

'Russian Federation: Chechnya for the Motherland,' (December 1999)
AI index: EUR 46/46/99,
[http://www.reliefweb.int/library/documents/chechfull.htm\(01/08/00\)](http://www.reliefweb.int/library/documents/chechfull.htm(01/08/00))

Canadian Section, 'Amnesty International's Concerns With Respect to Tamils Returned to Sri Lanka,' (Refugee Coordinators' Office, Ontario, (18 May 2000)

'Conditions in "Regroupment" (Forced Relocation) Camps: Burundi,' AI Index: AFR 16/13/00 (29 June 2000)

'Sri Lanka: Rape in Custody,' AI Index: ASA 37/001/2002 (January 2002)

Annual Report 2005: Uganda,
(<http://amnestyusa.org/countries/uganda/document.do?id=ar&yr=2005>)

Press release, AI index:46/006/2005 (24 Feb 2005)

Askin, Kelly D., 'Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles' (2003)21 *Berkeley Journal of International Law* 288

Barutciski, M., 'Tensions Between the Refugee Concept and the IDP Debate' (1998) 3 *Forced Migration Review* 11

'International Law and Development- Induced Displacement and Resettlement' in C de Wet (ed.), *Development Induced Displacement: Problems, Policies and People* (Berghahn Books, Oxford, 2006), 71

Bassiouni, M. C. , 'Enforcing Human Rights Through International Criminal Law and Through an International Criminal Tribunal' in L. Henkin and J. L. Hargrove (eds.), *Human Rights: An Agenda for the Next Century* (American Society of International Law, Washington, D.C, 1994), 347

'Universal Jurisdiction Unrevisited: The International Court of Justice Decision in *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*' (2002/2003) XII *Palestine Yearbook of International Law* 27

'The History of Universal Jurisdiction and its Place in International Law' in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (Philadelphia, University of Pennsylvania, 2004), 39

Bassiouni, M. C., and Manikas, P., *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Transnational Pubs, Inc, New York, 1996)

Bayefsky, A.F., 'The Principle of Equality or Non-Discrimination in International Law' (1990)11 *Human Rights Law Journal* 1

Bayefsky, A.F., (ed.), *The UN Human Rights Treaty System in the 21st Century*, (Kluwer Law International, Hague, 2000)

Bayefsky, A., Fariior, S., Hanrahan, K., and Langham, A., 'Protection Under the Complaint Procedures of the United Nations Treaty Bodies', in J. Fitzpatrick (ed.), *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons: A Guide to International Mechanisms and Procedure*, (Transnational Publishers, New York, 2002)23

Becker, S.W., 'Commentary on the Princeton Principles' in *The Princeton*

Principles on Universal Jurisdiction, 2001, p.39

‘Universal Jurisdiction: How Universal is it? A Study of Competing Theories’ (2002/2003) *XII Palestine Yearbook of International Law* 49

Beau, C., ‘National Legislation’ (2003) *17 Forced Migration Review* 16

Bennett, J., ‘Forced Relocation in Uganda, Rwanda and Burundi: Emerging Policy’ (2000) *7 Forced Migration Review* 27

Berman, P., ‘The ICRC’s Advisory Service on International Humanitarian Law: the Challenge of National Implementation’ (1996) No.312 *International Review of the Red Cross* 338

Bertodano, S. D., ‘Judicial Independence in the International Criminal Court’ (2002) *15 Leiden Journal of International Law* 409

Beyani, C., *Internally Displaced Persons in International Law*, Oxford, 1995

Human Rights Standards and the Free Movement of People Within State (Oxford University Press, Oxford, 2000)

Blix, H., ‘Modernizing the Laws of Armed Conflicts: Present Issues and Approaches,’ in M. K. Nawaz (ed.), *Essays in International Law, in Honour of Krishna Rao* (Sijthoff, Leiden, 1976), 266

Boerefijn, I., *The Reporting Procedure Under the Covenant on Civil and Political Rights : Practice and Procedures of the Human Rights Committee*, (Intersentia, Antwerpen, 1999)

Bond, J.E., *The Rules of Riot: Internal Conflict and the Law of War* ((Princeton University Press, Princeton, 1974)

Bonard, P., *Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity*, 1999 (available at <http://www.icrc.org>)

Boot, M., *Genocide, Crimes Against Humanity , War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court* (Intersentia, Antwerpen, / 2002)

Bothe, Michael, Partsch, Karl Josef, and Solf, Waldemar A., *New Rules for Victims of Armed Conflicts: Commentary to the Two 1977 Protocols Additional to the Geneva Conventions of 1949* (Martinus Nijhoff, The Hague, 1982)

Bothe, M., ‘Relief Actions: The Position of the Recipient State’ in F. Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff, Dordrecht, 1989), 91

Bottiglierio, I., *Redress for Victims of Crimes Under International Law* (Martinus Nijhoff, Leiden/Boston, 2004)

Brohmer, J., ‘Diplomatic Immunity, Head of State Immunity, State Immunity:

Misconceptions of a Notorious Human Rights Violator' (1999) 12 *Leiden Journal of International Law* 361

Brun, C., 'Local Citizens or Internally Displaced Persons? Dilemmas of Long Term Displacement in Sri Lanka' (2003) 16 *Journal of Refugee Studies* 376

Brownlie, I and Goodwin –Gil, G.S., (eds.), *Basic Documents on Human Rights*, 4th ed. (Oxford University Press, Oxford, 2002)

Buergenthal, T., 'To Respect and to Ensure: State Obligations and Permissible Derogations' in L. Henkin (ed.), *The International Bill of Rights, The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981), 72

Bugnion, F., '17 December 1996: Six ICRC Delegates Assassinated in Chechnya,' (1997) No.317 *International Review of the Red Cross* 140

Butler, A.H., The Growing Support for Universal Jurisdiction in National Legislation, in S.Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania, Philadelphia, 2004), 67

Cassese, A., 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts' in A. Cassese (ed.), *Current Problems of International Law, Essays on U.S. and the Law of Armed Conflict*, (Dott. A.Giuffre, Milan, 1975) 287

'The Geneva Protocols of 1977 and Customary International Law' (1984) 3 *UCLA Pacific Basin Law Journal* 55

International Law in a Divided World (Clarendon Press, Oxford, 1986)

'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' (2000) 11 *European Journal of International Law* 187

'When May Senior State Officials be Tried for International Crimes? Some Comments on the Congo v. Belgium Case' (2002) 13 *European Journal of International Law* 853

'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction' (2003) 1 *Journal of International Criminal Justice* 589

'The Belgian Court of Cassation v. the International Court of Justice: the *Sharon and Others* Case' (2003) 1 *Journal of International Criminal Justice* 437

International Criminal Law, (Oxford University Press, Oxford, 2003)

Cerna, C., 'The Inter-American Commission on Human Rights: its Organization and Examinations of Petitions and Communications' in D. J. Harris and S. Livingstone, *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998), 65

Chimini, B.S., 'The Incarceration of Victims :Deconstructing Safety Zones' in N.Al-Nauimi, R.Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (Martinus Nijhoff, Hague, 1995), 823

Clarence, W.D., 'Open Relief Centres: A Pragmatic Approach to Emergency Relief and Monitoring During Conflict in a Country of Origin' (1991)3 *International Journal of Refugee Law* 320

Clarence, B., 'Protective Structure, Strategy and Tactics: International Protection in Ethnic Conflicts' (1993)5 *International Journal of Refugee Law* 585

Cohen, R., and Deng, F. M., *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution, Washington D.C, 1998)

Cohen, R., 'Masses in Flight: People Under Assault in their Own Countries', Inaugural Lecture, University of Missouri, 16 January 2001 (http://www.brookings.edu/fp/projects/idp/articles/stl_address_cohen.htm)

Coles, G.J.L., 'The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry', in A.E. Nash (ed.), *Human Rights and the Protection of Refugees Under International Law*, (Canadian Human Rights Foundation, Institute for Research for Public Policy: Nova Scotia, 1988), 195

Condorelli, 'War Crimes and Internal Conflicts in the Statute of the International Criminal Court' in M. Politi & G.Nesi (eds.), *The Rome Statute of the International Criminal Court:A Challenge to Impunity* (Dartmouth, Ashgate, 2001), 107

Cottier, M., 'Attacks on Humanitarian Assistance or Peacekeeping Missions' in O.Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (1999), 187

'Preliminary Remarks on Subparagraphs (xvii)-(xx): Prohibited Weapons: Drafting History' in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 239

'Starvation of Civilians as a Method of Warfare' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (1999), 254

Craven, M., *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon, Oxford, 1995)

David, E., 'Universal Jurisdiction in Belgium Law' (2002/03) XII *Palestine Yearbook of International Law* 77

De Preux, J., 'Article 91-Responsibility' in Sandoz, Y., Swinarski, C., and B. Zimmermann, B., (eds.), *Commentary on the Additional Protocols of 8 June 1977*, 1053

- Deng, F.M., 'Frontiers of Sovereignty: A Framework of Protection, Assistance, and Development for the Internally Displaced' (1995) 8 *Leiden Journal of International Law* 249
- Desormeau, Kate, 'The Outside Inside: Chechen IDPs, Identity Documents and the Right to Free Movement in the Russian Federation,' Working Paper No.22, (Refugee Studies Centre, University of Oxford, 2005)
- Dimitrijevic, V., 'State Reports' in (eds.), G. Alfredsson et al., *International Human Rights Monitoring Mechanisms* ((Martinus Nijhoff, Hague, 2001), 185
- Dinstein, Y., 'Human Rights in Armed Conflict: International Humanitarian Law' in T.Meron (ed.), *Human Rights in International Law: Legal and Policy Issues* (Clarendon, Oxford, 1984), 345
- 'Crimes Against Humanity' in J. Makarczyk (ed.), *Theory of International Law at the Threshold of the 21st Century, Essays in Honour of Krzysztof Skubiszewski*, (Kluwer Law international, The Hague, 1996), 891
- 'The Right to Life, Physical Integrity, and Liberty' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press, New York, 1981), 114
- 'The Right to Humanitarian Assistance' (2000) LIII *Naval War College Review*. (<http://www.nwc.mil>)
- The Conduct of Hostilities Under the Law of International Armed Conflict*, (Cambridge University Press, Cambridge, 2004)
- Donat-Cattin, D., 'The Role of Victims in ICC Proceedings,' in F. Lattanzi and W.A. Schabas (eds.), *Essays on the Rome Statute of International Criminal Court*, vol. I, (il Sirente, 1999)
- Dormann, K., *Elements of War Crimes Under the Rome Statute of the International Criminal Court : Sources and Commentary* (Cambridge University Press, Cambridge, 2002)
- Doswald-Beck, L., 'The Value of the 1977 Geneva Protocols for the Protection of Civilians ' in M.A.Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (British Institute of International and Comparative Law, London, 1989), 137
- Doswald-Beck, L., and Vite, Sylvain, 'International Humanitarian Law and Human Rights Law' (1993)No.293 *International Review of the Red Cross* 94
- Doswald-Beck, L., 'International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons ' (1997) No.316 *International Review of the Red Cross* 35
- Draper, G.I.A.D., 'The Implementation and Enforcement of the Geneva Conventions of 1949 and the Two Additional Protocols of 1978'. (1979)III *Recueil des Cours* 9

Dugard, J., 'Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders', (1998)No.324 *International Review of the Red Cross* 445

Dupuis, M.D., *et al.*, 'The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions' (1987)2 *American University Journal of International Law and Policy* 415

Eggle, Ann Vibeke, *Mass Refugee Influx and the Limits of Public International Law* (Martinus Nijhoff, Hague, 2002)

Eide, A., 'New Humanitarian Law in Non-International Armed Conflict' in A. Cassese. *The New Humanitarian Law of Armed Conflict* (Editoriale Scientifica, Napoli, 1979), 277.

'The Right to an Adequate Standard of Living Including The Right to Food' in A.Eide *et al.* (eds.), *Economic Social and Cultural Rights*, 2nd ed., (Kluwer, Netherlands, 2001),133

'Economic, Social and Cultural Rights as Human Rights' in A.Eide *et al.* (eds.), *Economic Social and Cultural Rights*, 2nd ed., (Kluwer, Netherlands, 2001), 9

Evans, M., and Murray, R., 'The Special Rapporteurs in the African System' Commission' in MD. Evans and R. Murray, (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge University Press, Cambridge, 2002), 280

Fenrick, W.J., 'Should Crimes Against Humanity Replace War Crimes' (1997) 37 *Columbia Journal of Transnational Law* 767

Fenrick, W.J., 'The development of the Law of Armed Conflict Through the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavis,' (1998) 3 *Journal of Armed Conflict Law* 197

Ferstman, C., 'The Reparation Regime of the International Criminal Court: Practical Considerations' (2002)15 *Leiden Journal of International Law* 667

Fitzpatrick, J., *Human Rights in Crisis: The International System for Protecting Rights During States of Emergency*, (University of Pennsylvania Press, Philadelphia, 1994)

'The Use of International Human Rights Norms to Combat Violence Against Women,' in R. J. Cook (ed.), *Human Rights of Women: National and International Perspective*,(University of Pennsylvania, Philadelphia ,1994), 532

Fitzpatrick, J., (ed.), *Human Rights Protection for Refugees, Asylum Seekers, and Internally Displaced Persons; A Guide to International Mechanisms and Procedure*,(Transnational Publishers, New York, 2002)

Forsythe, D.P., 'Legal Management of Internal War: The 1977 Protocol on Non-International Armed Conflicts,' (1978)72 *American Journal of International Law* 272

'The International Committee of the Red Cross and Humanitarian Assistance: A Policy Analysis,' (1996) No.314 *International Review of the Red Cross* 512

'Human Rights and the International Committee of the Red Cross' (1990)12 *Human Rights Quarterly* 265

'Humanitarian Protection: The International Committee of the Red Cross and the United Nations High Commissioner for Refugees' (2001)83, No.843 *International Review of the Red Cross* 675

The Humanitarians: The International Committee of the Red Cross (Cambridge University Press, Cambridge, 2005)

Franco, L., 'An Examination of Safety Zones for Internally Displaced Persons as a Contribution Toward Prevention and Solution of Refugee Problems', in N.Al-Nauimi, R.Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law* (Martinus Nijhoff,Hague,1995), 871

Frelick,B., *Safe Havens, Broken Promises*,(1998)
http://www.refugees.org/world/articles/safehavens_98.htm (visited on 12/06/03).

Gardam, J. G., *Non-Combatant Immunity as a Norm of International Humanitarian Law* (Martinus Nijhoff, Dordrecht, 1993)

Gardam, J., & Charlesworth, H., 'Protection of Women in Armed Conflict' (2000)22 *HRQ* 148.

Gasser, H.P., 'Protection of the Civilian Population' in D.Fleck (ed.), in *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, Oxford, 1995), 209

Gassmann, P., 'Colombia: Persuading Belligerents to Comply with International Norms' in S. Chesterman (ed.), *Civilians in War* (Boulder, London, 2001), 67

Geissler, Nils, 'The International Protection of Internally Displaced Persons' (1999)11 *International Journal of Refugee Law* 451

Giffard, C., and Hrle, M., 'The United Nations Charter Based Mechanisms' in J. Fitzpatrick (ed.), *A Guide to International Mechanisms and Procedure*, (Transnational Publishers, New York, 2002), 137

Global IDP Survey, *Internal Displacement: Global Overview of Trends and Developments in 2004*, March 2005 (<http://www.idpproject.org>)

'Indiscriminate Aerial Bombing on IDP Camps, Relief Sites and People Fleeing',

'Besieged and Embargoed Communities Trapped in War and Hunger (2005)'

'Chechen IDPs Remain Deprived of Access to Documents and Registration'

'Sri Lanka: High Security Zones Prevent IDPs from Regaining Their Property' (February 2005)

'Uzbekistan: Authorities Deny Return of Several Thousand Villagers Displaced From Tajik Borders' (18 October 2005)

'High Levels of Traumatic Stress and Suicide Among Displaced' in *Profile of Internal Displacement: Sri Lanka* (as at 1 September, 2005)

Goldman, R.K., 'International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua,' (1987)2 *American University Journal of International Law and Policy* 539

'International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflict,' (1993)9 *American University Journal of International Law and Policy* 49

Goodwin- Gill, G. S., 'NonRefoulement and the New Asylum Seekers' in *The Ninth Sokol Colloquium on International Law, New Asylum Seekers :Refugee Law in the 1980s* (Martinus Nijhoff, Hague, 1988), 103

Goodwin-Gill, G. S., and Cohen, I., *Child Soldiers: the Role of the Children in Armed Conflict* (Oxford University Press, Oxford, 1994)

Goodwin-Gill, G.S., *The Refugee in International Law*, 2nd ed., (Clarendon, Oxford, 1996)

'The Right to Leave, the Right to Return and the Question of a Right to Remain' in V.Gowlland-Debbas (ed.),*The Problem of Refugees in the Light of Contemporary International Law Issues* (Martinus Nijhoff, The Hague, 1996), 93

Green, L.C., 'War Crimes, Crimes Against Humanity, and Command Responsibility' (1997) L Naval War College Review, sequence 358 (<http://www.nwc.navy.mil/press/review/1997/spring/rtocsp97.htm>)

Greenwood, C., 'Customary International Law and the First Protocol of 1977 in the Gulf Conflict,' in P. Rowe(ed.), *The Gulf War 1990-91 in International and English Law*, (Routledge/Sweet and Maxwell, New York/London, 1993), 63

'Historical Development and Legal Basis', in D.Fleck (ed.),*The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, Oxford,1995), 1

'International Humanitarian Law and the Tadic Case,'(1996)7 *European Journal of International Law* 265

‘Rights at the Frontier-Protecting the Individual in Time of War’ in B. Rider (ed.), *Law at the Centre: The Institute of Advanced Legal Studies* (Kluwer Law International, Hague, 1999), 277

‘A Critique of the Additional Protocols to the Geneva Conventions of 1949’ in H. Durham, and T. McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Martinus Nijhoff, Hague, 1999), 3

‘International Humanitarian Law (Laws of War)’ in F. Kalshoven (ed.), *The Centennial of the First International Peace Conference: Reports and Conclusions* (Kluwer Law International, The Hague, 2000), 161

‘Guiding Principles on the Right to Humanitarian Assistance’, reproduced in (1993) No.297 *International Review of the Red Cross* 519

Haeck, Y., and Herrera, C.B., ‘Interim Measures in the Case Law of the European Court of Human Rights’ (2003)21 *Netherlands Quarterly of Human Rights* 625

Hall, C.K., ‘“The Crime of Apartheid”’ in O. Triffterer(ed.), *Commentary on the Rome Statute*, 167

Hall, C.K., “Prohibited Movements Populations,” in O. Triffterer, (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers’ Notes, Article by Article*, 161

Hailbronner, K., ‘Non-Refoulement and “Humanitarian “ Refugees: Customary International Law or Wishful Legal Thinking?’ in *The Ninth Sokol Colloquium on International Law, New Asylum Seekers: Refugee Law in the 1980s* (Martinus Nijhoff, Hague, 1988), 123.

Hampson, F., ‘Human Rights and Humanitarian Law in Internal Conflicts’, in M. A. Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention* (British Institute of International and Comparative Law, London, 1989), 55

‘Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts’ (1992)31 *Military Law and Law of War Review* 119

‘Human Rights Law and International Humanitarian Law: Two Coins or Two Sides of the Same Coin?’ in *Human Rights and Humanitarian Law, Human Rights and Refugee Law*, Bulletin of Human Rights, (United Nations, New York, 1992), 46

Legal Protection Afforded to Children Under International Humanitarian Law, Report for the Study on the Impact of Armed Conflict on Children, (May 1996) (<http://www2.essex.ac.uk/c&acu/papers&reports/fh.htm>) (12/22/98)

‘Means and Methods of Warfare in the Conflict in the Gulf’ in P. Rowe(ed.), *The Gulf War 1990-91 in International and English Law*, (Routledge/Sweet and Maxwell, New York/London, 1993), 63

Hampton, J.,(ed.), *Internally Displaced People: A Global Survey* (Norwegian Refugee Council/ Earth scan, Oslo, London, 1998)

Happold, M., 'The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict' (2003)3 *Yearbook of International Humanitarian Law* 226.

Hartman, J.F., 'Working Paper for the Committee of Experts on the Article 4 Derogation Provision' (1985)7 *Human Rights Quarterly* 89

Hashimoto, N., 'The United Nations and Internally Displaced Persons: At the Crossroads of Human Rights and Humanitarian Affairs' in A. Bolesta (ed.), *Forced Migration and the Contemporary World: Challenges to the International System* (Bialystok, Poland, 2003), 78

Hanckaerts, J.M., 'Deportation and Transfer of Civilians in Time of War,' (1993) 26 *Vanderbilt Journal of Transnational Law* 469

L.Harbo, L., and Wallenstein, P., 'Armed Conflict and Its International Dimensions:1964-2004' (2005)42 *Journal of Peace Research* 623.

Hardcastle, R.J., and Chua, A.T.L., 'Humanitarian Assistance: Towards a right of Access to Victims of Natural Disasters', (1998) No.325 *International Review of the Red Cross* 589

Harris,D. J., 'Regional Protection of Human Rights: The Inter-American Achievement' in D. J. Harris and S. Livingstone, *The Inter-American System of Human Rights* (Clarendon Press, Oxford, 1998), 1

Hathaway, J.C., *The Law of Refugee Status* (Butterworths, Toronto, 1991)

'Forced Movement of Peoples', Panel Discussion (1996) 90 *American Society of International Law Proceedings* 549

Hathaway, J.C., and Neve, R.A. , 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution – Oriented Protection' (1997) 10 *Harvard human Rights Journal* 117,

W. Hayden, W., 'The Kosovo Conflict and Forced Migration: The Strategic Use of Displacement and the Obstacles to International Protection,' *Journal of Humanitarian Assistance*, <http://www-jha.sps.cam.ac.uk/b/b597.htm> Document posted : 3 June 2000 .

Heintze, Hans-Joachim, 'On the Relationship Between Human Rights Law Protection and International Humanitarian Law' (2004) 86 No.856 *IRRC* 789

Hanckaerts, J.M., 'Deportation and Transfer of Civilians in Time of War,' (1993)26 *Vanderbilt Journal of Transnational Law* 469

Henckaerts, J.M., 'New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the 1954 Hague Convention

for the Protection of Cultural Property in the Event of Armed Conflict' (1999)81, No.835 *International Review of the Red Cross* 593

Henckaerts, Jean-Marie, and Doswald-Beck, Louise, *Customary International Humanitarian Law, Volume I: Rules* (Cambridge University Press, Cambridge, 2005)

Henkel, J., 'Who is a Refugee' in *Asylum Law*, Report and Papers delivered at the first international judicial conference at London, 1 -2 December 1995, 17

Herby, P., and Nuiten, A.R., 'Explosive Remnants of War: Protecting Civilians Through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons' (2001)83 No.841 *International Review of the Red Cross* 195

Higgins, R., 'Liberty of Movement within the Territory of a State: The Contribution of the Committee on Human Rights' in Y. Dinstein & M.Tabory (eds.), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, Dordrecht, 1989), 325

Problems and Process: International Law and How We Use it (Clarendon, Oxford, 1994)

Hoffmann, M.H., 'The Application of International Humanitarian Law in Sri Lanka: A compliance Based Case Study on the Rules of War,' (2001)30 *Israel Yearbook of Human Rights* 209

Human Rights Watch, 'War Without Quarter: Colombia and International Humanitarian Law' (New York, 1998) <http://www.hrw.org>

'Emptying the Hills: Regroupment in Burundi', June 2000, vol.12, no.4 (A)

'Displaced and Disregarded: Turkey's Failing Village Return Programme', October 2002, vol.14, No.7(D)

'Into Harm's Way: Forced Return of Displaced People to Chechnya', January 2003, Vol.15, No.1.

'Darfur: U.N. 'Safe Areas' Offer No Real Security': U.N Security Council Should Reject Plan that Would Undermine Return of Civilians' (1 September 2004) (http://hrw.org/english/docs/2004/09/01/darfur9286_txt.htm)

'No Decision on Extradition of Ex-Chad Dictator: Court's Ruling that it "has no Jurisdiction" places Justice for Hissene Habre's Victims in Hands of Senegal's President'

World Report 2005: Uganda
<http://hrw.org/english/docs/2005/01/13/Uganda9862.htm>)

Hyndman, J., 'Preventive, Palliative, or Punitive? Safe Spaces in Bosnia-Herzegovina, Somalia, and Sri Lanka' (2003)16 *Journal of Refugee Studies* 167

Inter-American Commission on Human Rights, *Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin*, OEA/Ser.L/V/II.62, doc.10 rev. 3, 29 Nov 1983 (<http://www.cidh.org>)

Annual Report of the Inter-American Commission on Human Rights 1987-88, Ch.IV OEA/Ser.L/V/II.74, doc.10 rev.1 (16 Sept 1988)

Annual Report of the Inter American Commission of Human Rights, 1993, OEA/ Ser.L/V/II.85, doc.9, rev., (11 February 1994)

Third Report on the Human Rights Situation in Colombia OEA/Ser.L/V/II.102, Doc, 9 rev.1 (26 February 1999)

Fifth Report on the Situation of Human Rights in Guatemala,2001, OEA/Ser.L/V/II.III, doc.21.Rev,(6 April 2001)

Annual Report of the Inter-American Commission on Human Rights 2002, OEA/Ser.L/V/II.117 , Doc.1 rev.1 (7 March 2003)

Annual Report of the Inter-American Commission on Human 2004, OEA/Ser.L/V/II.122, Doc.5 rev.1 (23 February 2005)

International Committee of the Red Cross, *Annual Report 1999*

Annual Report 2002

Annual Report 2004

Press Release, Delegation in Sri Lanka, Nov, 6 1990

Press Release, 13 August 1992, reproduced in (1992) No.290 *International Review of the Red Cross*

Press release No.1759,7 October 1993

‘Public Statement by the ICRC on the Situation in Kosovo’ (1998) No.325 *International Review of the Red Cross* 725

Statute of the International Red Cross and Red Crescent (1987) No. 256 *International Review of the Red Cross* pp.25-59

‘Internally Displaced Persons :The Mandate and Role of the International Committee of the Red Cross’ (2000) No.838 *International Review of the Red Cross* 491

‘Assistance: General Introduction’ (<http://www.icrc.org>)

‘Three ICRC Delegates Killed in Burundi’ (1996) No.312 *International Review of the Red Cross* 323

‘Six ICRC Staff Killed in the Democratic Republic of the Congo’ (2001) No.842 *International Review of the Red Cross* 489.

'Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of Other Fundamental Rules Protecting Persons in Situations of Violence,' (2005)87 No.858 *International Review of the Red Cross* 393 ?

International Law Association, 'Commentary to the Draft Declaration of International Law Principles of Internally Displaced Persons', Report of the 69th Conference of International Law Association, London, 2000, 791

Jackson-Preece, J., 'Article 16' in M. Weller (ed.), *The Rights of Minorities in Europe: A Commentary on the European Framework Convention for the Protection of National Minorities* (Oxford University Press, Oxford, 2005), 463

Jakovljevic, B., 'International Disaster Relief Law' (2004)34 *Israel Year Book on Human Rights* 251

Jasudowicz, J., 'The Legal Character of Social Rights From the Perspective of International Law as a Whole' in K. Drzewicki *et al.*, *Social Rights As Human Rights: A European Challenge* (Abo Academy, Turku, 1994), 23

Jenatsch, T., 'The ICRC as a Humanitarian Mediator in the Colombian Conflict : Possibilities and Limits' (1998) No.323 *International Review of the Red Cross* 303

Junod, Sylvie-S., 'Commentary on Protocol II' in Y.Sandoz, C.Swinarski, and B.Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) 1319

Kalin, Walter, 'Refugees and Civil Wars: Only a Matter of Interpretation?' (1991)3 *International Journal of Refugee Law* 435

Kalin, W., and Gabriel, L., 'Human Rights in Times of Occupation: An Introduction' in W.Kalin (ed.), *Human Rights in Times of Occupation: The Case of Kuwait*, (Law Books in Europe, Berne, 1994),1

Kalin, W., 'Legal Protection of Internally Displaced Persons: Protection in International Human Rights Law,' in Jean-Philippe Lavoyer (ed.), *Internally Displaced Persons*, Report of the Symposium, 23-25 October 1995 (ICRC, Geneva, 1996),15

Kalin, W., and Goldman, R.K., 'Legal Framework' in Roberta Cohen, and F.M. Deng (eds.), *Masses in Flight: The Global Crisis of Internal Displacement* (Brookings Institution, Washington D.C, 1998), 73

Kalin, W., 'The Guiding Principles on Internal Displacement- Introduction' (1998) 10 *International Journal of Refugee Law* 557

Guiding Principles on Internal Displacement: Annotations (American Society of International Law, Washington, D.C, 2000)

'How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework,' Presentation at Roundtable Meeting

Ralph Bunche Institute for International Studies CUNY Graduate Centre,
December 19 2001

‘The Legal Dimension’ (2003)17 *Forced Migration Review* 15

Kalshoven, F., ‘Human Rights, The Law of Armed Conflict, and Reprisals’ (1971)
No.121 *International Review of the Red Cross* 183

‘Reaffirmation and Development of International Humanitarian Law
Applicable in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977,
Part II’(1978)IX *Netherlands Yearbook of International Law* 107

‘Reprisals and the Protection of Civilians: Two Recent Decisions of the
Yugoslavia Tribunal’ in L.C. Vohrah *et al* (eds.), *Man’s Inhumanity to Man:
Essays on International Law in Honour of Antonio Cassese* (Kluwer Law
International, Hague, 2003), 481

Kastberg, N., ‘Strengthening the Response to Displaced Children’ (2002)15
Forced Migration Review 4

Kellenberger, J., ‘Speaking Out or Remaining Silent in Humanitarian Work’,
(2004)86 No.855 *International Review of the Red Cross* 593

Kellenberger, J., ‘The Relevance of International Humanitarian Law in
Contemporary Armed Conflicts’, CAHDI (2004)27, 28th Meeting, Strasbourg, 13-
14 September 2004, Meeting Report, Appendix IV, at p.35 (<http://www.coe.int>)

Kleffner, J.K., and Zegveld, L., ‘Establishing an Individual Complaints Procedure
for Violations of International Humanitarian law’ (2000) 3 *Yearbook of
International Humanitarian Law* 384

Kleffner, J.K., ‘The Impact of Complementarity on National Implementation of
Substantive International Criminal Law’ (2003)1 *Journal of International Criminal
Justice* 86

Kolb, R., ‘The ‘Jurisprudence of the Yugoslav and Rwandan Criminal Tribunals
on Their Jurisdiction and on International Crimes’(2000)71 *British Yearbook of
International Law* 259

Kourula, P., *Broadening the Edges, Refugee Definition and International
Protection Revisited* (Martinus Nijhoff, Hague/Boston/London,1997)

Krause, C., ‘The Right to Property’ in A. Eide *et al.* (eds.), *Economic, Social and
Cultural Rights*, 2nd edition., p.191

Kress, C., ‘War Crimes Committed in Non-International Armed Conflict and the
Emerging System of International Criminal Justice,’(2000)30 *Isreal Year Book of
Human Rights*

Kwakwa, E.K., *The International Law of Armed Conflict: Personal and Material
Fields of Application* (Kluwer, Doedrecht, 1992)

Landgren, K., 'Safety Zones and International Protection: A Dark Grey Area' (1995) 7 *International Journal of Refugee Law* 436

Landmine Monitor Report 2004 (<http://www.icbl.org/lm/2004>)

Leus, X., et al., *Internally Displaced Persons*, (2001)16 *Prehospital and Disaster Medicine* 75, at p.76 (<http://www.reliefweb.int>)

Lauterpacht, E., and Bethlehem, D., 'The Scope and Content of the Principle of *Non-Refoulement* : Opinion' in E. Feller et al (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, Cambridge, 2003), 87

Lavoyer, J.P., 'Protection Under International Humanitarian Law' in J.P. Lavoyer (ed.), *Internally Displaced Persons*, Report of the Symposium, 23-25 October 1995, (ICRC, Geneva, 1996), 26

'Guiding Principles on Internal Displacement: A Few Comments on the Contribution of International Humanitarian Law' (1998) No.324 *International Review of the Red Cross* 467

Leckie, S., 'Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights' (1998) 20 *HRQ* 81

'Housing and Property Issues for Refugees and Internally Displaced Persons in the Context of Return: Key Considerations for UNHCR Policy and Practice' (2000) 19 *Refugee Survey Quarterly* 5

Lee, L.T., 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis' (1996) 9 *Journal of Refugee Studies* 27

'The Refugee Convention and Internally Displaced Persons' (2001) 13 *International Journal of Refugee Law* 363

Lubell, N., 'Challenges in Applying Human Rights Law to Armed Conflict', Conference to Mark the Publication of the ICRC Study on "Customary International Humanitarian Law", The Hague, 30-31 May 2005

Maass, P., 'Cultural Property and Historical Monuments,' in R.Gutman and D.Rieff (eds.), *Crimes of War: What the Public Should Know* (W. W. Norton & Co, London, 1999)

Macalister-Smith, P., *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* (Martinus Nijhoff, Dordrecht, 1985)

'Rights and Duties of the Agencies Involved in Providing Humanitarian Assistance and Their Personnel in Armed Conflict' in F. Kalshoven (ed.), *Assisting the Victims of Armed Conflict and Other Disasters* (Martinus Nijhoff, Dordrecht, 1989), 99

'Protection of the Civilian Population and the Prohibition of Starvation as a method of Warfare: Draft Texts on International Humanitarian Assistance,' (1991) No.284 *International Review of the Red Cross* 440

Malanczuk, P. , (ed.), *Akehurst's, Modern Introduction to International Law*, 7th rev.ed.(Routledge, London, 1997)

Mathews, R.J., & McCormack, 'The Relationship Between International Humanitarian Law and Arms Control', in H. Durham and T.L.H. McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Martinus Nijhoff, Hague, 1999), 65

Maurice,F., and Courten, J.de, 'ICRC Activities for Refugees and Displaced Civilians' (1991) No.280 *International Review of the Red Cross* 9

McCoubrey, H., 'Yugoslavia at War: International Laws of Armed Conflict and the Yugoslav Crisis' (1992) 136 *Solicitors Journal* 914

McCoubrey, H., & White, N.D., *International Organizations and Civil War*, (Dartmouth, England, 1995)

McCoubrey,H., *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2nd ed., (Dartmouth, Ashgate, 1998)

McDonald, A., 'Introduction to International Humanitarian Law and the Qualification of Armed Conflicts,' in P. J. van Krieken (ed.), *Refugee Law in Context: The Exclusion Clause* (T.M. C. Asser, Hague, 1999) 79

McDonald, A., 'The Year in Review' (2001) 4 *Yearbook of International Humanitarian Law* 255

McFadden, P.M., 'The Right to Stay' (1996)29 *Vanderbilt Journal of Transnational Law* 1

McGoldrick, D., *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (Clarendon, Oxford, 1991)

Medecins Sans Frontieres (MSF) 'Cholera Epidemic Within Displaced Near Bujumbura, Burundi' 24.07.2002 (<http://www.msf.org>)

Medecins Sans Frontieres, 'Escalating Attacks in North Darfur, Sudan, Force Civilians to Flee Repeatedly' (01.12.2004)

Medina, C., 'The Role of Country Reports in the Inter-American System of Human Rights' in D.J. Harris and S. Livingston (eds.) *The Inter-American System of Human Rights* (Clarendon, Oxford, 1998), 115

Meindersma, C., 'Legal Issues Surrounding Population Transfers in Conflict Situations' (1994) XLI *Netherlands International Law Review* 31

Meindersma, C., 'Violations of Common Article 3 of the Geneva Conventions as Violations of the Laws and Customs of War Under Article 3 of the Statute of the

International Criminal Tribunal for the Former Yugoslavia' (1995)XLII, *Netherlands International Law Review* 375

Melander, G., 'Internally Displaced Persons' in G.Alfredsson and P.Macalister-Smith (eds.), *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups in Memory of Atle Grahl-Madsen* (N.P.Angel, Kehl, 1996), 69

Meron, T., 'Human Rights in Time of Peace and in Time of Armed Strife: Selected Problems' in T.Buergenthal (ed.), *Contemporary Issues in International Law, Essays in Honor of Louis B.Sohn* (N.P.Engel, Kehl, 1984), 1

Human Rights and Humanitarian Norms as customary law (Clarendon, Oxford, 1989)

'International Criminalization of Internal Atrocities' (1995) 89 *American Journal of International Law* 554

'The Continuing role of custom in the Formation of International Humanitarian Law' (1996)90*American Journal of International Law* 238

'The Humanization of Humanitarian Law' (2000)94 *American Journal of International Law* 239

'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience,' (2000)94 *American Journal of International Law* 78

Meyer, M.A., 'Developments of the Law Governing Relief Operations,' in M.A. Meyer (ed.) *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, 209

Meyrowitz, H., 'The Principle of Superfluous Injury or Unnecessary Suffering' (1994) 299 *International Review of the Red Cross* 98

Moir, Lindsay, *The Law of Internal Armed Conflict* (Cambridge University Press, Cambridge, 2002)

'Decommissioned? 'Law and the Inter-American Human Rights System,' (2003) 25 *HRQ*182

Monika Sandvik-Nylund, *Caught in Conflicts: Civilian Victims, Humanitarian Assistance and International Law*, (Institute for Human Rights, Abo Akademi University, Turku, 1998)

Mooney, E., 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005)24 *Refugee Survey Quarterly* 9

Miyazaki,S., 'The Martens Clause and International Humanitarian Law' in C.Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, (ICRC, Geneva, 1984), 433

Mooney, E., 'Internal Displacement and the Conflict in Abkhazia: International Responses and Their Protective Effect', (1996)3 *International Journal on Group Rights*, p.197

Mooney, E., 'Bringing the end into Sight for Internally Displaced Persons' (2003)17 *Forced Migration Review* 4

'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005)24 *Refugee Survey Quarterly* 9,

Mourey,A., 'Famine and War'(1994) No.285 *International Review of the Red Cross* 549

Mullerson, R., 'The Efficiency of the Individual Complaint Procedures:The Experience of CCPR,CERD,CAT and ECHR' in A. Bloed, L. Leicht, M. Nowak and A. Rosas (eds.), *Monitoring Human Rights in Europe: Comparing International Procedures and Mechanisms*, (Martinus Nijhoff, Dordrecht,1993) at p.27

Muttukumaru, C.P.J., 'Reparations for Victims' in F. Lattanzi and W.A.Schabas (eds.),*Essays on the Rome Statute of International Criminal Court*, vol.I,(il Sirente, 1999), 303

Murray, R., 'Serious or Massive Violations Under the African Charter on Human and Peoples' Rights: A Comparison with the Inter-American and European Mechanisms' (1999) 17 *Netherlands Quarterly of Human Rights* 109

The African Commission on Human and Peoples' Rights and International Law (Hart, Oxford, 2000) at p.57

'Evidence and Fact-finding by the African Commission' in MD.Evans and R. Murray, (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge UP, UK, 2002), 100

Nagendra Singh, and McWhinney, E., *Nuclear Weapons and Contemporary International Law* 2nd Rev. ed.(Martinus Nijhoff, Dordrecht,1989)

Nowak, M., *U. N. Covenant on Civil and Political Rights, CCPR Commentary* (N.P. Engel Publisher, Strasbourg, 1993)

Nowak, M., 'The Right of Victims of Gross Human Rights violations to Reparation' in F.Coomans *et al.* (eds.), *Rendering Justice to the Vulnerable : Liber Amicorum in Honour of Theo Van Boven*, (kluwer, Hague, 2000), 203

Nmehielle, V.O. Orlu, *The African Human Rights System: Its Laws, Practice, and Institutions* (Martinus Nijhoff, Hague, 2001)

O'Boyle, M., 'Reflections on the Effectiveness of the System for the Protection of human rights', in Bayefsky (ed.), *The UN Human Rights Treaty System in the 21st Century*, (Kluwer Law International, Hague, 2000), 169

- O'Connell, M. Ellen, 'Humanitarian Assistance in Non-international Armed Conflict: The Fourth Wave of Rights, Duties and Remedies' (2002)? 31 *Israel Yearbook on Human Rights* 183
- O'Donnell, D., 'Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms' (1998) No.324 *International Review of the Red Cross* 481
- Odinkalu, C.S., 'Implementing Economic, Social and Cultural Rights Under the African Charter on Human and Peoples' Rights', in MD. Evans and R. Murray, (eds.), *The African Charter on Human and Peoples' Rights: The System in Practice, 1986-2000* (Cambridge University Press, Cambridge, 2002), 178
- Oeter, S., 'Methods and Means of Combat' in D. Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford University Press, Oxford, 1995), 105
- O'Flaherty, M., *Human Rights and the UN Practice Before the Treaty Bodies*, 2nd ed., (Martinus Nijhoff, Hague, 2002)
- O'Keefe, R., 'Universal Jurisdiction: Clarifying the Basic Concept' (2004)2 *Journal of International Criminal Justice*, 753
- Olson, L., 'Mechanisms Complementing Prosecution' (2002) 84 No.845 *International Review of the Red Cross* 173
- Opsahl, T., 'The Human Rights Committee' in P. Alston (ed.), *The United Nations and Human Rights: A Critical Appraisal*, (Clarendon Press, Oxford, 1992), 369
- Oraa, J., *Human Rights in States of Emergency in International Law*, (Clarendon, Oxford, 1994)
- Ouguergouz, F., 'The Establishment of an African Court of Human and Peoples' Rights: A Judicial Premiere for the African Union' (2003)II *African Year Book of International Law* 79
- Patrnogic, J., and Jakovljevic, B., *International Humanitarian Law in the Contemporary World* (International Institute of Humanitarian Law, San Remo, 1991), 21
- Steiner, H.J. and Alston, P., *International Human Rights in Context: Law, Politics, Morals*, 2nd ed., (Oxford University Press, Oxford, 2000)
- Partsch, K.J., 'Protection of Cultural property' in D.Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (Oxford:Oxford U.P,1995) p.377,at p.381
- Pasqualucci, Jo.M., *The Practice and Procedure of the Inter-American Court of Human Rights*,(Cambridge University Press, UK,2003)
- Pejic, J., 'The Right to Food in Situations of Armed Conflict: The Legal Framework' (2001) 83, No.844 *IRRC* 1097.

- Pejic, J., 'Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence' (2005)87 *IRRC* 375
- Perluss, D. , and Hartman, J.F., 'Temporary Refuge: Emergence of a Customary Norm' (1986)26 *Virginia Journal of International Law* 551
- Penna, L. Rao, 'Legal Problems Relating to Reunification of Families Dispersed as a Result of Armed Conflicts' 1998, *Year Book of International Institute of Humanitarian Law*.
- Petrovic, D., 'Ethnic Cleansing-An Attempt at Methodology',(1994)5 *European Journal of International Law*, 342
- Petty, C., *Family Tracing and Reunification-Safeguarding Rights and Implementing the Law*, (1996) 4, *International Journal of Children's Rights* 165
- Phuong, C., 'Internally Displaced Persons and Refugees: Conceptual Differences and Similarities' (2000) 18 *Netherlands Quarterly of Human Rights* 215
- Phuong, C., *The International Protection of Internally Displaced Persons* (Cambridge University Press, Cambridge, 2004)
- Pictet, Jean S., *Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958)
- Pictet, J., *Development and Principles of International Humanitarian Law* (Martinus Nihhoff, Dordrecht,1985)
- Pilloud, C., and Pictet, J., 'Article 50-Definition of Civilians and Civilian Population' in Sandoz, Y., Swinarski, C., and B. Zimmermann, B., (eds.), *Commentary on the Additional Protocols*, 609
- Pictet, J., and Pilloud, C., 'Article 51-Protection of the Civilian Population' in Y.Sandoz, C. Swinarski, and B. Zimmermann (eds.), *Commentary on the Additional Protocols*, 613
- Pilloud, C., and Pictet, J., 'Article 54-Protection of Objects Indispensable to the Survival of Civilian Population' in Sandoz, Y., Swinarski, C., and B. Zimmermann, B., (eds.), *Commentary on the Additional Protocols*, 651
- Pictet, J., and Pilloud, C., 'Article 75 –Fundamental Guarantees' in Y.Sandoz, C.Swinarski, and B.Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff, 1987) 861
- Plattner, D., 'The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed Conflicts'(1990) 278 *International Review of the Red Cross* 409

Plattner, D., 'The Protection of Displaced Persons in Non-International Armed Conflicts' (1992) No.291 *International Review of the Red Cross* 567

Plattner, D., 'Assistance to the Civilian Population: the Development and the Present State of International Humanitarian Law' (1992) No.288 *International Review of the Red Cross* 249

Plattner, D., 'ICRC Neutrality and Neutrality in Humanitarian Assistance' (1996) No.311 *International Review of the Red Cross* 161

Plender, R., 'The Present State of Research Carried Out by the English –Speaking Section of the Centre for Studies and Research' in *The Right of Asylum*, Centre For Studies and Research in International Law and International Relations, 1989, 63

Pocar, F., 'Human Rights Under the International Covenant on Civil and Political Rights and Armed Conflicts' in L.C.Vohrah *et al.*(eds.), *Man's Inhumanity to Man*, (Kluwer, The Hague, 2003), 729

Prebensen, S.C., 'Inter-State Complaints Under Treaty Provisions-The Experience Under the European Convention on Human Rights' in Alfredsson *et al.*, (eds.), *International Human Rights Monitoring Mechanisms*, (Kluwer Law International, Hague, 2001), 533

Princeton Principles on Universal Jurisdiction, (Princeton University, New Jersey, 2001) (<http://www.princeton.edu/~lapa/principles.html>)

Project Counselling Service, (PCS) Internal, 'Confined Communities in Columbia' (29 November 2004)

Provost, Rene, *International Human Rights and Humanitarian Law* (Cambridge University Press, Cambridge, 2002)

Quiroga, C. M., *The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System*, (Martinus Nijhoff, Dordrecht, 1988)

Rao Penna, L., 'Legal Problems Relating to Reunification of Families Dispersed as a Result of Armed Conflicts', 1998, *Year Book of International Institute of Humanitarian Law*, San Remo,

Reidy, A., Hampson, F., and Boyle, K., 'Gross Violations of Human Rights: Invoking the European Convention on Human Rights in the Case of Turkey' (1997) 15 *Netherlands Quarterly of Human Rights* 161

Reidy, Aisling, 'The Approach of the European Commission and Court of Human Rights to International Humanitarian Law (1998) No.324 *International Review of the Red Cross* 513

Reydams, L., 'Niyonteze v. Public Prosecutor' Tribunal Militaire de Cassation (Switzerland) April 27, 2001, (2002) 96 *American Journal of International Law* 231

'Belgium's First Application of Universal Jurisdiction: the *Butare Four Case*' (2003) 1 *Journal of International Criminal Justice* 428

Universal Jurisdiction: International and Municipal Legal Perspectives, (Oxford University Press, Oxford, 2003)

Roberts A., and Guelff, R., (ed.) *Documents on the Laws of War*, 2nd ed (Clarendon Press, Oxford, 1989)

Documents on the Laws of War, 3rd ed (Oxford University Press, Oxford, 2000)

Robinson, R., and Von Habel, H., 'War Crimes in Internal Conflicts: Article 8 of the ICC Statute' (1999) 2 *Yearbook of International Humanitarian Law* 193

Robinson, D., 'Defining "Crimes Against Humanity" at the Rome Conference,' (1999)93 *AJIL* 43

Rodley, N.S., *The Treatment of Prisoners Under International Law* 2nd ed. (Oxford University Press, Oxford, 1999)

Rogers, A.P.V., *The Law on the Battlefield* (Manchester University Press, Manchester, 1996)

Roos, S.R., 'The 'Right to Live and Remain in One's Place of Origin': A United Nations' Rhetoric or Internationally Recognized Human Right?-Reflections on the Potential of a Controversial Right to be Universally Recognized' (2001) 44 *German Yearbook of International Law* 517

Rottensteiner, C., 'The Denial of Humanitarian Assistance as a Crime Under International Law' (1999) No.835 *International Review of the Red Cross* 555

Romano, C.P.R., Nollkaemper, A., and Kleffner, J.K., (eds.), *Internationalized Criminal Courts and Tribunals: Sierra Leone, East Timor, Kosovo, and Cambodia* (Oxford University Press, Oxford, 2004)

Rosenblad, E., 'Area Bombing and Military Law' (1976)XV *The military Law and Law of Review* 54

Rosenblad, E., *International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems* (Henry Dunant Institute, Geneva, 1979)

Rutinwa, B., 'Refugee Claims Based on Violation of International Humanitarian Law: The "Victim's" Perspective,' in *The Changing Nature of Persecution*, International Association of Refugee Law Judges 4th Conference, (Berne, Switzerland, 2000) 251 http://www.ark-cra.ch/iarlj/EN/Nature_PDF/title.pdf

Sandoz, Y., Swinarski, C., and B.Zimmermann, B., (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of August 1949*, (ICRC, Geneva 1987)

Sandoz, Y., "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin," in N. Al-Nauimi & R. Meese (eds.) *International Legal*

Issues Arising Under the United Nations Decade of International Law (Martinus Nijhoff, Hague, 1995), 899

Sandoz, Y., 'A New Step Forward in International Law: Prohibitions or Restrictions on the Use of Certain Conventional Weapons' (1981) *International Review of the Red Cross* Extract 3

Sandoz, Y., *Respect for the Law of Armed Conflict: the ICRC's Observations and Experiences*, (ICRC, Geneva, 1996)

Sandoz, Y., 'Competing Priorities: Placing Cultural Property on the Humanitarian Law Agenda' in M.T. Dulti *et al* (ed.), *Protection of Cultural Property in the Event of Armed Conflict*, Report on the Meeting of Experts Geneva, 5-6 October 2000 (ICRC, Geneva, 2002), 21

Y. Sandoz, 'Article 70- Relief Actions' in Y. Sandoz, C. Swinarski, C., and B.Zimmermann, (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of August 1949*, (ICRC, Geneva 1987), 815

Sassoli, M., and Bouvier, A.A., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (ICRC, Geneva, 1999)

Save the Children, 'War Brought us Here, Protecting Children Within Their Own Countries By Conflict,' UK, 8 May 2000

Schabas, W.A., 'Article 6: Genocide' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court, Observers' Notes, Article by Article* (1999), 107

Scheinin, M., 'Forced Displacement and the Covenant on Civil and Political Rights' in A.F. Bayefsky and J. Fitzpatrick, (eds.), *Human Rights and Forced Displacement* (Martinus Nijhoff:Hague,2000) p.66

Scheinin, M., 'Economic and Social Rights as Legal Rights' in A. Eide *et al.* (eds.), *Economic Social and Cultural Rights*, 2nd ed., (Kluwer, Netherlands, 2001)

Schindler, D., 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols' (1979)II *Recueil des Cours* 117

Schindler, D., 'Human Rights and Humanitarian Law: Interrelationship of the Laws', (1982)31 *American University Law Review*

Schindler, D., 'Humanitarian Assistance, Humanitarian Interference and International Law' in R. St. J. Macdonald (ed.), *Essays in Honour of Wang Tieya* (Martinus Nijhoff, Dordrecht , 1994), 689

Schmitt, M.N., 'Future War and Principle of Discrimination,' (1998)28 *Israel Yearbook of Human Rights* 51

Schrijvers, J., 'Fighters, Victims and Survivors: Constructions of Ethnicity, Gender and Refugeeess among Tamils in Sri Lanka' (1999)12 *Journal of Refugee Studies* 307

- Shacknove, A., 'Who is a Refugee,' (1985)95 *Ethics* 274
- Shaw, M.N., *International Law*, 4th ed. (Grotius, Cambridge, 1997)
- Shoyele, O 'Armed Conflicts and Canadian Refugee Law and Policy' (2004)16 *International Journal of Refugee Law*547
- 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights', (1985)7 *Human Rights Quarterly* 3
- Smis, S., and Van Der Borcht, Kim., 'Introductory Note to Belgium's Amendment to the Law of June 16, 1993 (As Amended by the Law of February 10, 1999) Concerning the Punishment of Grave Breaches of Humanitarian Law' (2003) 42 *ILM* 740.
- Sommaruga, C., 'Assistance to Victims of War in International Humanitarian Law and Humanitarian Practice', (1992) 289 *International Review of the Red Cross* 373
- Spieker, H., 'The International Criminal Court and Non-International Armed Conflicts' (2000)13 *Leiden Journal of International Law* 395
- Stavropoulou, M., 'The Right Not to be Displaced,' (1994)9 *American University Journal of International Law and Policy* 689
- Stavropoulou, M., 'The Question of a Right not to be Displaced' (1996)90 *American Society of International Law Proceedings* 549
- Spieker, H., 'Twenty –Five Years After the Adoption of Additional Protocol II: Breakthrough or Failure of Humanitarian Legal Protection?' (2001) 4 *Yearbook of International Humanitarian Law*129
- Steiner, J., and Alston, P., *International Human Rights in Context: Law, Politics, Morals*, 2nd ed., (Oxford University Press, Oxford, 2000)
- Subedi, S.P., 'The Legal Competence of the International Community to Create 'Safe Havens' in 'Zones of Turmoil' ' (1999)12 *Journal of Refugee Studies* 23
- Symonides, J., 'Cultural Property' in J. Symonides (ed.), *Human Rights: Concept and Standards* (Ashgate, Dartmouth, 2000), 175
- The Refugee Council, 'Sri Lanka: Internally Displaced Persons and Safe Returns', Sri Lanka Project, September 2003, United Kingdom.
- 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' (1987) 9 *Human Rights Quarterly* 122
- 'The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights' (1998) 20 *Human Rights Quarterly* 691
- 'The Princeton Principles on Universal Jurisdiction', (Princeton University, New Jersey. 2001) (<http://www.princeton.edu/~lapa/principles.html>)

Thio, Li-Ann, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century* (Martinus Nijhoff, Leiden, 2005)

Thurer, D., 'The "Failed State" and International Law' (1999) No.836 *IRRC* 731

Toebes, B., 'The Right to Health' in A.Eide *et al.* (eds.), *Economic Social and Cultural Rights*, 2nd ed., (Kluwer, Netherlands, 2001), 169

Thomas, A.V.W., and Thomas, A.J., *Legal Limits on the Use of Chemical and Biological Weapons* (Southern Methodist University Press, Dallas, 1970)

Thornberry, P., *International Law and the Rights of Minorities* (Clarendon Press, Oxford, 1991)

Toman, J., *The Protection of Cultural Property in the Event of Armed Conflict: Commentary on the Convention for the Protection of Cultural Property in the Event of Armed Conflict and its Protocol Signed on 14 May 1954 in the Hague and on Other Instruments of International Law Concerning Such Protection*, (Dartmouth, U.K, 1996)

Tomuschat, C., *Human Rights: Between Idealism and Realism* (Oxford UP, Oxford, 2003)

'Darfur-Compensation for the Victims' (2005)3 *Journal of International Criminal Justice* 579

Torrelli, M., 'From Humanitarian Assistance to "Intervention on Humanitarian Grounds"?' (1992) No.288 *International Review of the Red Cross* 228

Trechsel, S., 'Liberty and Security of Person,' in J.Macdonald *et al.*, (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Dordrecht, 1993), 277

Triffterer, O., (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999)

Triffterer, O., 'Article 27: Irrelevance of Official Capacity' in O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (Nomos Verlagsgesellschaft, Baden-Baden, 1999), 501

Turton, D., 'Refugees and 'Other Forced Migrants,' ' Refugee Studies Centre Working Paper No.13, Oxford, October 2003

UNHCR, *UNHCR's Operational Experience with Internally Displaced Persons*, 1994

'UNHCR Paper on Asylum Seekers from the Russian Federation in the Context of the Situation in Chechnya', Geneva, February 2003

UNHCR, *The State of the World's Refugees 1997-98: A Humanitarian Agenda* (Oxford University Press, Oxford, 1997)

'The International Protection of Refugees: Complementary Forms of Protection', April 2001

2004 *Global Refugee Trends: Overview of Refugee Populations, New Arrivals, Durable Solutions, Asylum-Seekers, Stateless and Other Persons of Concern to UNHCR*, (UNHCR, Geneva, 2005)

U.S. Committee for Refugees, *World Refugee Survey 2000*

Udombana, N.J., 'Toward the African Court on Human and Peoples' Rights: Better Late than Never,' (2000)3 *Yale Human Rights and Development Law Journal* 45

Van Boven, T.C., 'Distinguishing Criteria of Human Rights,' in K.Vasak,(ed.), *The International Dimensions of Human Rights*, vol.I (Greenwood Press, Connecticut, 1982), 43

Van der Mei, A.P. , 'The New African Court on Human Rights and Peoples' Rights: Towards an Effective Human Rights Protection Mechanism for Africa?' (2005)18 *Leiden Journal of International Law* 113

Van Den Herik, L., and Van Sliedregt, E., 'Ten Years Later, Rwanda Tribunal Still Faces Legal Complexities: Some Comments on the Vagueness of Indictment, Complicity in Genocide, and the Nexus Requirement for War Crimes' LJIL 17(2004) 17 *Leiden Journal of International Law* 537

Vandermeersch,D., 'Prosecuting International Crimes in Belgium' (2005) 3 *Journal of International Criminal Justice* 400

Vetter, G.R., 'Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)' (2000) 25 *Yale Journal of International Law* 89

Veuthey,M., "Implementation and Enforcement of Humanitarian Law and Human Rights Law in Non-International Armed Conflicts: The Role of the International Committee of the Red Cross,' (1983)33 *American University Law Review* 83

Viljoen, F., and Baimu, E., 'Courts for Africa: Considering the Co-Existence of the African Court on Human and Peoples' Rights and the African Court of Justice' (2004)22 *Netherlands Quarterly of Human Rights* 241

Vinuesa, R.E., 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law' (1998)1 *Yearbook of International Humanitarian Law* 69

Volio, F., 'Legal Personality, Privacy, and the Family' in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia U.P, New York, 1981), 185

Von Habel, H., 'Crimes Against Humanity Under the Rome Statute,' in P.J.Van Krieken, *Refugee Law in Context: The Exclusion Clause*, (T.M.C.Asser, Hague,1999) 105

Von Sternberg, Mark R., 'The Plight of the Non-Combatant in Civil War and the New Criteria for Refugee Status' (1997)9 *International Journal of Refugee Law* 169

The Grounds of Refugee Protection in the Context of International Human Rights and Humanitarian Law (Martinus Nijhoff, Hague, 2002)

Waldock, C.H.M., 'Human Rights in Contemporary International Law and the Significance of the European Convention' (1965) 11 *International and Comparative Law Quarterly* 1

Weissbrodt, D and Andrus, B 'The Right to Life During Armed Conflict: Disabled Peoples' International V. United States'(1988) 29 *Harvard Human Rights Journal* 59

Weissbrodt, D., 'Ways International Organizations Can Improve Their Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflict', in E.L. Lutz, H. Hannum &K.J. Burke (eds.), *New Directions in Human Rights* (Pennsylvania University Press, Philadelphia, 1989), 63

Wiebe, V., 'Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law' (2000)22 *Michigan Journal of International Law* 85

S.A. Williams, 'Article 13: Exercise of Jurisdiction' in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, 343

Wirth, S., 'Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case'(2002) 13 *European Journal of International Law* 877

Wouters, J., and Smet, L.D., 'The ICJ's Judgment in the Case Concerning the Arrest Warrant of 11 April 2000: Some Critical Observations' (2001)4 *Yearbook of International Humanitarian Law* 373

Wulff, T., *Barriers Against Weapons: Developments of Weapons and Restrictions on Their Use* (Swedish Red Cross, Lund, 1984)

Zayas, A. de., 'The Right to One's Home Land, Ethnic Cleansing, and the International Criminal Tribunal for the Former Yugoslavia' (1995)6 *Criminal Law Forum* 257

Zegveld, L., 'Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the *Tablada* Case' (1998) No.324 *International Review of the Red Cross* 505

'Remedies for Victims of Violations of International Humanitarian Law', (2003) 85, No.851 *International Review of the Red Cross* 497

The Accountability of Armed Opposition Groups in International Law (Cambridge University Press, Cambridge, 2002)

Zolberg, A.R., Suhrke, A., and Aguayo, S., *Escape from Violence: Conflict and Refugee Crisis in the Developing World* (Oxford U.P, Oxford, 1989)

Zimmermann, A., 'Prohibition of Forced Movement of Civilians' in O.Triffterer(ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Nomos Verlagsgesellschaft, Baden-Baden,1999), 280

'Prohibited Destruction' in O.Triffterer (ed.), O.Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, (Nomos Verlagsgesellschaft, Baden-Baden,1999), 283

Official Documents

Human Rights Committee General Comment

General .Comment No.5, 'Derogation of Rights' (31/07/81)

General .Comment No.6, 'The Right to Life (Art.6)' (30/04/82)

General .Comment, No.15, 'The Position of Aliens Under the Covenant' (11/04/86)

General Comment No. 16, 'The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Art.17)' (08/04/88)

General Comment 19: 'Protection of the Family, the Right to Marriage and Equality to the Spouses (Art.23)' ICCPR, 27/07/90

General Comment 20: 'Replaces General Comment 7 Concerning Prohibition of Torture and Cruel Treatment or Punishment (Art.7)' (10/03/92)

General Comment No.23, 'The Rights of Minorities (Art.27)' CCPR/21/Rev.1/Add.5, (08/04/94)

General Comment No.27, 'Freedom of Movement (Art.12)' CCPR/C/21/Rev.1/Add.9 (02/11/99)

General Comment No.29, 'State of Emergency (Article 4)' CCPR/C/21/Rev.1/Add.11 (31 August 2001)

General .Comment 30, Reporting Obligations of State Parties Under article 40 of the Covenant CCPR/C/Rev.2/Add.12 (18 Sept 2002)

General Comment No.31, 'The Nature of the General Legal Obligation Imposed on States Parties to the Covenant', CCPR/C/21/Rev.1/Add.13 (26 May 2004)

Concluding Observation

Concluding Observations: France, CCPR/C/79/Add.80, (4 August 1997)

Concluding Observations: Uzbekistan, CCPR /CO/71/UZB (26 April 2001)

Concluding Observations: Philippines CCPR/CO/79/PHL (1 December 2003)

Concluding Observations: Austria, CCPR/C/79/Add.103 (19 November 1998)

Concluding observations: Sri Lanka CCPR A/50/40(1995)

Concluding observations: Sri Lanka CCPR A/39/40(1984)

Concluding observations: Sri Lanka CCPR A46/40(1991)

Concluding Observations: Bosnia and Herzegovina CCPR/C/79/Add.14 (28 December 1992)

Concluding Observations of the Human Rights Committee: Russian Federation, CCPR/C/79/Add.54 (26 July 1995)

Concluding Observations:Sudan,CCPR/C/79/Add.85 (19 Nov 1997)

Concluding Observations: Israel (CCPR/C/79/Add.93 (18/08/1998)

Concluding Observations :Russian Federation CCPR/C/79/Add.54 (26 July 1999)

Concluding Observations, Kyrgyzstan CCPR/Co/69/kgz (24 July,2000)

Concluding observations: Dominican Republic, A/56/40 vol. I (2001)

Concluding Observations: Colombia, CCPR/CO/80/COL (26 May 2004)

Concluding Observations : Russian Federation (6 November 2003)

Concluding observations: Sri Lanka, CCPR/CO/79/LKA01/12/2003

Concluding Observations: Serbia and Montenegro, CCPR/CO/81/SEMO (12/08/2004)

Concluding Observations of the Human Rights Committee: Kenya, CCPR/CO/83/Ken (29 April 2005)

Other

Bosnia and Herzegovina Special Report 30/10/92 (CCPR/C/89)

Croatia Special Report 30/10/92 (CCPR/C/87)

Special Decisions by the Human Rights Committee Concerning Reports of Particular States: Bosnia and Herzegovina, Croatia, Yugoslavia. (7/10/93) A/48/40,Annex VII

Summary Record of the 1438th Meeting : Sri Lanka, CCPR/C/SR.1438 (28 July 1995)

Report of the Human Rights Committee, A/57/40 (vol. I) 2002

Report of the Human Rights Committee, A/59/40 (vol.I) (31/10/2002)

Rules of Procedure of the HRC CCPR/C/3/Rev.7 (4 August 2004),

Committee on Economic, Social and Cultural Rights

General Comment

General Comment No.3, 'The Nature of States Parties Obligations (Art.2(1))' 14/12/1990,

General Comment No.4, 'The Right to Adequate Housing (Art.11(1))' (13/12/91)

General Comment No.5, 'Persons with Disabilities' (09/12/94)

General Comment No.6, 'The Economic, Social and Cultural Rights of Older Persons' (08/12/95).

General Comment No.7, 'The Right to Adequate Housing (Article 11(1) :Forced Eviction'(20/05/97)

General Comment No.12, 'The Right to Adequate Food (Art.11)' E/C.12/1999/5 (12 May 1999)

General Comment 13, 'The right to Education' E/C.12/1999/10 (8 December 1999)

General Comment No.14, 'The Right to Highest Attainable Standard of Health', E/C.12/2000/4 (11 August 2000)

General Comment No.15, 'The Right to Water' E/C.12/2002/11 (20 January 2003)

Concluding Observation

Concluding Observations of the Committee on the Economic, Social and Cultural Rights: Sri Lanka E/C.12/1/Add.24 (16 June 1998)

Concluding Observations: Sudan, E/C.12/1/Add.48 (1 September 2000)

Concluding observations on Russian Federation, E/C.12/1/Add.94 (12 December 2003)

Concluding Observations: Colombia, E/C.12/1/Add.74 (30/11/2001)

Other

Draft Report of the Committee on Economic, Social and Cultural Rights to the Economic and Social Council in Accordance with Economic and Social Council Resolution 1985/17, E/C.12/2003/CRP.I (20 August 2003)

Committee on the Rights of the Child

Concluding Observations: Burundi, CRC/C/15/Add.133 (16 October 2000)

Concluding Observations : Sri Lanka CRC/C/15/Add.40 (21 June 1995)

Committee on the Elimination of Racial Discrimination***General Comment***

CERD General Recommendation.22, 'Article 5 and Refugees and Displaced Persons' (24/08/96), para.2(a)

Concluding Observation

Concluding observations: Russian Federation, CERD/C62/CO/7 (21 March 2003)

Concluding observations : Sri Lanka, A/56/18 (14/09/2001)

Concluding Observations: Sudan, CERD/C/304/add.116 (27 April 2001)

Other

Summary Record of the 1079th Meeting: Sri Lanka CERD/C/SR.1079 (9 March 1995)

Report of the Committee on the CERD, Supplement No.18 (A/53/18) 1998

Report of the CERD, supplement No.18(A/57/18) 2002

Report of the Committee on the CERD, Supplement No.18.(A/59/18) 2004

UN Commission on Human Rights

Analytical Report compiled by the Secretary -General, *Forced Evictions*, E/CN.4/1994/20 (7 December 1993)

Progress Report of Special Rapporteur, *The Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, E/CN.4/Sub.2/1994/18 (30 June 1994)

Report of the Representative of Secretary –General, Mr.Francis Deng, *Compilation and Analysis of Legal Norms, Part I*, E/CN.4/1996/52/Add.2 (5 December 1995)

Report of the Independent Expert on the Situation of human Rights in Somalia,

E/CN.4/1996/14 (22 February 1996)

Graca Machel, *The Impact of Armed Conflict on Children* A/51/306.Add.1 (6 September 1996) <http://www.un.org/special-rep/children-armed-conflict/KeyDocuments/Printable/Report/...>

Final Report of the Special Rapporteur, Al-Khasawneh, *Human Rights and Population Transfer*, E/CN.4/Sub.2/1997/23 (27 June 1997) Annex II Draft Declaration on Population Transfer and the Implantation of Settlers.

Report of the Representative of the Secretary-General, Mr. Francis Deng, Submitted Pursuant to Commission on Human Rights Resolution 1997/39, *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection Against Arbitrary Displacement*, E/CN.4/1998/53/Add.1 (11 February 1998)

Report of the Special Rapporteur, Mona Rishmawi, *Situation of Human Rights in Somalia*, E/CN.4/1999/103 (18 February 1999)

Updated Study by A. Eide, *The Right to Adequate Food and to be Free From Hunger*, E/CN.4/Sub.2/1999/12, (28 June 1999)

Final Report of the Special Rapporteur, M. Cherif Bassiouni, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Freedoms*, E/CN.4/2000/62 (18 January 2000)

Report of the Special Rapporteur, Extrajudicial Executions, E/CN.4/2000/3 (25 January 2000)

Additional Report of the Special Representative of the S.G for Children and Armed Conflict, E/CN.4/2000/71 (9 February 2000)

Report of the Representative of the Secretary-General, *Profiles in Displacement: Forced Relocation in Burundi*, E/CN.4/2001/5/Add.1 (6 March 2000)

Additional Report of the Special Representative of the Secretary General for Children in Armed Conflict, *Rights of the Child*, E/CN.4/2000/71 (9 February 2000)

Mission Report on Israel's Violations of Human Rights in the Palestinian Territories Occupied Since 1967, by G. Giacomelli, Special Rapporteur E/CN.4/S-5/3 (17 October 2000)

Report of the Special Rapporteur. Asma Jahhanhir, submitted pursuant to Commission Resolution 2000/31, *Summary of Cases Transmitted to Governments and Replies Received*, E/CN.4/2001/9/Add.I (17 January 2001)

Report by the Special Rapporteur, *Right to Food*, E/CN.4/2001/53 (7 February 2001)

Report of the Special Rapporteur on Violence Against Women, *Communications to and from Governments*, E/CN.4/2001/73/Add.1 (13 February 2001)

F.M.Deng, *Profiles in Displacement: Indonesia*, E/CN.4/2002/95/Add.2 (15 February 2002)

Report of the Special Rapporteur, Asma Jahangir, on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2002/74 (9 January 2002)

Report of the Special Rapporteur, Philip Alston on Extrajudicial Executions, E/CN.4/2005/7(22 December 2004)

Working paper submitted by Paulo Sergio Pinheiro to the Sub-Commission, *The Return of Refugees' or Displaced Persons' Property* E/CN.4/Sub.2/2002/17 (12 June 2002)

Report of the Special –Representative of the Secretary-General on Internally Displaced Persons, *Protection of and Assistance to Internally Displaced Persons*, A/53/393, 58th Session of the General Assembly (2 September 2003)

Report of the Representative, F.M. Deng, *Profiles in Displacement: the Russian Federation*, E/CN.4/2004/77/Add.2 (24 February 2004)

Report of the Representative of the Secretary General on IDPs, Francis Deng, E/CN.4/2004/77, (4 March 2004)

Report of the Special Rapporteur, Asma Jahangir, on Extrajudicial, Summary or Arbitrary Executions: *Mission to the Sudan*, E/CN.4/2005/7/Add.2 (6 August 2004)

Interim Report of the Special Rapporteur of the CHR on the right to food, Jean Ziegler, in accordance to G.A resolution 58/186, 27 September 2004

Report of the Representative of Secretary-General on Internally Displaced persons, Francis M.Deng, *Mission to Sudan- The Darfur Crisis*, E/CN.4/2005/8 (27 September 2004)

UN Human Rights Expert Deplores Ongoing Displacement in Darfur, Press Release, 11 November, 2004

Report of the Special Rapporteur, Philip Alston on Extrajudicial, Summary or Arbitrary Executions, E/CN.4/2005/7(22 December 2004)

Report of the Representative of the Secretary-General, Walter Kalin on Human Rights of Internally Displaced Persons, E/CN.4/2005/84 (31 December 2004)

Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt: *Summary of cases transmitted to governments and replies received*, E/CN.4/2005/51/Add.1 (2 February 2005)

Report of the Special Rapporteur, on the adequate housing as a component of the right to an adequate standard of living, Miloon Kothari: *Economic, Social and Cultural Rights*, E/CN.4/2005/48 (3 March 2005)

Commentary of the Working Group on Minorities to the United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, E/CN.4/Sub.2/AC.5/2005/2 (4 April 2005)

Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law, E/CN.4/Sub.2/2005/14 (21 June 2005)

Explanatory Notes on the Principles on Housing and Property Restitution for Refugees and Displaced Persons, Final Report of the Special Rapporteur, Paulo Sergio Pinheiro, E/CN.4/Sub.2/2005/17/Add.1 (8 July 2005)

Final Report of the Special Rapporteur, Paulo Sergio Pinheiro, *Housing and Property Restitution in the Context of Return of Refugees and Internally Displaced Persons*, E/CN.4/Sub.2/2005/17 (28 June 2005) Annex, (endorsed by the Sub-Commission on the Promotion and Protection of Human Rights by Resolution 2005/21, E/CN.4/Sub.2/2005/L.II/Add.2 (11 August 2005).

UN Sub-Commission on Promotion and Protection of Human Rights

Resolution 1995/13 'The Right to Freedom of Movement' 1995/13 (18 August 1995)

Resolution 1995/29, 'Forced Eviction' (24 August 1995)

Resolution 1996/9 'The Right to Freedom of Movement' (23 August 1996)

Resolution 1998/27 ' Forced Population Transfer' (26 August 1998)

Resolution 2002/30, 'Right to Return of Refugees and Internally Displaced Persons'

International Law Commission

Fourth Report of the Special Rapporteur, R.Ago, 'State Responsibility', *Yearbook of the International Law Commission*, Vol. I, 24 th Session, 1972, p. 72.

Draft Articles on *Responsibility of States for Internationally wrongful Acts* adopted by the ILC at its 53rd Session (2001)

Report of the International Law Commission 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,' 56 th Session, A/59/10 (2004)

UN Secretary-General

Analytical Report compiled by the Secretary – General, *Forced Evictions*, E/CN.4/1994/20 (7 December 1993)

Report of the Secretary – General to the Security Council on the Protection of Civilians in Armed Conflict, S/1999/957 (8 September 1999)

Report of the S.G to the Security Council on the Protection of Civilians in Armed Conflicts (S/2001/331) 30 March 2001

Office of the United Nations High Commissioner for Refugees

‘UNHCR Paper on Asylum Seekers from the Russian Federation in the Context of the Situation in Chechnya’, UNHCR, Geneva, February 2003

Executive Committee Conclusion No.19, Temporary Refuge 1980, 31st Session

Executive Committee of the High Commissioner’s Programme, A/Ac.96/951(13 September 2001) Note on International Protection

Executive Committee Conclusion No.22,1981, *Protection of Aylum seekers in Situations of Large- Scale Influx*

UNHCR, ‘29 Killed in Attack on Darfur Camp: UNHCR Gravely Concerned,’ 29 September 2005. (<http://www.unhcr.ch/cgi-bin/texis/vtx/chad?page=news&id=433c23744>)

UNHCR, ‘Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees’, 6 March, 2000

Office of the United Nations High Commissioner for Human Rights

IASC, ‘Statement on Forced Relocation (Regroupment) in Burundi’, press release-IHA/694-20000119, (10/07/01)
<http://www.reliefweb.int/w/rwb....c05ae9e8db89197b8525686boo7a5e28?OpenDocument>

‘Protection of Internally Displaced Persons’, Inter –Agency Standing Committee Policy Paper, New York, 1999

The United Nations High Commissioner for Human Rights, *The OHCHR Plan of Action :Protection and Empowerment*, Geneva, May 2005

UN General Assembly

G.A. Resolution 2675 of 1970, ‘Basic Principles for the Protection of Civilian Population in Armed Conflicts’

G.A Resol.3318 (XXIX) (14 Dec 1974) UN GAOR, 29th Sess.Supp.No.31 (A/9631)(1975) ‘Declaration on the Protection of Women and Children in Emergency and Armed Conflict’

Resolution Adopted by the General Assembly, 60/1, 2005 World Summit Outcome, 24 October 2005

Draft Resolution by the President of the General Assembly, recommended for the abolishment of Human Rights Commission on 16 June 2006 and to convene the first meeting of the Human Rights Council on 19 June 2006. (23.02.06)

UN Security Council

Resolution 794 of 3 December 1992

Resolution 814 of 26 March 1993

Resolution 808 of 25 May 1993

Resolution 955 of 8 November 1994

Resolution 1261 of 30 August 1999

Resolution 1296 of 19 April 2000

Resolution 1286 of 19 January 2000.

Resolution 1564 of 18 September 2004

Final Report of the Commission of Experts established pursuant to Security Council resolution 780(1992), S/1994/674, 27 May 1994

Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) S/1994/674 (27 May 1994) Annex

Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, pursuant to Security Council Resolution 1564 of 18 Sept 2004, (25 January 2005)

International Criminal Court

Rules of Procedure and Evidence of the ICC (9.9.2002)

Report of the Preparatory Commission for the International Criminal Court, Finalized Draft Text of the *Elements of Crimes*, PCNICC/200/1/Add.2 (2 November 2000)

‘Letter to the Presiding Judge, Pre-Trial Chamber I by the Prosecutor, 1 June 2005

Press release, *Prosecutor receives list prepared by the Commission of Inquiry Darfur*, Statement of the ICC Prosecutor Luis Moreno-Ocampo 5 April 2005 (www.icc-cpi.int);

International Criminal Tribunal For the Former Yugoslavia

Rules of Procedure and Evidence of the ICTY, IT/32/Rev.36, Adopted on 11 February 1994, (contains amendment till 21 July 2005)

International Criminal Tribunal for Rwanda

Rules of Procedure and Evidence of the ICTR Adopted on 29 June 1995, (contains amendment till 7 June 2005)

Inter-American System of Human Rights

Habeas Corpus in Emergency Situations (Arts 27(2),25(1) and 7(6)) ACHR Requested by the Inter-American Commission on Human Rights, Advisory Opinion OC-8/87 of 30 January 1987.

Statute of the Inter-American Commission on Human Rights. (Approved by Resolution No.447 taken by the General Assembly of the OAS at its ninth regular session in October, 1979). (<http://www.cidh.oas.org>)

Rules and Procedures of the Inter-American Commission on Human Rights (2003) (<http://www.cidh.oas.org>)

European System of Human Rights

Statute of the Council of Europe, 1949 (<http://conventions.coe.int>)

Recommendation 1456 (2000) of the Parliamentary Assembly of the Council of Europe, Strasbourg, ‘Urgent Appeal to Members “to make use of Art.33” ECHR (inter-state complaint) v. Russia/ Violation of Human Rights in the Chechen Republic’, 6 April, 2000, reproduced in (2000) 21*HRLJ* 286.

Rules adopted by the Committee of Ministers for the Application of Article 46, para 2 of the European Convention on Human Rights. (10 January 2001)

Council of the European Union Directive on Minimum Standards for giving Temporary Protection in the Event of a Mass Influx of Displaced Persons 2001/55/EC (20 July 2001)

CAHDI (2002) 8, 23rd Meeting, Strasbourg, 4-5 March 2002, Meeting Report, paras.32-55 (<http://www.coe.int>)

Recommendation 1456 (2000) of the Parliamentary Assembly of the Council of Europe, Strasbourg, ‘Urgent Appeal to Members “to make use of Art.33” ECHR (inter-state complaint) v. Russia/ Violation of Human Rights in the Chechen Republic’, 6 April, 2000, reproduced in

Rules of Procedure of the Parliamentary Assembly, June 2005

Rules of Court, Registry of the Court, Strasbourg, December 2005 (www.echr.coe.int)

African System of Human Rights

Resolution 7(XIV)93:Resolution on the Promotion and Respect of International Humanitarian Law and Human and Peoples' Rights (1993)

Resolution 8 (xv)94: Resolution on the Situation in Rwanda (1994)

Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum seekers and Internally Displaced Persons in Africa (7th December 2004). (www.achpr.org)

Constitutive Act of the African Union of 11 July 2000 entered into force on 26 March 2001 (replaced the Charter of the OAU of 1963)

Other

Belgium's Act of 16 June 1993 Concerning the Punishment of Grave Breaches of International Humanitarian Law as amended by the Act of 10 February 1999, (1999) 38 *ILM* 921

Canada, Immigration and Refugee Protection Act 2001

Belgium's Act of 16 June 1993 Concerning the Punishment of Grave Breaches of International Humanitarian Law (as amended by the Act of 10 February 1999) (2003) As Amended By the Act of 23 April 2003, (2003) 42 *ILM* 749

World Food Programme, *WFP Assistance to Internally Displaced Persons, Country Case Study on Internal Displacement, Sri Lanka: Displacement in the North and East, July 1999*

'Civilian Non-Combatants Fearing Persecution in Civil War Situations', Guidelines Issued by the Chairperson, Pursuant to Section 65(3) of Immigration Act, Immigration and Refugee Board, Canada, March 7, 1996

Statute of the International Red Cross and Red Crescent Movement, reproduced in (1987) No.256 *IRRC*, pp.25-59.

ECOSOC Resolution 1235(XLII) 1967

ECOSOC Resolution 1503 (XLVIII) May 27 1970.

Economic and Social Council Resolution 1985/17 para(a) UN ESCOR, Supp. (No.1) at 15, UN Doc.E/1985/85 (1985)