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Humanitarian debate: Law, policy, action

Displacement

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EDITORIAL

Movement of populations is an ancient phenomenon, beginning with the expansion of *Homo erectus* out of Africa. In all civilizations, the quests for land to cultivate, for labour revenues and for commerce have been fundamental motives for migration. Whether in the form of outright conquest or slow cultural infiltration and resettlement, migration has affected all epochs in human history. In the form of colonization, it has even transformed the world.

In history, conflicts of all sorts have provoked other types of displacement: exoduses, mass expulsions, and exile of populations. If the 19th century was the century of mass migrations, the 20th century was the century of refugees. In total, more than 100 million people were forced to leave their countries due to the two World Wars. In displacing, deporting or expelling more than 10% of the European population (about 50 to 60 million people), the Second World War created a migratory nightmare. Similarly, with the end of the British Empire, the partition of India and Pakistan provoked the departure of 17 million people from their home areas – the later secession of Bangladesh led to the exodus of another 6 to 8 million people.

It was not until the beginning of the 20th century that a robust system of passports and visas was fully established to regulate border crossings. Today, despite the progression of human rights and economic interdependence, borders and migration law are often the last bastion of sovereignty in the globalizing world, as the movement of populations has continued in the form of both voluntary migration and forced displacement. Conversely, effective control of cross-border activities is nearly impossible where states have to keep their borders open for goods, capital and services. Thus, tensions arise between legal systems predicated on openness and security-driven rhetoric justifying restrictive and coercive practices against foreigners. States' reaction to their perception of a loss of control was first reflected in the damage done to refugees and to refugee law. After the end of the Cold War, the global crackdown on 'illegal migration' and the tightening of migration restrictions made international refugee law a more important constraint on sovereignty than ever before.

However, displacement of populations also takes place within State borders. At the end of last year, the number of people internally displaced by conflict, generalized

violence or human rights violations across the world reportedly remained at over 20 million. The causes of displacement are of course manifold and complex. Quite apart from natural disasters or development-induced displacement, in most cases the root causes of displacement are the same as those that have triggered, or at least contributed to, armed conflict or situations of violence in the first place. Poverty, the effects of climate change, scarcity of resources, political instability, and weak governance and justice systems may all be catalysts for conflict-induced displacement. These same factors often hamper solutions to displacement and make the task of rebuilding lives and restoring the livelihoods of people affected by displacement all the more difficult. The sanitized acronym 'IDP' cannot convey the faintest idea of the grim realities that confront those people in many parts of the world today.

One of the main causes of forced displacement in armed conflict remains, undoubtedly, violations of international humanitarian law. Attacks that are directed against civilians or indiscriminate in nature – prohibited by humanitarian law – are particularly to blame for civilians fleeing their homes. Parties to an armed conflict are also expressly prohibited from compelling civilians to leave their homes, and internally displaced persons are entitled to the same protection from the effects of hostilities and the same assistance as the rest of the civilian population. If these laws were better respected, internal displacement could to a large degree be prevented from happening in the first place.

The development of legal standards outside of humanitarian law has extended the protection of IDPs to a wider range of situations. Ten years after their adoption, the Guiding Principles on Internal Displacement remain an important international framework for the protection and assistance of internally displaced persons. They address issues associated with forced displacement, regardless of the way a particular situation is classified under law. Thus they are as pertinent during and after armed conflict as they are in situations of internal strife, complex emergencies, or natural disasters. On a regional level, the new African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), adopted by the AU Summit on 23 October 2009 in Kampala, Uganda, takes an all-embracing approach to the phenomenon. This Convention is the first ever international treaty for the protection and assistance of internally displaced persons and is as such a significant achievement.

Where severe and sudden crises bring about massive displacement of population groups, an urgent humanitarian response is needed. The often highly complex and fluid nature of displacement on the ground makes coverage of displaced persons' needs a difficult task, and a comprehensive approach to the humanitarian needs of the entire civilian population in any crisis or situation of conflict is required. For humanitarian organizations, it is of paramount importance that they reach out to everyone in need, not only to those who have been forcibly displaced. Only this approach will help those living in remote areas to recover some measure of

self-sufficiency and resilience, ease tensions over scarce resources, and prevent these people from having to move to IDP camps.

In most cases, the vast majority of IDPs living in camps usually express an interest in returning home – often to reclaim land or property and resume their normal lives – as long as security conditions are conducive to this. Additionally, the establishment of camps creates new problems that are complex to tackle, and which may in fact compound the vulnerabilities and risks to which IDPs are exposed.

The challenges relating to the prevention of displacement apply equally to preventing its recurrence once IDPs return to their places of origin, settle in the community that hosted them, or relocate to yet another place. The conditions for return or relocation must be safe, voluntary and dignified. Without long-term commitment to tackle the root causes of conflict, there is a risk of repeated patterns of internal displacement and humanitarian crisis. Unless displaced populations are effectively stabilized through adequate protection and assistance, there can be little hope of achieving sustainable peace.

Tackling the problem of internal displacement in all its dimensions therefore requires a huge concerted effort at both national and international levels. The 30th International Conference of the Red Cross and Red Crescent acknowledged for the first time that migration, in a broad sense of the term, is one of its major strategic challenges of the future. Moreover, the recommendation issued in 2007 was that, in addressing the humanitarian dimension of migration, the Red Cross and Red Crescent should take an inclusive approach, irrespective of the status of the migrants of concern. Needs and vulnerabilities of migrants should be the determining factors in the humanitarian response, whatever the legal status or category to which they belong. Similarly, the ICRC, the Federation and the National Red Cross and Red Crescent Societies developed policy guidelines for addressing the needs and vulnerabilities of people and communities affected by internal displacement. The guidelines adopted in November 2009 highlight the strengths and added value of the Movement in providing a comprehensive response to displacement crises, mainly through its global network which is firmly anchored in communities.

Toni Pfanner
Editor-in-Chief

Interview with William Lacy Swing*

William Lacy Swing is the Director General of the International Organization for Migration (IOM). He has held the office of Special Representative to the UN Secretary-General for the Democratic Republic of Congo (2003–2008) and Western Sahara (2001–2003), and headed the UN Mission for the Referendum in Western Sahara. This followed a long career in the United States Department of State, during which he served as ambassador six times.



People are moving around the world for all kinds of reasons, whether economic, political or otherwise. Does IOM deal with all these different categories of migrant persons without any differentiation, or is there an emphasis on some specifically?

We help all types of migrants, but we do deal a lot with conflict-related IDPs, refugees and other forced migrants, as well as increased migratory movements induced by climate change and natural disasters. However, IOM's 2008 World Migration Report makes one concluding point, which is that more than ever in human history, most migration is related to employment in some manner or another. Labour migration is the big wave of the future, given the demographic, economic and labour market trends of today. Although climate change will continue to be a factor – with anywhere between 25 million to 1 billion people possibly affected by climate change by 2050 (the most widely cited figure being 200 million) – the overwhelming majority of migration is and will be about employment.

Has IOM broadened its scope to deal with these new trends? How has its work developed over the years?

What has remained constant is that from its creation, the IOM has been the only international organization that has had the remit to deal with all the ramifications

* The interview was held on 6 July 2009 by Toni Pfanner, Editor-in-chief of the International Review of the Red Cross, and Deborah Casalin, assistant editor.

of the way that people move. People initially thought of IOM as a transport agency, as after World War Two we were focused on the ravages of the war and unemployment in Europe, and moving people to places such as Australia, Canada, the US and Latin America, to countries used to receiving refugees and migrants. However, even at the time, it was also a question of helping member states to meet their migration needs, whether by helping them to come up with policies, ways of being able to recruit labour migrants, etc. After that, in the period of the Cold War, there were the regional conflicts in South-East Asia, in Africa and Central America, so our work moved more into those areas. By 1990, when the Berlin Wall had fallen and globalization began, we became a truly global organization, although we still don't have the universal coverage that either the UN or the ICRC would have.

Nevertheless, IOM has made a spectacular step forward in the size of its membership, growing from 67 countries in 1998 to 127 today. What are the reasons for that?

I give a lot of credit to my predecessor, who worked very hard at this. During his ten years here, he doubled the membership, as well as quadrupling the budget, from around US\$200 million to last year's budget of US\$1 billion. In that time, our number of worldwide offices increased from 119 to 440, and our staff grew from about 1100 to about 7000.

Apart from his good work, we were also riding the crest of a wave. Fifteen, or even twelve years ago, migration used to get a big yawn – nobody wanted to talk about it. Today, virtually every government and every agency in the world has an interest in migration. We have more and more partners now – this is good for us, because we're too small to do migration on our own. Today it's clear that we live in the era of the greatest human movement in recorded history. Not percentage-wise, but in terms of number of people. By next year, there will be an estimated 214 million international migrants in the world, counting refugees, labour migrants, their families, students and young professionals going abroad, etc. I have made the point that if these people were constituted as a nation, it would be the fifth most populous in the world. The 305 billion dollars that they sent home last year to developing countries alone is larger than the gross domestic product of Switzerland and a number of other IOM member states. So they would be a major power, in that sense alone. Of course, with migration, there are social costs, in the sense of tearing at the fabric of the family when the breadwinner is away. So that's to be taken into consideration. But with all of that in mind, the issue that this agency is focused on is how migration can take place in a humane and orderly manner.

You mentioned that labour migration is a major factor in this current wave of human movement – to what can this surge in labour migration be attributed?

That's the key question – the answer is demographic, economic and labour market trends. If you consider that in the North (Western Europe, the US, Canada, or Japan, for example), there is a dramatically declining birth rate and an ageing population. In the South, of course, given the economic disparities, you have a labour market always in surplus: too many people chasing jobs and too little

development to create jobs. So whether one likes it or not, the reality is that South/North movement will continue for the foreseeable future. However, we shouldn't forget that South/South migration is just as important. Within the West African region, for example, South/South migration is much greater than from there to Europe; in the Americas, so many Mexican workers have left for the United States that Mexico has now created some multiple entry temporary worker visas for Guatemalans to come back and forth as seasonal workers to fill the gap. There's a lot of that happening now. So we help to look for solutions to migration problems, and to facilitate an exchange of information. We are continuing to support 14 regional consultative mechanisms on migration, which work very well because they bring together the destination, origin and transit countries.

Has the increase in labour migration resulted in states trying to limit their reception of refugees – to classify them as migrants rather than asylum seekers?

I think until recently the current trend had been more of the number of refugees declining, and that of IDPs increasing. But I don't see any lessening of support for refugees. The quotas in the US, for example, have tended to go up more than decline – it's just over 77,000 people per year now. I would think that these quotas are likely to continue to increase over a period of time, because I think that's the inclination of the administration. But they will of course be constrained somewhat by the financial circumstances.

In Europe, such a phenomenon might partly be due to the pressures of labour migration. A lot of the countries would like to select who comes, in terms of the skill levels. I think they're looking at it much more as a migration challenge, because they've opened their borders with the East now, and the borders get very soft as you go eastward. There is also their flank on the South, in the Mediterranean, and the problems that Italy, Malta, Greece and Spain are facing now with irregular migration. This reflects the kinds of pressures that impact on many European countries' attitude towards refugee flows.

In many destination countries, there is also a lot of resistance to migration because the population feels their identity is threatened. Do you also engage in that kind of issue?

Very much so – especially now with the financial crisis, we're obviously concerned about the loss of jobs and the decline in remittances. We're also concerned that official development assistance and foreign direct investment levels don't decline in this period. But our overriding concern is that governments do not resort to discriminatory policies that verge on xenophobia. Now, my belief is that we have to counter a tendency on the part of some governments to think in a counter-cyclical way, that the answer to our problem is to send the migrants home. If they're going to recover, they're going to need these people, considering what I just told you about the demographic and labour market trends. You can send them home, but you're going to have to call them right back. There's also something related to

national identity, but that's already changing, even just with the creation of the European Union.

Another fundamental point is that far too much attention is being paid in the media and by governments to the question of what they call illegal migration – we call it irregular migration, in the sense that these migrants are not properly documented. At the same time, far too little attention is paid to the contribution migrants make to our countries. We do a lot of work disseminating information to educate the public – for example, we recently did a campaign through the Italian media about the contribution of migrants to society. In South Africa and in Ukraine, we also have initiatives that directly tackle issues of xenophobia because of the levels of violence towards migrants. This is a very important part of what we do, to educate and work with communities to promote greater understanding of migrants.

How can destination countries manage migration in the face of this pressure from their populations?

You have to strike a balance between migration control and migration facilitation. If you don't have a control policy, your migration facilitation won't be credible with your populations. I think two elements are fundamental. First, governments need to have a comprehensive, whole-of-government approach to migration. For example, a country may turn over the migration portfolio to the interior ministry; therefore, their focus will be on border control, police, and sending irregular migrants home, because that's what they do. However, the foreign ministry may have an interest in the relations with the countries of origin and would not want to cause tensions. Other ministries, such as social welfare, would have an interest in human rights and humanitarian concerns. So if you don't bring it all together, you tend to get an imbalanced policy that will not serve the national interest. Now, the second aspect is that you have to then put that into a regional consultation framework to avoid the kinds of bilateral conflicts that come up because the two parties are not talking to one another.

The issue of detaining asylum seekers or migrants – as well as the question of sending them back to their countries of origin (refoulement) – can become quite critical in many situations. How do you see your role there? Do you engage in protection activities?

We don't have a formal protection mandate, but we do protect. Our role is not a specific treaty-based protection mandate, like UNHCR's for example, which we respect and support. But we do a lot of *de facto* protection because we are involved in a lot of grey areas where nobody else is present, or where no-one else can do it, wants to do it or has a mandate to do it. We are obviously going to protect when people are in need.

The question of detained migrants is one such grey area. Tens of thousands of migrants all around the world – in developed and developing countries alike – have been put into prisons, not because they're criminals but just because they are in the country irregularly. Countries will often call these detention places

something else, like migrant centres, but they end up being detention centres nonetheless. In many parts of the world, the conditions in the prisons are absolutely appalling. So if you do not enter that grey area, and actually go and help them – whether by trying to improve their conditions, providing assistance or just being there as a support – they would just be left there to rot in jail. It's a very difficult one to justify on the face of it, but on a purely humanitarian level, detained migrants actually need that help, and that is something that we can do.

Do you counsel refugees on the possible risks of returning to their countries? What is your policy in situations where they are not ready to go back?

We definitely have a policy – we will only do voluntary returns. We do not do forceful repatriation of any kind. I've had several European countries ask whether we could suggest to the migrants that they go home, or stimulate them to do so. I said no – we don't do suggestions, we don't do stimulation. If they come to us and want to go home, we'll take them home. Beforehand, we will also provide them with all the information they need, including what the situation is like back at home.

We have to make judgements on the ground, though. If a government decides to send people back forcefully, then we have to face the dilemma of whether to offer reintegration services on the other side to migrants who often have little to nothing and need some humanitarian assistance. It has to be done in such a way that we do not promise the government sending them back that we'll do that. However, once they're back, they're back, and then you have to deal with the issue. If the government in the country of origin doesn't have any kind of reintegration services in place, then we would give serious consideration to undertaking those activities. But it has to be done in a manner that would not then encourage the government of the destination state to send people back against their will.

What assistance do you offer to refugees who are resettled in third countries?

In the resettlement programme for refugees and IDPs, we often work closely with UNHCR, which refers refugees for resettlement to third countries. IOM organizes their travel documents and transport, we carry out medical screenings for serious illnesses or contagious diseases such as TB, and treat those who are sick until they are cleared fit to travel.

We also do a lot of cultural orientation for people who are being resettled, and have very well-trained people to facilitate that. If we are resettling Iraqis out of Jordan and Syria to Canada, they need to know a little bit about the place – for example, that it's cold! So we try to brace them. The Japanese, remarkably, have just asked IOM to start cultural orientation and Japanese language training on very, very tiny numbers in the Northern Thailand refugee camps, where the Myanmar refugees are. Japan is actually going to integrate these refugees into their society, which is a first. They've never done this before.

There's actually a lot more involved, including medical escorts and transit assistance, but essentially, UNHCR refers refugees for resettlement to third countries and once a resettlement country approaches us, we get involved. It's very

complicated. One example of such collaboration with UNHCR is in Malaysia, which is not an IOM member and where we don't have an office, but from where we resettle about 7000 Myanmar refugees per year.

IOM is not a part of the UN, but you work closely with UNHCR, for example. How do you find your place in the system of the various UN agencies who also deal directly or indirectly with issues that have a bearing on migration? What is the strategy?

Our membership decided once again in 2006 that they didn't want us to be part of the UN; they wanted to keep us independent. At the same time, however, member states want us to continue to strengthen our ties with the UN. The result is that we're now part of all UN country teams worldwide. We're the lead in the camp management cluster for natural disasters, and also part of the Inter-Agency Standing Committee.

Finding our role is a difficult kind of balancing act, but I think we've managed to do it – we have our place at the table. Our weakness is that generally speaking, in an emergency or disaster, we're the first at the table who has no money even though often we have an operational presence in these places where others don't. If something happens, we have to go out and look for money quickly. We draw on UN funds too, like the Central Emergency Response Fund (CERF) and the Peace Building Fund. We have an excellent relationship with OCHA as well. However, we only have one contingency fund of our own right now, which we use for stranded migrants. We need to build up those funds so that we can get off the mark very quickly, as we have been valued over the years for being quick, low-cost and also relatively low-profile.

Nevertheless, we are much closer to the private sector than the UN in the way we operate. In terms of our operational pattern, we're probably closer to the World Food Programme than anybody else, because we're operational. However, we're more than operational, as we do a lot of policy too, especially as we've become more of a global organization. That is why we look for a chief of mission who is both very skilled operationally, but also very nuanced on the policies – the complete diplomat who can bring together the diplomatic skills to have credibility within the UN system and the diplomatic corps, but who can also deliver.

What do IOM's policy activities entail? Does IOM seek to develop international law on migration?

We counsel a lot on national migration legislation – making comparable foreign laws available, examining best practices, and advising on which elements make a good law and which may be problematic. We similarly support governments in coming up with counter-trafficking legislation. We also advise States and other actors on the contents of existing norms of international law.

Although we are not part of any of the UN policy-making bodies, not even as observers, we also try to make sure that we have a voice in every significant conversation related to migration, and a seat at every important table. IOM is involved in the Global Migration Group (which promotes the wider application of

international and regional migration instruments and norms, as well as coherent migration policies), and the World Economic Forum, where we are part of the Global Alliance for Migration. We also want to be part of the Summit of the Americas follow-up, it's important for IOM and I've insisted on keeping our place at the Joint Summit Working Group.

However, we've had to be very careful. While we do provide policy advice, the majority of member states are very concerned that IOM does not become a normative body.

The Red Cross Movement – particularly National Societies – have some activities which overlap with migration issues, for example the restoration of family links. What is IOM's interaction with the Red Cross Movement?

We don't work with the national Red Cross or Red Crescent society everywhere, but where we can, we do – for example, in places like Iraq, Syria and even in Kenya, with the post-election violence. We worked very closely with the Kenyan Red Cross, actually, in devising the humanitarian response: the camps and the food and non-food relief distribution. I'll give you another example – in Italy. The migrant reception centre on Lampedusa, where we work with the Italian Red Cross, UNHCR and others, was meant to be a role model to be replicated elsewhere, in places like the Greek islands. There has now been a change in policy by the new government regarding the centre. However, every time I go to Rome, one of the main calls I make is on the Italian Red Cross. They are a very important player and we value the relationship.

One thing I've learned about ICRC over the years is that you cannot work with the ICRC if you cannot develop a degree of confidence that it will guard any information it gets. I've always respected ICRC's total institutional integrity. I respect that because I know that at the end of the day, when everybody else has gone, ICRC will be the only one left who can really do something.

The programmes that you have in conflict areas – Afghanistan or Sudan, for example – are wide-ranging, and include activities such as assistance operations and community stabilization. What is the link between those programmes and the migration issue?

There's a debate among the member states as to the true role of IOM. There are those who are strictly constructionist, and insist on only the core mandate, which they would like to see defined in a very strict way. Then there are others who want us to be much more flexible. I tend a little more toward the flexible approach, because I can see a very clear connection between migration and various other activities. For example, the disarmament, demobilization and reintegration (DDR) programmes, which we have done or are doing in nearly 30 countries, including demobilizing and reintegrating ex-Tamil fighters in Sri Lanka right now. Until you have political and community stability, you are going to have a very heavy migration push factor, people are just going to leave. So it's very much migration-related.

You'd probably be surprised at some of our other activities – for instance, we did the whole German compensation programme for victims of the Nazi war crimes. Again, we do that – land and property compensation claims – because it's part of stabilizing countries. We are involved in many such programmes on an *ad hoc* basis – we're doing them now in Iraq and Sierra Leone.

In Indonesia, we're training the police in Aceh. There are a lot of members who don't like that – they ask, 'what does this have to do with migration?' Well, we have a 12-point strategy that they came up with in June 2007. In our annual budget, we relate every project we do to one of the 12 points. The programme in Aceh, for example, was related to three points. I say to them, you can still disagree with me, or my interpretation that fits with that particular point in the strategy, but they have to tell us if they want it that way – up to now, the majority have wanted us to remain relatively flexible, because we are operational.

Running this 'nation' of 200 million migrants, so to speak, is a heavy task. How do you prioritize?

A heavy task, yes. We're very limited in terms of our budget and very dependent on donor funding. But migration is not a clear-cut issue. The whole complex process of moving from one country to another or within a country has led to so many issues surfacing. Every aspect adds to the picture: for example, through our work, it's clear that tackling human trafficking isn't just about helping a victim of trafficking recover from their ordeal, physically, emotionally and economically, but also in overcoming stigma and discrimination towards them so that they can once again be full members of a society. If you don't do something to address the demand side, the problem will continue forever. If governments don't enact strong counter-trafficking legislation, traffickers will always escape prosecution because of legal loopholes, and if law enforcers don't understand the issue or have proper legislation to work with, they will neither be able to protect the victim nor ensure that traffickers are put behind bars.

You can't isolate and just deal with one component, because then you would really not be able to truly help the person. That is the difficulty of working in migration.

The ICRC's response to internal displacement: strengths, challenges and constraints

Jakob Kellenberger

Dr. Jakob Kellenberger is the president of the International Committee of the Red Cross.

Abstract

The often highly complex and fluid nature of displacement on the ground makes coverage of IDPs' needs a difficult task, and a flexible response is required to fit different contexts. The ICRC's humanitarian response is guided by the vulnerability and the needs of all people affected by armed conflict and violence – including, of course, IDPs, whose vulnerability is often (but not automatically) exacerbated by their particular situation. The protection and assistance of IDPs therefore naturally lies at the heart of the ICRC's mandate and activities. In identifying and responding to needs, the ICRC looks at the whole context in which internal displacement occurs, as well as all the people affected. The aim is to promote self-reliance among vulnerable communities so as to avoid displacement, or to strengthen their capacity to host IDPs. Nevertheless, where needed, the ICRC also fills gaps by providing emergency aid in IDP camps, coordinating with other international organizations in order to optimize response.



Internal displacement poses perhaps one of the most daunting humanitarian challenges of today. The impact on not only many millions of internally displaced persons (IDPs), but also on countless host families and resident communities is hard, if not impossible, to measure. Addressing their protection and assistance needs – often in the absence of national authorities assuming their responsibilities

in this regard – requires a huge, concerted effort by the international humanitarian community as a whole.

Faced with a humanitarian challenge of such magnitude, the ICRC is just one of many actors to play its own particular role. In recent years the ICRC has felt a growing need to define its approach to the problem of IDPs and to determine how that approach fits into the international normative and institutional framework for dealing with internal displacement. Above all, it has asked itself what this definition might mean where it matters most: in the field. What is the value of the ICRC's approach in practice, and what are its limits?

In an attempt to answer these questions, it is useful to look at a range of issues, including the potential complexity of patterns of displacement and return, the question of camps versus temporary shelter in host families, criteria for gauging vulnerability, targeting humanitarian action, and UN humanitarian reform and coordination issues.

The ICRC's approach

There have long been certain differences of perception concerning the ICRC's operational position on IDPs. Sometimes these have been starkly expressed. In November 2008, when I addressed an audience of donor States at the UN in Geneva on the subject of internal displacement, one participant asked, in all sincerity, "Since when has the ICRC been talking about IDPs? I thought they didn't recognize IDPs as a separate category for humanitarian purposes?"

The reality is somewhat more nuanced. The ICRC's humanitarian response is guided by the degree of vulnerability and the essential needs of all people affected by armed conflict and violence – including, of course, IDPs. Aiming to protect and assist IDPs therefore naturally lies at the heart of the ICRC's mandate and activities.

There is no doubt that the vulnerability of civilians is often exacerbated if they are displaced. Indeed, displaced people are deprived, often brutally, of their ordinary living environment in terms of security, shelter, sources of food and water, livelihood, and community support systems. This deprivation seriously impedes their ability to meet their most basic needs. Furthermore, IDPs frequently have specific protection needs, as they are at an increased risk of being separated from their families, and are particularly exposed to abuse during displacement (while fleeing, or in camps or settlements).

Internally displaced people are hardly ever a homogeneous group. Displacement undoubtedly has a different impact on men, women, boys and girls, owing to their different social and economic roles, as well as the reasons for their displacement.

Women and children are usually the worst hit. Women may be particularly vulnerable due to factors such as the loss of their primary breadwinner, an increased risk of sexual violence or the need for reproductive health care. They are often exposed to abuse during flight – on the road – as well as in and around

camps and informal settlements. That said, women often exhibit remarkable strength and resilience as they support their families and lead their communities in both acute crises and situations of protracted displacement. Their potential to make significant social and economic contributions or to play a key role in return or settlement processes should not be underestimated.

Children, however, are particularly vulnerable – especially if they become separated from their families during displacement.

However, where the ICRC perhaps differs from some other humanitarian organizations is that while it recognizes that internal displacement can exacerbate the vulnerability of communities affected by armed conflict, it does not consider that displaced people are automatically more vulnerable than civilians who are not displaced. Many of those who have stayed behind (including, often, the elderly and the sick) might be in an even more vulnerable position than those who were able to flee. Overburdened host families who share often meagre resources with displaced people may also be extremely vulnerable and in need of humanitarian aid.

In identifying and responding to needs, the ICRC tends to look at the whole context in which internal displacement occurs, as well as all the people affected by that context: those who flee, those who cannot flee, those who decide to stay for other reasons, and those who return. The ICRC strives to meet needs where they are most acute, in a flexible and adaptable way, depending on the circumstances in a given situation. In certain cases, this may entail providing aid in IDP camps – usually only in the short term and when other humanitarian organizations are, for various reasons, unable to respond. Often, preventing displacement from happening in the first place plays a very prominent role in the ICRC's operational choices and strategies. This is why, in conflict zones from Darfur and the Democratic Republic of the Congo to Sri Lanka and the Philippines, and many more, the ICRC strives to prevent further displacement by providing a wide range of services to the population in areas at risk, and by urging all parties to respect their obligations under international humanitarian law (IHL), which also serves to protect vulnerable populations once displacement does occur.

The ICRC aims to promote self-reliance among vulnerable communities to help avoid displacement and, where necessary, to improve the community's capacity to host IDPs by strengthening existing coping mechanisms. For example, the ICRC has provided varying degrees of emergency aid in several IDP camps in Darfur since 2004,¹ particularly when other humanitarian organizations have been unable to do so. Yet the ICRC focuses more on helping residents of rural and remote areas to become self-sufficient to the greatest extent possible. It does this in various ways, for example by supplying cash-crop and staple-crop seeds and tools, putting existing water systems back into operation and helping provide veterinary services. This is just one example of the ICRC's activities that are guided by longer-term development principles within an emergency phase. Where displacement

1 Including the Gereida camp – see the subsection below on “Prevention and the role of camps”.

does occur, the ICRC seeks to address the needs of both the displaced population and of local and host communities, as well as of returning IDPs.

There we have the policy – but before considering in some detail what this actually means in practice, it may be worth reminding ourselves of the growing international framework for IDP response over the past few years, and why increasing attention has been focused on the phenomenon of internal displacement.

The ICRC within a growing international framework

Regardless of one's position and policy with regard to IDPs, it is an incontrovertible fact that the overall problem is immense. While no one can be sure how many IDPs there are around the world (one estimate suggested 26 million at the end of 2008),² it is clear that they far outnumber refugees. Yet despite, or because of, the scale of the worldwide displacement crisis, international attention has traditionally focused more on refugees, who are usually much more visible than IDPs.

Unlike refugees, IDPs are not yet covered by a specific international convention. This sometimes gives rise to an assumption that there is a gap in the legal framework for the protection and assistance of IDPs. However, although the relevant law may not contain any specific reference to IDPs, there is always a legal framework that can be referred to for the protection of those displaced, those left behind, and other relevant communities.

Where people suffer forced displacement within a country, national legislation is the primary source of relevant law and should contain guarantees of assistance and protection for the affected populations. However, national legislation does not always account for the extraordinary circumstances of internal displacement.

Although the primary responsibility for protecting IDPs and meeting their basic needs lies with the State or the authorities that control the territory where the IDPs find themselves, more often than not those authorities are unwilling or unable to fulfil these obligations. As a result, large numbers of IDPs remain exposed to further violence, malnutrition and disease, and are often forced to flee several times.

International humanitarian law, which is legally binding on both State and non-State actors, should be adequate to address most problems of internal displacement associated with armed conflict. Indeed, displacement is often a consequence of violations of humanitarian law during armed conflict, or failure to comply with other norms intended to protect people in situations of violence, such as those of human rights law. Humanitarian law provisions of particular relevance

2 Internal Displacement Monitoring Centre (IDMC), *Internal Displacement: Global Overview of Trends and Developments in 2008*, April 2009, p. 9, available at [http://www.internal-displacement.org/idmc/website/resources.nsf/\(httpPublications\)/0605361027488A28C12575A90042305B?OpenDocument](http://www.internal-displacement.org/idmc/website/resources.nsf/(httpPublications)/0605361027488A28C12575A90042305B?OpenDocument) (visited 21 August 2009).

here include the prohibitions on attacking civilians or civilian property, conducting indiscriminate attacks, starving civilians as a method of warfare, destroying objects indispensable to their survival, and carrying out reprisals against civilians and civilian property. Violations of these rules often cause civilians to flee their homes.

When civilians flee a conflict zone, it is a good indication that the warring parties are indifferent to their rights under humanitarian law, or are deliberately ignoring their responsibilities. The law expressly prohibits any party to an armed conflict from compelling civilians to leave their homes,³ and affords IDPs the same protection from the effects of hostilities and the same assistance as the rest of the civilian population.⁴ States and any other parties to conflict are obliged to allow the unhindered passage of relief supplies and the provision of the aid necessary for the survival of all civilians, regardless of whether they have been displaced or not.⁵

IHL and international human rights law do not say a great deal about return and reintegration of displaced people or durable solutions to internal displacement. The UN Guiding Principles on Internal Displacement,⁶ which were developed in 1998 by the then Special Representative of the Secretary-General on IDPs, Francis Deng, stress that the national authorities are responsible for establishing the conditions for safe, voluntary and dignified return, as well as providing the means to assist IDPs to voluntarily pursue durable solutions in safety and with dignity. The ICRC helped draft the Guiding Principles and supports their dissemination and use. One of the challenges facing the Guiding Principles is that – although they are based on existing international humanitarian law and human rights law – many States still see them as non-binding, and even as interference in a sovereign issue.

Given the magnitude of the problem of internal displacement, a comprehensive response is generally beyond the capacity of any single actor. In many places where large-scale humanitarian operations are needed, the number of humanitarian agencies involved has grown. As a result, all the organizations involved need to systematically coordinate their efforts as far as possible and find ways of making the best possible use of their resources, capacities and competencies in order to optimize their overall impact. The ICRC has always been committed to coordination with – not coordination by – UN and other actors in order to optimize humanitarian response and to better meet the needs of those affected by armed conflict and other situations of violence. This was already the case when, in the absence of a single organization mandated to protect and assist IDPs, the “collaborative response” system was developed by the UN’s Inter-Agency Standing Committee in 1999. When the collaborative response was effectively

3 Article 17, Additional Protocol II (AP II).

4 For example: Arts 13-14, AP II; Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Volume 1: Rules, ICRC, Geneva, 2005, Rules 1, 2, 7, 11 and 15.

5 Article 18, AP II; Henckaerts and Doswald-Beck, above note 4, Rule 56.

6 *UN Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 17 April 1998, reprinted in *International Review of the Red Cross*, No. 324, September 1998, pp. 545–556.

overtaken by the various humanitarian reforms born of the 2005 Humanitarian Response Review,⁷ the ICRC was equally supportive of efforts to further improve and strengthen the inter-agency response to the needs of IDPs.

The “cluster” approach established in 2006 – whereby the UNHCR agreed to take on sectoral responsibility for the protection cluster, camp coordination and camp management, and emergency shelter within the framework of UN humanitarian reform – was clearly aimed at improving the coherence, accountability and predictability of the overall humanitarian response to internal displacement. Although the ICRC considers it incompatible with its understanding of genuine independence to be formally part of this approach, at the field level it attends cluster meetings and participates as an observer.

While enhanced coordination and dialogue are clearly essential in order to avoid gaps and duplications in addressing needs, it is also clear that effective and meaningful coordination must be based more on genuine respect for certain basic principles than on ever more refined coordination mechanisms and procedures. In this respect, while some progress has been made, there is undoubtedly still a long way to go. Honesty and transparency on fundamental issues such as beneficiary numbers and operational capacities (including humanitarian access and reliance on implementing partners), as well as on standards, are crucial for humanitarian coordination to be effective. The ICRC is fully supportive of coordination provided that, firstly, the ICRC can maintain full autonomy over its decision-making processes; secondly, that the coordination does not blur the ICRC’s identity as an independent and neutral humanitarian actor; and thirdly, that the coordination adds real humanitarian value for those in need.

A reality check

So what do these policies and positions actually mean in the field for the people affected by armed conflict or other disaster?

One of the basic realities that makes a well-coordinated humanitarian response to internal displacement more difficult to achieve in reality than on paper is the often highly complex and fluid nature of displacement itself. One example of the complexity of displacement, which will be considered in some detail, is the eastern part of the Democratic Republic of the Congo (DRC) – specifically North Kivu province, where the ICRC has a significant operation.

Hundreds of thousands of people are estimated to have fled their homes in North Kivu as a result of joint operations by the Congolese and Rwandan armies against Hutu militias in the region at the beginning of 2009. The majority of these were in the South Lubero, Walikale and Masisi districts of the province. This brought the total number of internally displaced people in North Kivu to around

7 See United Nations, *Humanitarian Response Review*, United Nations, New York/Geneva, August 2005.

707,000, according to the UN, while some 350,000 returned to “stabilized areas” in the Kivus. The overall number of IDPs in the DRC was subsequently estimated at 1.4 million, concentrated mainly in the Kivus and Orientale province.⁸ Internal displacement peaked in 2003 – estimated at 3.4 million people, mainly in the same three provinces.

Few humanitarian organizations working in eastern part of the country would deny, however, that the reliability of these figures is tenuous at best. This is due largely to lack of access to displaced people because of insecurity and poor roads, lack of verification, and the continuous movement of populations (both those newly displaced and those returning to their homes). It is safe to say that no one knows how many IDPs there are in North Kivu or in the country as a whole. Furthermore, questions as to how many IDPs are “old caseload”, at what stage displacement effectively ends and assistance is no longer required, and what exactly makes IDPs more vulnerable than other groups (if indeed that is the case) are all debatable, with no consensus among agencies that would translate into a coherent, common approach on the ground.

There are four main types of internal displacement apparent in the DRC, which ultimately make it even harder to get an accurate picture of the numbers, and needs, of IDPs. Displacement can be reactive, in response to an actual attack or specific event; preventive, in anticipation or fear of an attack or abuses; of a “pendulum” nature, with people returning to their areas of origin either during the day or intermittently for planting or school seasons (sometimes hiding in nearby forests for one or more nights);⁹ or of an itinerant nature, whereby IDPs move from one place to another, often in search of humanitarian aid.

Overall, IDPs in the DRC have traditionally stayed with host families, returning intermittently to their homes. Around 70 per cent of the IDPs in the country are still estimated to be living with host families or in host communities, with a significant increase in the percentage of IDPs living in formal camps and “spontaneous” settlements during the past year or so. As of April 2009, there were 11 IDP camps in North Kivu managed by international NGOs under the coordination of the UNHCR, and an estimated 80 “spontaneous” sites, for example in public buildings such as churches and schools which may receive sporadic, small amounts of aid. The main reasons for this phenomenon are thought to be the increasing “saturation” of overburdened communities hosting IDPs (which often results in further economic hardship and sometimes tensions between IDPs and their hosts), the longer periods for which people are displaced, and the “pull factor” of greater resources being available in camps (generally supplied by

8 UN Security Council, *27th report of the Secretary-General on the United Nations Organization Mission in the DRC*, UN Doc. S/2009/160, 27 March 2009.

9 Katherine Haver, *Out of Site: Building Better Responses to Displacement in the DRC by Helping Host Families*, Oxfam International Research Report, September 2008, p. 10, available at <http://www.oxfam.org/sites/www.oxfam.org/files/out-of-site-drc-0908.pdf> (visited 25 August 2009).

humanitarian agencies). At household level, aid is generally not provided to IDPs in host families or to host families themselves. Clearly, aid is more easily targeted, distributed and monitored in controlled settings such as a camp. Often, it is also more visible. The incessant population movements in North Kivu, combined with access problems, makes identifying and assisting IDPs in host families problematic.

The implications of such a complex and fluid situation of internal displacement on the actual humanitarian response are crucial, and highlight the need for a flexible approach adapted to the particular context. It may seem obvious to state that there can be no “one-size-fits-all” approach for the diverse situations to be found in contexts such as the DRC (characterized by both chronic and acute displacement crises), Colombia (defined by chronic, mostly urban displacement), Liberia and Uganda (where IDPs are returning and resettling) and north-western Pakistan (where large-scale displacement began in May 2009 in largely inaccessible areas). Yet the humanitarian community as a whole still faces huge challenges in providing a tailor-made, consistent response to the wide-ranging needs that emerge when internal displacement occurs.

Whose needs come first?

IDPs, who have in some cases been displaced several times, undoubtedly have some specific protection needs – particularly women and children. IDPs are exposed to abuses while fleeing, as well as in and around camps and spontaneous settlements. IDP camps have at times been directly targeted and/or looted by armed groups, and IDPs in camps have been killed and threatened, particularly by demobilized fighters. They have also been the victims of abduction and sexual violence. IDPs are also at increased risk of being separated from their families. This includes a rise in the number of children being separated from their parents, in many cases remaining unaccompanied.

On the whole, however, in a context of generalized violence, protection concerns apply to all groups within the civilian population, not only IDPs. In an armed conflict where internal displacement occurs, and where different phases of the crisis are often overlapping, it can be very difficult – and frankly undesirable – to give higher priority to the protection and assistance needs of IDPs than to those of other highly vulnerable groups. In the case of the eastern DRC, for instance, the protection of all civilians continues to raise serious concern, not least because of the prevailing climate of impunity. All parties to the ongoing armed conflict centred in North Kivu have been guilty of a range of serious abuses against civilians.

The dire situation in the DRC – one of the worst in the world – indeed affects a whole cross-section of the civilian population, including people living in non-conflict areas. This is due to a combination of acute crises linked to localized armed conflicts, a general lack of security, natural disasters and epidemics, and to underlying chronic crises related to structural problems stemming from the

collapse of State services.¹⁰ The distinction between the consequences of these different problems is not always clear, with some peaceful areas of the country suffering higher mortality and malnutrition rates than areas experiencing armed conflict.¹¹

According to the most recent mortality survey carried out in the country by the International Rescue Committee, an estimated 5.4 million people died between 1998 and 2007 as a result of armed conflict and its lingering effects. Most deaths were due to easily preventable and curable conditions such as malaria, diarrhoea, pneumonia, malnutrition and neonatal problems – by-products of a largely collapsed health-care system and a moribund economy. Only 0.4% of all deaths across the country were the direct result of violence. These conditions took the highest toll on children, who accounted for nearly 50 per cent of the recorded deaths, despite constituting only 19 per cent of the total population. Mortality rates are high across the country, with the national rate almost 60% higher than the average for sub-Saharan Africa.¹²

Even if the accuracy of these findings is debatable, it is nevertheless clear that in such an environment, and where the majority of IDPs live with host families or in host communities, vulnerability may be linked to a broad range of factors, not simply the status of being displaced. IDPs and returnees do have some specific subsistence needs, especially if they have no shelter and where they are unable to access their fields; however, the large number of IDPs living with friends or family members puts an enormous strain on already limited resources, including food supplies, arable land, water, sanitation and services such as health centres and schools. The prolonged presence of IDPs in a host community means that resources inevitably diminish and tensions rise, which negatively affects the economic and food security of the community as a whole. Although IDPs usually prefer living with host families (not least because they generally feel more secure there than in camps),¹³ increasing numbers have had little choice but to move to spontaneous sites or planned camps as the situation of the host family deteriorates. But while many humanitarian organizations acknowledge the erosion of the host communities' ability to support displaced people, there has not yet been a comprehensive strategy aimed specifically at helping IDPs in host communities, or indeed the host communities themselves.

10 It is estimated, for example, that a mere 20% of that vast country is accessible by road – see HIV in Humanitarian Situations, *Democratic Republic of Congo: HIV Humanitarian Overview*, available at http://www.aidsandemergencies.org/cms/index.php?option=com_content&task=view&id=63&Itemid=132 (visited 28 August 2009).

11 UN Office for the Co-ordination of Humanitarian Affairs (OCHA), *Humanitarian Action Plan: Democratic Republic of Congo*, 2009, p. 30 (map showing zones of acute malnutrition), available at http://www.rdc-humanitaire.net/IMG/pdf/2009_DRC_HAP_EN_FINAL_-2.pdf (visited 31 August 2009).

12 International Rescue Committee/Burnet Institute, *Mortality in the DRC: an ongoing crisis*, January 2008, available at http://www.theirc.org/resources/2007/2006-7_congomortalitysurvey.pdf (visited 24 August 2009), pp. ii – iii.

13 Haver, above note 9, p. 24.

A flexible response

Prevention and the role of camps

It is the ICRC's policy to prioritise the strengthening of existing coping mechanisms of resident communities, both to prevent internal displacement from happening in the first place as far as possible, and to support communities hosting IDPs in order to reduce the "pull factor" of the services and comparative safety that camps may provide. The ICRC has given – and continues to give – emergency assistance to IDPs in camps in exceptional circumstances. However, experience has shown that in many cases, new problems are created that are complex to tackle, and which may in fact compound the vulnerabilities and risks to which IDPs are exposed.

The ICRC ran the Gereida camp in Darfur – one of the biggest IDP camps in the world with a population of 125,000 – at a time when security constraints prevented other humanitarian organizations from operating in the area. Although it has now handed over responsibility for food distribution to CARE and the World Food Programme, the ICRC will continue to play a major role in the camp until other humanitarian organizations can assume the responsibility. The ICRC also initiated the establishment of the Abu Shok and Kassab camps in Darfur in 2004, when there seemed no choice but to do so.

In the case of Abu Shok in El Fasher, some 30,000 IDPs had been living in deplorable conditions in an open space in the town. Political wrangling and the limited abilities of the few humanitarian agencies present at the time had prevented them from providing adequate aid. The ICRC negotiated with the authorities to establish a camp on the outskirts of town that effectively maintained traditional leadership and clan structures. The government was responsible for ensuring the external and internal security of the camp, and the ICRC, together with the Sudanese Red Crescent, designed the camp, registered its residents, distributed shelter and non-food kits, installed water systems and eventually coordinated the activities of other humanitarian organizations. The aim was to avoid dependence and facilitate return as soon as conditions permitted, by providing aid that was adequate but did not create living conditions of a higher standard than those in the IDPs' areas of origin. This also avoided the risk of indirectly supporting politically-motivated resettlement plans.

This plan was ultimately undermined as the influx of humanitarian organizations into the Abu Shok and some other Darfur camps by the summer of 2004 resulted in an artificially high level of aid that did not reflect the reality of rural life. Furthermore, the security situation in the IDPs' areas of origin was not conducive to return. These camps became semi-permanent extensions of the towns near to which they were built. At the same time, the ICRC conducted surveys in rural areas that showed an urgent need for food aid in the villages as a result of failed or partial harvests. This prompted the ICRC to shift its focus to rural areas, with the aim of helping residents to stay in their home areas and to avoid an exodus to the camps.

There are other examples of the ICRC taking action in camps at the outset of a new emergency where there is a large-scale influx of IDPs and other humanitarian organizations are not in a position to provide adequate, rapid aid. This was the case in the Kibati camps near the North Kivu city of Goma, in October 2008, where the ICRC provided short-term food rations, non-food items and water supply, as well as in northwestern Pakistan, in the wake of heavy fighting which caused massive displacement in largely inaccessible areas. In this latter case, starting from May 2009, the ICRC and the Pakistan Red Crescent Society managed a large IDP camp in Swabi. The ICRC also supported several other camps run by the Red Crescent. At the same time, it provided food and non-food items to IDPs in host families, as well as to the host families themselves, particularly in conflict areas where no other humanitarian organizations were present.

In general, however, official camps that have no particular security constraints are usually well-served by the UN system and its NGO implementing partners. The ICRC aims to complement these efforts with activities that add a particular value or fill gaps where needs remain unaddressed. To take North Kivu as an example, the activation of the cluster approach in 2006 resulted not only in the UNHCR co-chairing the protection cluster (with MONUC, the UN mission in the Democratic Republic of the Congo) and the return and reintegration cluster (together with the UNDP) – it also resulted in UNHCR taking on greater responsibilities for protecting and assisting IDPs. In 2007 it assumed leadership of the Camp Coordination, Camp Management (CCCM) working group. In mid-2009, there were 11 official CCCM camps in North Kivu, as compared with just one camp when the CCCM had been established two years earlier. With their expertise and approach derived from traditional refugee settings, the UNHCR and its implementing partners (such as the Norwegian Refugee Council) naturally focus on camps. Nevertheless, the UNHCR's official position is that camps should be a last resort where there is no other choice, that aid should be provided in ways that take into account the living standards of surrounding communities, and that responses to host families should be improved. The UNHCR has also made clear its ambition to distribute aid more according to the criterion of vulnerability than simply the status of being displaced *per se*. However, in the eastern DRC at least, the organization cites various constraints in achieving this, not least of which is insufficient funding.

UNICEF also emphasizes the need to strengthen traditional coping mechanisms and the ultimate undesirability of setting up camps. Like the UNHCR, UNICEF in the eastern DRC has devised a new aid strategy aimed at distribution more on the basis of specific vulnerabilities than on the status of being an IDP or a returnee, and faces similar constraints in putting this into practice. In the meantime, the biggest emergency response mechanism in North Kivu for both IDPs and disaster-affected populations is undoubtedly the Rapid Response Mechanism, managed by UNICEF and the UN Office for the Co-ordination of Humanitarian Affairs (OCHA) and implemented through international NGOs. This mechanism provides broad coverage of emergency needs, with one-time distributions of non-food items, water and sanitation assistance, and school infrastructure for up to

three months. While the mechanism is widely viewed as a successful initiative, UNICEF is the first to admit that it does not necessarily address needs according to the criteria of vulnerability, but rather on the basis of status (e.g. as an IDP).

During displacement

The ICRC strives continuously to match its activities squarely with the specific needs of the affected populations, but cannot – and does not claim to – meet all such needs. Humanitarian coordination is thus a tool through which the ICRC systematically pools efforts with other humanitarian organizations, aiming to work in a complementary and collaborative way alongside their activities, and naturally to avoid duplication.

Often, the ICRC focuses its operations on “priority zones” which are defined against criteria determined by the delegation. These criteria vary from place to place, but generally include protection concerns for the civilian population, assistance needs, the presence of armed actors, and actual or potential armed conflict. It can almost be taken for granted that in such an environment, internal displacement will be a significant factor contributing to the vulnerability and needs of the population as a whole.

The ICRC's mandate gives it a clear role in protection. Dialogue and other action vis-à-vis armed actors, including reminders of their responsibilities under IHL (i.e. to prevent displacement, as well as obligations toward civilians already displaced or returning to their home areas), detention-related work, tracing and restoring family links are among the ICRC's core traditional protection activities.

Work to trace missing people and restore family links – almost invariably carried out with the country's National Society – benefits many IDPs, since being separated from one's loved ones is obviously a common consequence of reactive or forced displacement. This activity facilitates the registration of stranded children, including demobilized child soldiers, and of families searching for their children or other family members. In some cases, local radio broadcasts and poster or photo displays are used to help trace relatives and reunite families. For children whose families cannot be found, care arrangements may be made with other relevant humanitarian organizations.

In eastern DRC, one of the ICRC's less traditional protection activities that benefits people who are often displaced is the psycho-social support programme, which offers assistance to victims of sexual violence and other forms of abuse. Through 18 *maisons d'écoute* (literally: “listening houses”) in North Kivu (four of them in camps) and 19 in South Kivu, the ICRC carries out protection work and community awareness-raising regarding sexual violence. It also offers capacity-building activities and training to sexual violence counsellors, who are usually members of local women's networks and work in the *maisons d'écoute*. In addition, where appropriate, the ICRC provides some direct aid, such as baby kits, food, lodging and transport costs. When necessary, beneficiaries are directed to health centres for medical treatment. As the programme began just four years ago, this is a relatively new domain for the ICRC and the approach is still innovative.

The ICRC takes an integrated approach to addressing both the protection and assistance needs of IDPs, returnees and residents in areas where it has access and where there is sufficient stability. Its work covers economic security, water and habitat, and health. In North Kivu, for example, the ICRC's economic security activities have been focusing on areas of IDP return. The ICRC provides IDPs with both a three-month food ration and non-food items, and furnishes returnees who have access to their fields with seeds and tools as well as a food ration for seed protection. For those without access to their fields, only food is given. Depending on the circumstances, seeds and food rations might also be given to host families. This occurred in December 2008 and January 2009, when host families in the Kibati area were found to have severely depleted resources (as they had no access to their fields), and where there were evident tensions between IDPs and their hosts. This is similar to the situation in Central Mindanao in the southern Philippines, where large-scale displacement resulting from fighting in October 2008 put an additional burden on already vulnerable residents. Some families were found to be hosting as many as 20 displaced people, despite being very poor themselves. The ICRC directed its response accordingly, providing both IDPs and residents with food and essential household items.

The ICRC's water and habitat activities in North Kivu are another example of an approach which strives to ease tensions between the displaced and their hosts. Although some short-term emergency aid is provided in IDP camps where necessary (such as water delivery and construction of latrines), the emphasis is on durable "early recovery" projects such as the rehabilitation of water-supply systems, often in areas where large numbers of IDPs and returnees have placed a strain on already damaged or dilapidated supply networks. In Kitchanga, for example, the rehabilitation of the water-supply system (which involved securing the water source and constructing a network including reservoirs) benefited around 35,000 people – including one IDP camp, IDPs in host families, and local residents. A similar project has begun in the Sake area, where IDP return is anticipated and where the water supply has been inadequate for at least the past three years. The ICRC is also undertaking a viability study for a major project to overhaul the water-supply system in the city of Goma, the population of which has been swollen by IDPs to an estimated 750,000 people – more than three times the number estimated in 2004.

The approach of focusing on durable projects which benefit host communities and displaced persons alike can be seen in numerous other situations. Colombia is one example, where decades of armed conflict have resulted in chronic displacement within the country, much of it in urban areas. The ICRC provides emergency aid to displaced persons as well as other victims of the conflict, including public health programmes, and small-scale repair and upgrading of infrastructure in conflict-affected areas.

The value of meeting the needs of IDPs living in host communities seems clear. However, limits on our ability to respond, combined with other constraints, means that aid must be assigned according to strict priorities reflecting vulnerability and actual need.

During return, local integration or relocation

Providing coherent and systematic humanitarian aid to IDPs who return to their places of origin, settle locally in the community that hosted them, or relocate to yet another place is as important as it is challenging. Problems can arise if the authorities encourage IDP return as a sign of political stability, when in fact the security conditions are not really conducive to return. Civilians may be given insufficient or even misleading information on both security conditions and available support in return areas, and humanitarian agencies may be pressured or misled into giving return assistance when this is clearly not durable. And when IDPs do return or resettle, tensions can arise over land, property and other resources.

Knowing at what point a conflict is really over, and at what point the emergency phase leads into the development phase, remains a point of much academic debate. While there is no shortage of definitions and graphs on what constitutes “transition”, the reality on the ground is often vague and inconsistent, and the gap between relief and recovery remains problematic.

In countries where large-scale IDP and refugee return has taken place and the post-conflict phase has been consolidated by a sufficient period of (relative) stability – such as in Liberia or Uganda – the humanitarian response obviously becomes more predictable and consistent.

Yet in many contexts, neither return of IDPs nor a peace agreement nor the deployment of peacekeeping troops can be taken as a definite indicator of a “post-conflict” phase. The eastern DRC is just one example, where despite numerous peace agreements and deployment of the world's largest UN peacekeeping mission (MONUC), new displacements and IDP returns have continued unabated. The UN's 2009 Humanitarian Action Plan for the DRC acknowledges that humanitarian aid in the country is effective as an emergency response but ill-adapted to chronic crises. Thus there is a need to support and strengthen traditional coping mechanisms, including those of communities hosting IDPs, and to find durable solutions. The Plan also stresses the need to tackle the root causes of crises – conflict, epidemics, malnutrition, food insecurity, to name but a few – rather than just the symptoms. To this end, the 2009 Plan introduced two new objectives based on early recovery principles: strengthening food security, and micro-economic development.¹⁴ However, putting these strategies into practice in a consistent, systematic manner remains highly challenging, mainly because the conditions for durable solutions simply do not exist. Sustainable return of IDPs, rehabilitation and reconstruction will only be realized when security conditions improve and when State authority is restored and strengthened in conflict-affected areas.

The ICRC advocates measures to ensure conditions for the safe, voluntary and dignified return of IDPs to their places of origin, or for them to resettle or relocate. This includes recognition by the authorities of the right to property,

¹⁴ OCHA, above note 11, p. 7.

public services, and sometimes compensation. It may also include encouraging the relevant authorities to clear land contaminated with mines and explosive remnants of war, forego further use of such weapons, and conduct mine-risk education programmes to make people aware of the dangers. As mentioned earlier in the North Kivu example, aid may include offering livelihood-support programmes aimed at boosting the economic security of both returnees and residents, ensuring access to an adequate and safe water supply, and ensuring access to health care.

Yet the ICRC's activities reach only limited numbers of people and represent just one part of the overall humanitarian response. Depending on local conditions in the place of return, permanent local integration or relocation, a variety of programmes may be developed by other components of the Red Cross and Red Crescent Movement as well – targeting the most vulnerable groups first – in order to help the displaced resume normal lives. The challenge of filling the gaps in aid for IDP return and reintegration – in contexts as diverse as those in the DRC, Sri Lanka, Chad and Pakistan – is one that the humanitarian community as a whole faces daily.

Conclusion

The ICRC's humanitarian response is guided by regular assessments of the vulnerability and essential needs of all victims of armed conflict and other situations of violence, which has always included IDPs. While IDPs undoubtedly have certain specific protection and assistance needs, and internal displacement is clearly an indicator of potential vulnerability, the ICRC does not consider that displacement status automatically implies a greater level of need than that suffered by civilians who are not displaced – including often overburdened host families. In identifying and responding to needs, the ICRC tends to look at the broad spectrum of internal displacement and the people affected by it.

The ICRC believes that international humanitarian law is adequate to address most problems arising from internal displacement associated with armed conflict. With proper compliance, the law is sufficient to prevent displacement in the first place and protect vulnerable populations if displacement does occur. That said, the political will to implement and comply with international humanitarian law at both national and international levels is, in many cases, still far from sufficient. It is also the ICRC's conviction that the Guiding Principles are relevant and deserve our full support, as in several instances they provide more specific guidance than IHL does. For example, there are no specific provisions in IHL requiring that displaced persons be allowed to return safely and with dignity. Also, the Guiding Principles deal with issues associated with forced displacement regardless of the way in which a particular situation is classified under law. Thus, they are as pertinent during and after an armed conflict as they are in a situation of internal strife, a complex emergency, or a natural disaster.

The ICRC has welcomed the various UN initiatives towards humanitarian reform, including the cluster approach, which aims to improve the overall

humanitarian response for IDPs. However, for coordination to be really effective and meaningful, it must be based more on genuine respect for certain basic principles than on ever more refined mechanisms and procedures. It is essential for the ICRC that coordination not result in a blurring of the neutral and independent nature of its humanitarian action.

One of the fundamental factors hampering a well-coordinated humanitarian response to internal displacement is the often highly complex and fluid nature of displacement itself, especially where the majority of IDPs live with host families. When the complex nature of displacement itself is combined with restricted access (in many cases) for humanitarian organizations – whether due to poor security conditions or poor infrastructure – it becomes virtually impossible to get an accurate picture of either the numbers or needs of IDPs. The situation is often further complicated by a lack of clarity or transparency regarding the resources of – and access by – different humanitarian actors.

The ICRC strives to assign priority to strengthening people's existing coping mechanisms, both in order to prevent displacement in the first place as far as possible, and to minimise the creation of camps by supporting communities hosting IDPs. It also focuses on reducing the vulnerability of residents and host communities. While in certain circumstances the ICRC may provide humanitarian aid in camps (usually only in the short term), official IDP camps are in a great many cases well-covered by the UN system and its implementing partners. The ICRC aims to complement these efforts and fill gaps where the needs of IDPs, returnees and residents remain unmet. Such assistance is typically given in the areas of economic security, water/habitation and health, in addition to the ICRC's protection activities. However, given that the limits of its resources demand a prioritization of needs, the ICRC is not in a position to fill all major gaps in aid for IDPs. This is particularly true with regard to return, reintegration and the longer-term transition between relief and recovery – situations which in so many cases today remain under-addressed.

Internal displacement: global trends in conflict-induced displacement

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Abstract

At the end of 2008, the number of people internally displaced by conflict, generalized violence or human rights violations across the world stood at 26 million, a record high since the IDMC started to monitor internal displacement in 1998. This high figure remains in spite of the growing recognition and implementation of the Guiding Principles on Internal Displacement. This article presents the findings of the latest IDMC survey on trends in internal displacement, challenges faced by displaced populations, and the measures taken to address these.



Global trends

At the end of 2008, there were 26 million people worldwide who had been internally displaced by conflict, generalized violence or human rights violations.¹ The figures alone do not give much insight into the long-term plight and daily problems of internally displaced persons (IDPs), but they do provide measurable indicators of the challenge which internal displacement continues to pose to humanitarian and development organizations as well as human rights defenders. Despite ever-wider recognition of the Guiding Principles on Internal

Displacement² and their progressive adoption into national and regional frameworks, and improvement to international response mechanisms within the humanitarian reform process, the global IDP figure stands at the same record high level as at the end of 2007. Internal displacement has continued in many countries to result from failures by parties to armed conflicts to respect the rights of civilian populations, including by taking necessary steps to prevent displacement.

Global figures and hotspots

At the end of 2008, the global IDP figure of an estimated 26 million reflects the new displacement of 4.6 million people,³ as well as an equivalent decrease in the number of IDPs as a result of the revision of some national figures or the achievement of durable solutions. There were 900,000 more people newly displaced in 2008 than in 2007, when 3.7 million people were newly displaced. Many IDPs found other durable solutions than return: integration in their place of displacement, or settlement elsewhere in the country. In some countries IDPs were deregistered, and elsewhere estimates of their numbers were amended.

Five countries had larger IDP populations than any other, of which the top four remained the same as at the end of 2007 (Table 1). The top three – Sudan, Colombia and Iraq – together accounted for 45% of the world's IDPs. The number of IDPs in Somalia rose to 1.3 million following a year of sustained conflict, while the number in Uganda fell below the 1 million mark as return movements continued.

When looking at the proportion of IDPs out of the total national population, two types of situations emerged: the very large IDP populations in Somalia, Sudan, Iraq and Colombia made up at least 10% of the entire population of each

- 1 This article is a summary of the Internal Displacement Monitoring Centre (IDMC) publication *Internal Displacement: Global Overview of Trends and Developments in 2008*, IDMC, Geneva, April 2009, available at [http://www.internal-displacement.org/idmc/website/resources.nsf/\(httpPublications\)/0605361027488A28C12575A90042305B?OpenDocument](http://www.internal-displacement.org/idmc/website/resources.nsf/(httpPublications)/0605361027488A28C12575A90042305B?OpenDocument) (visited 7 September 2009).
- 2 *UN Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 17 April 1998, reprinted in *International Review of the Red Cross*, No. 324, September 1998, pp. 545–556. Concern over the vulnerability of IDPs led the UN Commission on Human Rights to ask the Representative on IDPs, Francis Deng, to examine the extent to which existing international law provides adequate coverage for IDPs (1992), and to develop an appropriate framework for IDPs (1996). Accordingly, the Representative, with the support of a team of international legal experts, formulated the *Guiding Principles on Internal Displacement*, which were presented to the Commission in 1998.
- 3 Note on figures: Producing reliable figures on conflict-induced internal displacement in politically sensitive contexts is challenging. In most countries affected by internal displacement, existing data on IDPs are often incomplete, unreliable, out of date or inaccurate. Disaggregated data are only available in a few countries. Arriving at a commonly agreed numbers of IDPs implies government recognition of the displacement crisis, and a complex identification and registration of IDPs who are often mixed with other affected populations. The best-quality data are normally available for the number of displaced, whereas figures on return or other durable solutions are systematically more incomplete or totally unavailable. IDMC seeks and compiles data from national governments, UN and international organizations, national and international NGOs, human rights organizations and the media. IDMC also carries out field missions to a number of countries every year.

Table 1. Countries with most IDPs at the end of 2008

| Country | IDPs at the end of 2008 |
|------------------------------------|-------------------------|
| Sudan | 4,900,000 |
| Colombia | 2,650,000–4,360,000 |
| Iraq | 2,840,000 |
| Democratic Republic of Congo (DRC) | 1,400,000 |
| Somalia | 1,300,000 |

Table 2. Countries with most IDPs as a percentage of their population

| Country | IDPs as percentage of population |
|------------|----------------------------------|
| Cyprus | Up to 23% |
| Somalia | 13% |
| Sudan | 12.4% |
| Iraq | 9.6% |
| Colombia | 5.7–9.3% |
| Zimbabwe | 4.2–7.4% |
| Azerbaijan | 6.7–7.1% |
| Georgia | 5.7–6.3% |
| Lebanon | 2–9% |

country. A number of smaller countries also had relatively large IDP situations in terms of population percentage, notably including Cyprus, Azerbaijan, Georgia, Zimbabwe and Lebanon (Table 2).

New displacements and returns in 2008

In total, new displacement occurred in 24 of the 52 countries monitored and reported on by IDMC. Of these, ten countries had new large-scale displacements of at least 200,000 people (see Table 3). Of these, only the displacement in Kenya and in India followed a new outbreak of violence; in Georgia (South Ossetia), there was a new development in that it was the first time that Russia had been a direct party to the conflict. The other new displacements were related to causes that had been ongoing before 2008.

Large scale returns of 200,000 people or more were reported in five countries: Uganda, DRC, Sudan, Kenya and the Philippines (Table 4). All of these

Table 3. New large-scale displacements reported

| Country | New displacement in 2008 |
|------------------------------------|--|
| Philippines | 600,000 |
| Sudan | 550,000 (315,000 in Darfur, 187,000 in Southern Sudan and 50,000 in Abyei) |
| Kenya | 500,000 |
| Democratic Republic of Congo (DRC) | At least 400,000 |
| Iraq | 360,000 |
| Pakistan | Over 310,000 |
| Somalia | 300,000 |
| Colombia | 270,000 to June 2008 |
| Sri Lanka | 230,000 |
| India | Over 220,000 |

countries except Uganda are also among the list above of countries with new large-scale displacements. The largest reported return movement in relation to the size of the displaced population took place in Timor-Leste, where the IDP figure fell by two-thirds in 2008. Likewise, in the Central African Republic (CAR) the number nearly halved, while in Uganda the downward trend continued from 2007, with the IDP figure falling from 1.3 million to below 900,000 by the end of 2008.

Protracted displacement and ongoing conflicts

A definition of protracted displacement was agreed upon by participants at a 2007 expert seminar on protracted IDP situations, hosted by UNHCR and the Brookings-Bern Project on Internal Displacement: 'Protracted internal displacement situations are those in which the processes of finding durable solutions have stalled and/or IDPs are marginalised as a consequence of violations or a lack of protection of human rights, including economic, social and cultural rights.' Factors such as the amount of time in displacement or the number of people affected are not a primary consideration in determining whether a situation is protracted.⁴

The majority of the IDPs worldwide live in such situations. It is difficult to assess their number, particularly in countries where both protracted and new

4 The Brookings-Bern Project on Internal Displacement/University of Bern, *Expert Seminar on protracted IDP situations*, Seminar report from seminar hosted by UNHCR and Brookings-Bern Project on Internal Displacement, Geneva, 21–22 June 2007, p. 2, available at http://www.brookings.edu/events/2007/~media/Files/events/2007/0621_displacement/20070621_displacement.pdf, visited 14 September 2009.

Table 4. Return movements reported

| Country | Returns reported in 2008 |
|------------------------------------|-----------------------------|
| Democratic Republic of Congo (DRC) | At least 400,000 |
| Uganda | 400,000 |
| Sudan | 350,000 (in Southern Sudan) |
| Kenya | 300,000 |
| Philippines | 250,000 |
| Iraq | 167,000 |
| Sri Lanka | 126,000 |
| Georgia | 96,000 |
| Cote d'Ivoire | 89,000 |
| Central African Republic (CAR) | 85,000 |
| Timor-Leste | 80,000 |
| Yemen | 55,000–90,000 |

displacement is present, but IDMC's survey found that at least 35 countries have a significant number of IDPs in this situation. Their plight is often overshadowed by new and high-profile crises. For example, in the August 2008 conflict between Russian and Georgian forces, the situation of people displaced since the 1990s was overlooked in favour of the people affected by the new displacement crisis.

The second-largest proportion of internal displacement situations are caused by ongoing conflicts, and characterized by significant new displacements and returns. This phenomenon is present in the top five countries with the largest reported IDP populations: Sudan, Colombia, Iraq, DRC and Somalia.

Displacement by region

In 2008, the number of IDPs in Africa was the lowest recorded in this decade. With the exception of Europe and Central Asia, the number of IDPs increased in all other regions. South and South-East Asia was the region with the largest relative increase in the IDP population (Table 5).

Africa

Africa's record lowest figure for this decade, at 11.6 million people, represented an enormously positive development for a region that has always had a larger number of IDPs than any other. Three out of five of the world's largest internal

Table 5. IDP estimates by region (end of 2008)

| Region | Countries monitored | IDPs (million) | Change from end of 2007 |
|---------------------------|---------------------|----------------|-------------------------|
| Africa | 19 | 11.6 | – 9% |
| Americas | 4 | 4.5 | + 7% |
| Middle East | 6 | 3.9 | + 11% |
| South and South-East Asia | 10 | 3.5 | + 13% |
| Europe and Central Asia | 13 | 2.5 | 0% |
| Total | 52 | 26.0 | |

displacement situations are found in the region, and Africa still hosts 45% of the world's IDPs; however, compared with the region's total population, the ratio of IDPs has fallen. There were no new conflicts in Africa causing displacement in 2008, but several ongoing conflicts caused 2 million people in Africa to be newly displaced during the year.

In Somalia, the figure continued to increase, reaching 1.3 million by the end of the year. The DRC remains the world's fourth largest displacement situation with 1.4 million people displaced. The 400,000 people who returned home in some parts of the country were balanced out by the 400,000 who were newly displaced by armed conflict in the East. Sudan too saw both large numbers of newly displaced people and large numbers of returns. In Darfur, 315,000 people were newly displaced in the course of 2008, bringing the total for that region to 2.7 million IDPs. In Southern Sudan, an estimated 187,000 people were newly displaced, mostly as a result of inter-communal violence, while 350,000 IDPs were able to return to their homes. The total IDP population in Sudan stood at 4.9 million by the end of 2008.

Americas

In the Americas, there were 4.5 million IDPs at the end of the year – the highest figure since IDMC started to monitor internal displacement in the region 10 years ago. The rise was due to an acceleration in new displacement in Colombia, which pushed the world's second-largest displaced population to a record high. Despite increased efforts in national and international response to the displacement crisis, IDPs in Colombia continued to face widespread protection problems.

Middle East

The Middle East continued to experience an increase in population displacement. At the end of 2008, there were around 3.9 million IDPs in the region, the highest total in the past decade. Most of these people have been displaced for decades, and

there is little information on these long-term IDPs. Around 470,000 were newly displaced during 2008, principally by armed conflict in Iraq and Yemen. The largest return movements took place in Iraq, where 167,000 people were reported to have returned, and in Yemen where an estimated 70,000 people returned.

South and South-East Asia

South and South-East Asia were more affected by internal displacement in 2008 than in previous years. The internally displaced population in the region grew by 13% during 2008 to reach 3.5 million. New displacement was particularly significant in the Philippines, where 600,000 people fled an upsurge in fighting between the government and the Moro Islamic Liberation Front (MILF), and in Pakistan where over 310,000 people were forced from their homes due to fighting between the government and armed groups. In Sri Lanka, an estimated 230,000 people were displaced as the conflict between the government and the Liberation Tigers of Tamil Eelam (LTTE) intensified. The majority of the 530,000 or so people who reportedly returned in South and South-East Asia did so after a relatively short period of displacement. In the Philippines 250,000 people returned within a few weeks or months of their displacement. In Sri Lanka an estimated 126,000 people displaced since 2006 managed to return to areas no longer affected by conflict. Only in Timor-Leste was return linked to peace-building and overall national progress in tackling the displacement situation.

Europe and Central Asia

The figure for Europe and Central Asia (including Turkmenistan and Uzbekistan) changed little, and remained at around 2.5 million IDPs. New conflict broke out in Georgia in August, which caused the displacement of 128,000 people of whom around one in four were still displaced at the end of the year. Elsewhere, small numbers of IDPs managed to achieve durable solutions to end their situations of protracted displacement. However, in 2008 some 390,000 IDPs in the region were still living in temporary shelter and collective centres in desperate conditions, often without security of tenure many years after their displacement.

Profiling displaced populations

Information on the profile of IDP populations, including their location and their number disaggregated by age and sex, is still limited, despite an increased awareness of the importance of such information in planning and delivering responses. Only in six situations of internal displacement was there up-to-date information in 2008. For the rest, data was outdated, incomplete or non-existent.

Information was particularly scarce for the less visible groups of IDPs: in more than half of the displacement situations monitored in 2008, IDPs were dispersed, having in many cases found refuge with host communities either in rural or

urban areas. The relatively low visibility of these groups also meant that most received limited or no support from government agencies or local or international organizations. However, even in countries where IDPs were more visible (because they were concentrated in collective centres or IDP sites), essential data were still lacking. It was equally difficult to ascertain when and if IDPs ceased to be displaced, as there was little or no information on IDPs who had returned and even less on those who had integrated locally or resettled.

Several new standards were made available to humanitarian agencies and governments in 2008, including comprehensive guidance and a methodology to help profile urban IDPs. The challenge lies in ensuring that they are widely disseminated and used, so that better data are more consistently available in the future. Particular attention should be paid to less visible IDP populations. Profiling exercises should also include information on the rest of the population or host communities, in order to help identify the specific needs and concerns of both IDPs and non-IDPs.

Urban IDP populations

Internal displacement to towns and cities has received increasing attention over the years, but the data collected on most of these populations have remained limited and even anecdotal. Profiling urban IDP populations has indeed been particularly challenging, as conflict-induced displacement has coincided with massive and complex urbanization processes which make it difficult to distinguish between IDPs, other migrants and other urban residents. For example, more than 70% of IDPs in Côte d'Ivoire found refuge in Abidjan, the main economic centre, where the population has already increased by more than twenty times in the past 50 years.⁵ IDPs typically disperse within urban areas, in some cases relying on 'invisibility' for security reasons, and in others being forced to move again within the city limits by local conflicts and actions of city authorities. IDPs in Khartoum, Sudan, were more likely than non-IDPs to have been evicted because of government relocation programmes. People's choice of housing can also contribute to their 'invisibility' – in cities in western Russia, IDPs from Chechnya were living in private rented accommodation, discouraging any effective profiling and monitoring of their needs as they sought to integrate.

IDP protection needs and risks

People caught in situations of internal displacement face various barriers to their enjoyment of rights, which may threaten their immediate safety or deny them equal access to entitlements. In many situations of internal displacement, IDPs have shared several protection risks with other groups, but the fact remains that internal

5 UN Habitat, *State of the World's Cities 2008/9*, Earthscan, London/Sterling, 2008, p. 15.

displacement commonly exposes IDPs to additional discrimination and human rights violations directly resulting from their being uprooted.

Protection and assistance programmes should not target IDPs *per se*, but rather be based on their needs as identified in each specific situation. It is important to highlight displacement as an important ‘indicator of potential vulnerability’ for governments, national and international agencies assessing the situations of populations affected by armed conflict and situations of generalized violence, or developing human rights monitoring frameworks.

Physical security and integrity

The search for conditions where their physical safety and integrity may be protected is a major motivation for people to flee their homes. As restated in the Guiding Principles, IDPs have the right to be protected from violent attacks on their lives, dignity and physical, mental and moral integrity.⁶ However, in 26 countries surveyed, IDPs have continued to be exposed to insecurity and violence in the places to which they have fled. IDPs in camps or settlements were specifically targeted in Darfur, the DRC, Kenya and Myanmar. IDPs in Chad – in particular, women going out to collect water or firewood – were victims of attacks and violence in areas surrounding camps and settlements. In Somalia and in Chad, armed groups were using the camps and settlements as cover and to hide weapons. Their use of the IDPs around them as a shield heightened the risks of the often disproportionate and indiscriminate attacks by government forces, with the IDPs being equally affected. The militarization of camps also implied a higher risk of displaced people, including children, being forcibly recruited into armed groups.

Basic necessities of life

Displacement dramatically disrupts livelihoods, and leads to a severe reduction in access to the basic necessities of life including food, clean water, shelter, adequate clothing, health services and sanitation. The right of IDPs to these necessities is strongly anchored in existing international human rights and humanitarian law, and should be protected both in emergency and non-emergency situations.⁷

Other social, economic and cultural rights

Beyond the provision of humanitarian assistance – which can generate a serious risk of dependency – the right of IDPs to an adequate standard of living (as restated in Guiding Principle 18) is best achieved by protecting their right to participate in economic opportunities (as referred to in Guiding Principle 22). IDPs are often deprived of the means to restore self-reliance, as they lack access to livelihoods and

6 UN *Guiding Principles on Internal Displacement*, above note 2, Guiding Principles 10–11.

7 *Ibid.*, Guiding Principles 7 (2) and 18.

work opportunities. This is particularly a problem for people trapped in situations of protracted displacement.

A distinctive consequence of displacement is the violation of IDPs' property rights,⁸ protected both under international human rights and humanitarian law. In a majority of countries, IDPs were deprived of their land and houses as a result of destruction and looting.

Occupation of IDPs' land and houses, often by members of armed forces or groups and their families, was reported in 29 situations. In Côte d'Ivoire, members of the *Forces Nouvelles* (New Forces) were occupying IDPs' properties in the central and northern areas, while in Senegal, rebels from the Movement of Democratic Forces in the Casamance were exploiting parts of the IDPs' land for timber, cashew and cannabis production. In Southern Sudan, the authorities failed to take action against the occupation of IDPs' land by Sudan People's Liberation Army soldiers. In Colombia, land left behind by IDPs was occupied by the paramilitary groups whose actions caused the displacement.

Displacement is often followed by the settlement of other groups in properties left behind. In Iraq, one of the principal barriers to return was the secondary occupation of houses, often by families that had been displaced themselves. The government in Bangladesh actively sponsored the settlement of Bengali families in villages formerly inhabited by indigenous tribal groups, while IDPs' land in Mexico was often given to other indigenous groups and to peasants allied with the local government forces. In Cyprus, IDPs' houses and businesses on both sides of the 'green line' have been reallocated to other IDPs who have been using these properties for almost 35 years; on the northern side, IDPs' property was also allocated to migrants from Turkey.

In most of these situations, IDPs have had little hope of recovering their lost property and rebuilding their lives in their home areas. Many areas affected by decades of war and violence, such as Southern Sudan, lack the legal framework to address disputes based on contested occupancy. In countries such as Uganda, where land issues are also governed by customary law, the right of widows and orphans to recover land left behind has often not been recognized.

Other civil and political rights

IDPs' movements and free choice of residence are often arbitrarily restricted. In India, Myanmar and Sri Lanka, national and regional authorities confined IDPs into camps, to separate them from the host population for alleged security reasons.

Access to personal documentation that had been lost in flight or become inaccessible was a problem affecting IDPs in 20 countries in 2008. This hindered their enjoyment of the right to recognition before the law.⁹ Enjoyment of other related rights was affected as well: IDPs without valid documentation were unable

8 UN *Guiding Principles on Internal Displacement*, above note 2, Guiding Principle 21.

9 *Ibid*, Guiding Principle 20.

to enrol their children in schools, access health care services and welfare and pensions entitlements and claim their property. The denial of IDPs' right to vote¹⁰ in many instances reflected the continuing widespread failure to ensure their participation in decision-making processes.

Age, gender and diversity among internally displaced groups: specific needs

Internally displaced children

The Guiding Principles on Internal Displacement, reflecting international law as enacted in the Convention on the Right of the Child and its additional protocols, underline that 'children and unaccompanied minors ... shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs.'¹¹ All the Guiding Principles apply equally to displaced children, but some provisions specifically address the situation of children, expressly prohibiting their enslavement, use in forced labour¹² and participation or recruitment in armed hostilities.¹³ The Principles also clarify displaced childrens' right to family life¹⁴ (stating authorities' responsibility in expediting family reunification) and to education.¹⁵ In practice, however, children displaced in many conflict situations continued in 2008 to suffer grave violations of these and other basic rights, as they were exposed to extremes of violence and deprivation.

For many armed groups, the recruitment and use of children has become the means of choice for waging war.¹⁶ The social upheaval and poverty caused by hostilities make children vulnerable to recruitment, and internally displaced children – some of whom may have been separated from their families – are at high risk.¹⁷ In 2008, internally displaced children were abducted and recruited from IDP camps or host families, sometimes on their way to or from school. Some followed armed groups or soldiers to find protection, while others were recruited by local self-defence militias. They were used as combatants, porters, domestic servants or sex slaves. Girls were involved in combat and non-combat roles in the majority of these countries, and many were raped or subjected to other forms of sexual violence. The vast majority of child soldiers were in the ranks of non-state armed groups.

10 *Ibid*, Guiding Principle 22.

11 *Ibid*, Guiding Principle 4 (2).

12 *Ibid*, Guiding Principle 11 (b).

13 *Ibid*, Guiding Principle 13 (1).

14 *Ibid*, Guiding Principle 17 (3).

15 *Ibid*, Guiding Principle 23 (2).

16 UN General Assembly, *Report of the Special Representative of the Secretary General for Children and Armed Conflict*, UN Doc. A/63/227, 6 August 2008, para. 43.

17 Coalition Against the Use of Child Soldiers, *Child Soldiers Global Report 2008*, pp. 22–24, available at <http://www.childsoldiersglobalreport.org/> (visited 9 September 2009).

During conflict and displacement, children and adolescents are often separated from their families or caretakers. These are the most vulnerable displaced children: they are more likely to be neglected and exposed to abuses including recruitment, trafficking and sexual exploitation. In several countries, many displaced children had sole responsibility for caring for their family, either because they were the heads of their household or because family members were too sick or too old to work. Cases of forced labour or economic exploitation of displaced children were frequent in at least 20 countries.

Internally displaced women

The Guiding Principles explicitly provide protection for displaced women against violence and exploitation,¹⁸ and promote their equal access to assistance, services and education,¹⁹ as well as their participation in decisions affecting them,²⁰ reflecting international law such as the Convention on the Elimination of All Forms of Discrimination against Women. Provisions in favour of displaced women are guided by the need to safeguard them from gender-based violence, and to uphold their rights to equal access to services. In practice the rights of displaced women were violated in many countries surveyed by IDMC in 2008, with often devastating physical and psychological consequences for them and their families.

Rape and sexual exploitation of children and women have remained a frequent characteristic of conflict, and displaced women and children are at particular risk. In conflicts with an ethnic dimension, systematic rape has commonly been used to destabilize populations, and destroy community and family bonds. Displaced women have faced an increase in abuses such as domestic violence, and exploitation by people in positions of power, including those who control and distribute humanitarian assistance.²¹

Despite the lack of comprehensive statistics on sexual or gender-based attacks in countries undergoing internal displacement, reports in 2008 clearly indicated that sexual or gender-based violence against displaced women or children was a serious problem in at least 18 countries, 13 of them in Africa. Government troops were cited as the primary perpetrators of sexual abuses, followed by members of armed non-state groups, criminal groups and the general population (for example, relatives or neighbours), and in a few countries peacekeeping troops. Abuses were generally perpetrated with total impunity. In addition, many displaced women were unable to access essential reproductive health services, due to prohibitive fees, lack of health care infrastructure and insecurity.

In some 30 countries, many displaced women were reported to have taken sole responsibility for their families. In countries like Chad and Somalia,

18 *UN Guiding Principles on Internal Displacement*, above note 2, Guiding Principle 11 (2).

19 *Ibid*, Guiding Principles 18 (2), 19, 20 (3) and 23 (3).

20 *Ibid*, Guiding Principles 7 (3)(d) and 18 (3).

21 Gender-Based Violence Global Technical Support Project, *Gender-Based Violence in Populations Affected by Armed Conflict*, Reproductive Health Response in Conflict Consortium, Arlington, 2004.

female-headed households made up the majority of internally displaced families – thus women were the main breadwinners in situations offering few livelihood opportunities.

Displaced women faced particular obstacles to obtaining documentation in 14 countries. In at least half of them, this meant that displaced women could not receive assistance due to them as IDPs, take possession of or receive compensation for their land or property, or travel freely in their country. In as many as half of the countries affected by conflict-induced displacement, displaced women (widows in particular) faced obstacles to owning or inheriting property or land. They and their dependents were thus deprived of adequate housing and land, and denied the chance to return to their former homes.

Elderly displaced people

The Guiding Principles on Internal Displacement state that ‘elderly persons ... shall be entitled to protection and assistance required by their condition and to treatment which takes into account their special needs’.²² Older people can have more difficulty accessing services, and are less able to flee quickly or to protect themselves from harm during conflict. Among them, older widows are often the most vulnerable.²³ In some countries in 2008, elderly IDPs were unable to return to their home areas once the security situation improved. In Uganda, elderly IDPs were prevented from returning home by the lack of support to build new huts there or because health centres were too far away.

In the few countries affected by internal displacement in which older people received a state pension, IDPs often lacked the documentation needed to claim their entitlements. For example in the Russian Federation, older IDPs struggled to get their full pensions as archives had been destroyed and they had no way of replacing documents lost during the conflict. As a result, they received a minimum pension and had to continue to work or rely on the care of relatives who often had limited means themselves following their displacement. In Bosnia and Herzegovina, different entitlements to pensions within the country led to reduced pension entitlements for IDPs, while in Croatia the non-recognition of years worked in areas not under state control had the same impact.

Internally displaced minorities

Indigenous peoples, minorities, pastoralists and groups with a special dependency on and attachment to their lands make up a disproportionate share of internally displaced populations across the world. A number of international norms recognize the vulnerabilities these groups face in the context of displacement. The

22 UN *Guiding Principles on Internal Displacement*, above note 2, Guiding Principle 4 (2).

23 Inter-Agency Standing Committee, *Humanitarian Action and Older Persons. An essential brief for humanitarian actors*, October 2008, available at <http://www.unhcr.org/refworld/docid/490b0c102.html> (visited 11 August 2009).

Guiding Principles emphasize the obligation of States to protect indigenous peoples and minorities from displacement.²⁴ Acknowledging their dependence on their land for survival and the continuation of their way of life, Article 10 of the UN Declaration on the Rights of Indigenous Peoples states that they ‘shall not be forcibly removed from their lands or territories’. The International Labour Organisation Indigenous and Tribal Peoples Convention obliges ratifying states to respect their dependence on and relationship with their collective lands, in particular by prohibiting their relocation other than in exceptional circumstances, and recognizing their right to return to their lands once the reasons for relocation have ceased.²⁵

Nevertheless, minorities were internally displaced in at least 36 countries surveyed by IDMC: as a mechanism to eliminate them or their claims for recognition or autonomy, to access natural resources in their collective territories, or because they were caught up in external conflicts. Minorities make up virtually the entire population displaced in Sri Lanka (Tamil and Muslim groups) since 2006, and also in eastern Myanmar (including Karenni, Karen, Shan and Mon people). They also make up more than half of the displaced population in the Philippines (Moro peoples) and Croatia (Croatian Serbs). In Colombia, a disproportionate number of indigenous tribal groups and Afro-Colombians have been displaced. In almost all countries surveyed, loss of ancestral land was the most serious threat faced by ethnic minorities as a result of displacement. Other threats, such as assassination or forced disappearance, forced assimilation, and destruction of their identity were also frequent. After being displaced, in most countries, loss of livelihoods was reported as the most important protection challenge, followed by discriminatory access to assistance and services. For example, the traditionally nomadic Peuhl in the Central African Republic were displaced after losing their cattle to road bandits. As a result, they were forced to give up their traditional way of life, and had to settle among subsistence farmers or flee to neighbouring countries.

Language problems and a lack of government officials trained to deal with their special needs further complicate the situation of displaced minorities, especially when they have been displaced beyond their own region.

Achieving durable solutions

IDPs may find solutions to their displacement in three ways: through returning to their place of origin, integrating in the place to which they have been displaced, or settling in a third location. These options can be considered durable once IDPs enjoy their rights in a non-discriminatory manner and have no more protection or assistance needs related to their displacement.

24 *UN Guiding Principles on Internal Displacement*, above note 2, Guiding Principle 9.

25 Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989, entered into force 5 September 1991, Art 16.

There is little reliable or precise information on the number of IDPs who have found durable solutions, because it is the culmination of a gradual process and must be assessed on the basis of multiple criteria. Political considerations can also complicate the picture, as governments wishing to declare that situations have been resolved may claim that IDPs have found durable solutions, or put pressure on them to choose one settlement solution over others. It is therefore essential to assess whether there are outstanding protection and assistance needs related to displacement before concluding that a durable solution has been found.

What are durable solutions to internal displacement?

According to the Framework for Durable Solutions,²⁶ the extent to which a durable solution has been achieved depends on both the process that led to the solution and the fulfilment of certain conditions. The process includes the provision of relevant information so that IDPs can freely choose their preferred solution, and their consultation and involvement in the process of designing programmes and policies. Conditions for durable solutions include a safe environment, access to documentation, restitution of property or compensation for property lost or destroyed, and access to basic necessities of life, services and livelihood opportunities.

The fulfilment of both process and conditions criteria can take years of progressive improvement from the end of a conflict. Information from the IDMC database illustrates the difficulty in assessing durable solutions: in 18 countries out of 46 surveyed it was impossible to determine whether durable solutions had been found due to the lack of information and monitoring of the situation.²⁷

The process of seeking durable solutions should not be confused with their achievement. Return, for instance, is not in itself a durable solution. Therefore, returnee figures do not necessarily reflect the achievement of a durable solution, as some returnees may still have specific protection and assistance needs that should be monitored. Security risks, for example, can be higher after return than during displacement, and returnees facing unsustainable conditions can be displaced again, as has happened in Afghanistan and in the Central African Republic in recent years. To mitigate these risks, returnees in countries such as Turkey, Uganda or Kosovo have decided to commute between their places of displacement and villages of origin to cultivate their fields there, and to assess conditions before leaving the life they have built while displaced. In Bosnia and Herzegovina, many returnees did not register their return so they could continue to receive the healthcare that they were entitled to as IDPs in their place of displacement, but which they feared losing due to discrimination or bureaucratic hurdles in return areas. The lack of income or access to education also led some families to split, with

26 Brookings-Bern Project on Internal Displacement, *When Displacement Ends: A Framework for Durable Solutions*, June 2007, available at: <http://www.unhcr.org/refworld/docid/469f6bed2.html> (visited 9 September 2009).

27 IDMC, above note 1, p. 25.

adults returning and children staying in areas of displacement, or travelling back daily to continue their education. In Indonesia, IDPs returning to their former homes in Central Aceh left their families behind until their coffee plantations had been partly restored.

While IDPs who return or settle elsewhere may be identifiable, the transition from long-term displacement to sustainable local integration is harder to track. This is particularly the case where temporary IDP settlements gradually become permanent, or where displaced groups progressively merge into the local population. Forced displacement often mirrors other migrations from rural to urban areas, with IDPs and migrants joining the existing residents of slum neighbourhoods. In cities across the world, the challenge remains to distinguish the needs of those forcibly displaced in order to facilitate durable solutions to their displacement.

Measures designed to ensure IDPs' full enjoyment of their rights – in particular an adequate standard of living (shelter, livelihood opportunities) – will facilitate local integration either on a temporary basis until return is possible, or on a permanent basis if IDPs do not wish to return. Local integration can therefore be a durable solution in itself, or a way to live a decent life until other durable solutions become feasible.

The role of governments in supporting durable solutions

Governments are responsible for securing durable solutions for IDPs on their territory. Most provide support to durable solutions through legislation, policies and programmes. In the majority of cases, national policies developed to address internal displacement do indeed focus on durable solutions, and particularly on return: governments in 32 countries actively supported return, compared with only ten that supported resettlement and eight that supported local integration.

According to IDMC's survey, return and local integration have taken place in more situations than resettlement in a third location. Despite the support mentioned above, all three durable solutions were overwhelmingly achieved by IDPs acting independently, with little or no direct involvement of national authorities or the international community. Nevertheless, the survey did suggest possible links between the effectiveness of attempts to achieve durable solutions and the national or international support available. Support was lent primarily to return, less frequently to resettlement and yet more rarely to local integration; return was also the most frequently successful and durable option, followed again by resettlement and local integration. However, these figures may in fact reflect the prevalence of successful returns after short-term displacement.

Return of IDPs has sometimes been achieved through pressure or coercion before conditions allow for it to be sustainable. IDPs have been forced to return in nine countries, while pressure in favour of return (for example, provision of assistance only to IDPs who intend to return) has become more frequent. In half of the countries monitored, return was the only durable solution actively supported by authorities; thus, IDPs were rarely in a position to make a free choice.

Governments may favour return for a number of reasons. Return is a way to remedy forced displacement and some of the human rights violations resulting from displacement. It may be hoped that return to areas of origin will enable IDPs to access their lands and previous sources of livelihood. Governments may also prefer to help people to return to their own land and homes, rather than try to accommodate them permanently in places they do not own. The political focus on return underlines the necessity of monitoring return situations to ensure that conditions exist for return to be sustainable, and that national authorities have not used return to give the impression that an internal displacement situation has been addressed.

Support to local integration involves the provision of permanent and adequate housing through the development of social housing programmes or the upgrading of temporary accommodation while ensuring security of tenure for residents. Because so few governments have supported local integration or settlement elsewhere, IDPs have tended to remain without support in inadequate living conditions, often for many years, when conditions have not allowed for return. This has particularly been the case in countries where supporting local integration has been perceived as endorsing ethnic cleansing. For this reason, authorities in Bosnia and Herzegovina are still reluctant to openly facilitate local integration more than 13 years after the end of conflict there. In contrast, Georgia and Afghanistan changed their policies in 2008 to facilitate the local integration of IDPs.

In order to address the reluctance to support durable solutions other than return, the Representative of the UN Secretary-General on the Human Rights of IDPs has argued that local integration and settlement elsewhere are not incompatible with return, underlining that IDPs who enjoy decent living conditions and access to livelihood opportunities will be in a better position to rebuild their lives in places of return when it becomes possible.²⁸

The obstacles to durable solutions highlighted above indicate the areas where national and international efforts should focus to create conditions for durable solutions. Once security conditions are established and consolidated through reconciliation activities to address possible discrimination, programmes should facilitate access to livelihoods and to the housing, land and property that so often support those livelihoods. Social housing schemes should also be set up for those who cannot return or reclaim their properties. Ensuring non-discriminatory access to services such as healthcare, education and pensions is also necessary in order to ensure durable solutions.

Programmes to support durable solutions should promote income-generating activities, and address land and property disputes arising when properties left behind by IDPs are occupied by others or destroyed. Addressing these issues requires immediate and long-term action: first to register abandoned

28 Walter Kälin, Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, *Statement to the Human Rights Council*, 12 March 2009, available at http://www.brookings.edu/speeches/2009/0312_internal_displacement_kalin.aspx (visited 14 September 2009).

land and property, and then to rebuild properties and implement restitution and compensation mechanisms.

In countries where ownership is mostly customary and the government elects to address the issue through global land reform (combining recognition of customary ownership and measures for the landless), it is essential to ensure that measures do not discriminate against IDPs, for example by making continuous and peaceful occupation a pre-condition for formalizing customary ownership.

The role of the international community is to support national governments' efforts towards durable solutions. The considerable financial support offered during emergencies tends to diminish rapidly, and this lack of sustained support is generally reflected in the absence of programmes monitoring the achievement of durable solutions and the scarcity of information on the issue. Effective peace-building processes must go hand-in-hand with sustained reconstruction, as well as economic regeneration efforts to ensure durable solutions.

Conclusion: a specific response for IDPs?

Displacement remains a critical factor of vulnerability for people across the world. While the wider non-displaced population (particularly in areas of displacement) may be exposed to the same abuses and barriers, the fact of having been displaced tends to further reduce IDPs' access to physical security, the basic necessities of life, and enjoyment of other rights. They are liable to have lost property, livelihoods and documentation in their flight, as well as the support of family members and community networks, and to have suffered severe trauma in the process.

It is crucial to consider and address the protection and assistance needs of host populations in areas of displacement, resettlement and return. As local communities are frequently called to provide protection and assistance to IDPs, they also merit adequate support to accommodate displaced people in conditions of safety and dignity. Therefore, efforts should be strengthened to assess the impact of displacement on all the populations affected by a displacement situation, and to identify the specific needs of each.

Fleeing war and relocating to the urban fringe – issues and actors: the cases of Khartoum and Bogotá

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Abstract

This article presents the findings of a long-term study of the circumstances of displaced persons in Khartoum and Bogotá. It explores the similarities and differences between these contexts and how they have evolved. The study shows that while the two situations raise fairly similar issues, the policy decisions taken differ widely, impacting on how various actors cope with the phenomenon.



Interest in displaced persons has been growing in the international community since the 1990s. The number of internally displaced persons has increased considerably as borders have gradually been closed (strategies to 'contain' crises and population movements)¹ and 'new' complex long-term conflicts have emerged.² Internally displaced persons have become a fact of life in today's humanitarian world and the focus of keen competition amongst actors aiming to gain legitimacy and influence in this sad and terrible field of opportunity. The recent reform of the UN system originated mainly in the realization that, despite the initiatives taken to promote assistance and protection, the situation of these displaced populations was

still particularly critical.³ After years of oblivion, renewed attention has for several years been focusing on displaced people who have relocated to urban areas. Lost in the urban multitude and dissolved into the surrounding poverty, this elusive population has often escaped the humanitarian machinery, falling outside its fields of operation or jurisdiction. A major initiative has been underway for three or four years to try to remedy this shortcoming; it consists of devising methods of ‘profiling’ displaced persons who have settled in urban areas in order to have a better idea of their characteristics and needs.⁴ The present article pursues a different purpose, seeking to understand the issues and problems raised by displaced populations who settle in the capital, and to examine how the various actors cope with the phenomenon. A long-term study of the circumstances of displaced persons in Khartoum and Bogotá⁵ revealed the similarities between these two highly different contexts, and provided a basis for understanding how and why they differ and how they have evolved. The massive presence of displaced populations in the capital cities of Khartoum and Bogotá, although of varying intensity, raises fairly similar issues, but the policy decisions taken to deal with the situation differ widely. As a result, both the panels of aid actors involved and the strategy choices they make differ from one context to another.

Displaced persons – a category shaped by politics

The term internally displaced persons (IDPs) is now used virtually unanimously by the international community, as though the reality it designates were uniform and agreed. Yet depending on the context and on who is using the term, the population group to which it refers is very heterogeneous. Rather than evading the complexity of the term and of the circumstances in which it was developed, we wish to focus on the expression to demonstrate that it is profoundly political and ideological in concept.

An attempt was admittedly made over ten years ago in the Guiding Principles on Internal Displacement to define the term of IDP:

‘persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or

1 Luc Cambrézy, *Réfugiés et exilés, crise des sociétés, crise des territoires*, Éditions des Archives Contemporaines, Paris, 2001, 216 pp.

2 Mark Duffield, *Global governance and the new wars, the merging of development and security*, Zed Books, New York, 2001, 293 pp.

3 Marc Vincent, Birgitte Refslund Sorensen (eds), *Caught between borders, response strategies of the internally displaced*, Pluto Press, London, 2001, 317 pp.

4 This work is currently being carried out jointly by Tufts University and the Internal Displacement Monitoring Centre (IDMC).

5 Field research commenced in Bogotá in 2003 and in Khartoum in 2005, and continued until 2009. See A. de Geoffroy, ‘Les déplacés et l’intégration urbaine dans deux quartiers de l’agglomération de Bogotá’, in *Villes en guerre, Guerres en ville*, Karthala Collections Pratiques Humanitaires, Paris, 2004, pp. 281–358; A. de Geoffroy, ‘Political authorities, humanitarian agencies and Southern Sudanese IDPs in Greater Khartoum, what place for a human rights-based approach in an authoritarian regime?’, Communication presented at the first World Conference of Humanitarian Studies, Groningen, Netherlands, 4–7 February 2009.

in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised State border.⁶

There are two factors in this definition that are beyond debate: the coercive nature of the displacement, and the fact that it takes place within an internationally recognized border. However, due to the nature of these Guiding Principles (soft law), this definition is non-binding, and the list of possible causes of displacement that it contains is non-restrictive (being preceded by the expression 'in particular'). There is thus room for interpretation on the part of the person using the term. For example, are natural disasters, whether man-made or not, to be regarded as a cause of displacement? More specifically, are the people who have been displaced by drought and famine in Sudan IDPs? Are the people who have been displaced by the fumigations of coca fields in Colombia IDPs? Furthermore, the fact that this definition is non-binding and the looseness of its interpretation means that the authorities can set their own definition criteria to suit the imperatives of the regime's domestic policy and ideological motives. Let us take a further look at this point.

Colombia – legislation and a specific status for displaced persons

Colombian legislation is regarded as an example at the world level when it comes to displaced persons.⁷ Special attention was devoted to displaced persons at a very early stage in Colombia,⁸ and specific legislation was introduced back in 1997, one year prior to the adoption of the Guiding Principles by the UN General Assembly, although it was very clearly based on the work carried out by Francis Deng's team at the time.

There is a legal, and thus binding, definition of IDPs in Colombia: 'A displaced person is any person who has been forced to migrate within the territory of Colombia, thus abandoning his/her place of residence or usual economic activities, because his/her life, physical integrity, or personal safety or freedom have been flaunted or are directly threatened due to any of the following situations: internal

6 *UN Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 17 April 1998, reprinted in *International Review of the Red Cross*, No. 324, September 1998, pp. 545–556.

7 On displacement in Colombia, see generally: A.M. Ibañez Londoño, *El Desplazamiento forzado en Colombia: un camino sin retorno hacia la pobreza*, Universidad de los Andes (Centro de Estudios sobre Desarrollo Económico), Bogotá, 2008, 277 pp.; D. Meertens, *Forced Displacement in Colombia: Public Policy, Gender and Initiatives for Reconstruction*, Paper prepared for the Conference on African Migration in Comparative Perspective, Johannesburg, South Africa, 4–7 June 2003; A. Molano, 'Sobre el desplazamiento forzado en Colombia', in *Para que se sepa, Hablan las personas desplazadas en Colombia*, IDMC, Bogotá, 2007, pp. 209–236; M.N. Bello, M.I. Villa (co-ord.), *El Desplazamiento en Colombia, regiones, ciudades y políticas públicas*, Red Nacional de Investigación/UNHCR/Universidad Nacional de Colombia/Corporación Región, Medellín, 2005, 426 pp.

8 This statement must be qualified, however. Although the conflict in Colombia is generally considered to have started in 1948 with the assassination of the politician Jorge Eliécer Gaitán, the political and social violence accompanying the construction of the Colombian nation goes back much further. Forced population displacements are thus a constituent part of Colombian history; the awareness of the issue that emerged at the end of the 1990s was early in the eyes of the international community, but not in the eyes of the Colombian nation.

armed conflict, internal unrest or tension, widespread violence, massive human rights violations, violations of international humanitarian law or other circumstances resulting from previous situations which can impair or drastically affect public order'.⁹

The Colombian definition disregards natural or man-made disasters from the outset. Any citizen who declares to the public prosecution department that he/she has been displaced and whom the public authorities recognize as such acquires displaced person status and thus has access to the system of aid provided by law.¹⁰ The question of who is recognized as a displaced person and who is not thus becomes crucial. The determination of the criteria for defining IDPs is thus profoundly influenced by politics. The non-recognition of persons who are displaced as the result of fumigations and the implementation of major agricultural projects and the growing temptation to no longer recognize populations that have been displaced by paramilitary groups are the result of domestic policy decisions. In the context of the Colombia Plan initiated by the United States, the massive eradication of illegal crops is an essential component of action to combat drugs. The fumigation of coca fields causes the displacement of people, who are thus deprived of their livelihood. Yet at the present time, it is imperative that any examination of the location of fields where coca is produced and of the laboratories where the drug is processed include an analysis of the conflict. It is now a well-known fact that armed groups have close links with this parallel economy,¹¹ and it sometimes becomes artificial to make a distinction between persons who have been displaced because of drug production and those who have been displaced as the result of conflict. Similarly, when large-scale production projects are being launched, investors frequently rely on the support of armed groups in order to 'free up' productive land. To evade the responsibility of the State and of those armed groups in these two cases of displacement is thus basically a political issue; the image of noble US–Colombia co-operation and of the major investors must not be tarnished. Likewise, the policy of 'Justicia y Paz' and democratic security pursued since President Alvaro Uribe's accession to power in 2002 has led to dialogue with the paramilitary groups resulting in their demobilization. Officially, there are no more paramilitary forces in Colombia; thus to recognize that displacements are still being caused by such organizations would amount to recognizing that Uribe's policy for resolving the conflict has failed, at least in part. Yet it has now become manifest

9 Law No. 387 of 1997 (by means of which measures are adopted for the prevention of forced displacement, and for assistance, protection, socioeconomic consolidation and stabilization of persons internally displaced by violence in the Republic of Colombia), *Diario Oficial* (Official Gazette), No. 43,091 of July 24, 1997. English translation available at http://www.brookings.edu/projects/idp/Laws-and-Policies/~media/Files/Projects/IDP/Laws%20and%20Policies/Colombia/Colombia_Law387_1997_Eng.pdf (visited 9 September 2009).

10 See Angela Carillo, 'Internal displacement in Colombia: humanitarian, economic and social consequences in urban settings and current challenges', *International Review of The Red Cross*, Vol. 91, No. 875, September 2009.

11 Alain Labrousse, 'Colombia, le rôle de la drogue dans l'extension territoriale des FARC-EP (1978–2002)', *Hérodote*, No. 112, 2004, pp. 27–48.

that the paramilitary groups are remobilizing in local militias and that the forced displacements caused by these new groups are continuing.

Sudan: long ignored, displaced persons are now a major political issue

The situation is very different in Sudan.¹² Under repeated and growing pressure from the international community the Sudanese regime has gradually come to recognize the problem of forced displacement. Sudan's relations with western countries have been stormy, to say the least, and the subject of displaced persons has on certain occasions provided an opportunity to make amends. Political decisions on the issue have long remained evasive, however, and have rarely been implemented. A succession of institutions has been set up since the 1980s, to little avail. The criteria used to define displaced persons (who are known as *naziheen* in Sudanese Arabic) and to distinguish them from others have changed from one era and actor to another. The tribal criterion and geographic origin have prevailed for a long time. The great majority of Sudanese regard people who come from South Sudan and are living in the North as displaced persons, and this has been extended more recently to cover some of the Darfuris who are now living in Khartoum. The question of what caused the displacements is not broached, and people are classed as *naziheen* – or not – according to physical criteria, manifest social vulnerability, date of arrival in the North or place of residence (urban fringe districts, camps for displaced persons). The actual causes of displacement do not seem to be of any particular significance. '*Naziheen*' is a pejorative term, which, as will be seen below, results in considerable discrimination on the part of the regime. The term 'IDP', which has been imported by the international community and humanitarian actors, is of a different register, since it can lead to access to aid programmes and represents possible positive discrimination. Humanitarian actors have not clarified the vagueness surrounding this population group in Sudan, however, and the term 'IDP' generally refers to population groups in Khartoum, people who have come from the South, the Nuba Mountains or Darfur, are living in the outskirts of Khartoum, and are extremely vulnerable. However, an attempt was made in the recent work preceding the promulgation of the new policy on displaced persons in 2009 to fill this gap and put an end to the ambiguity. Although several international organizations encouraged the government in this process of reflection and decision-making, providing support and advice, the definition which the government eventually opted for in the final version of the policy is so evasive that, depending on how it is interpreted, it can cover a large proportion, or just a fraction, of the Sudanese population. Displaced persons are defined as individuals or groups of individuals who have been forced or obliged to leave their homes due to, as the result of, or in order to avoid the

12 On displacement in Sudan in general, see G.M. Hamid, *Population Displacement in the Sudan, Patterns, Responses, Coping Strategies*, Centre for Migration Studies, New York, 1996, 196 pp.; E. Denis, 'Khartoum, ville refuge et métropole rentière, Mégapolisation des crises contre métropolitité', in *Villes arabes en mouvement, Cahier du Gremamo No. 18*, L'Harmattan, Paris, 2005, pp. 87–127; D. Johnson, *The root causes of Sudan's civil wars*, Woolnough, Irthingborough, 2006, 234 pp.

consequences of a disaster, whether natural or man-made, and who have moved to other places in Sudan.¹³ There is no direct reference to situations of armed conflict or violation of human rights or to international conventions or the Guiding Principles. The significance and effectiveness of this document is thus likely to be similar to that of the Sudanese government's previous commitments regarding displaced persons and should not require any change of strategy.

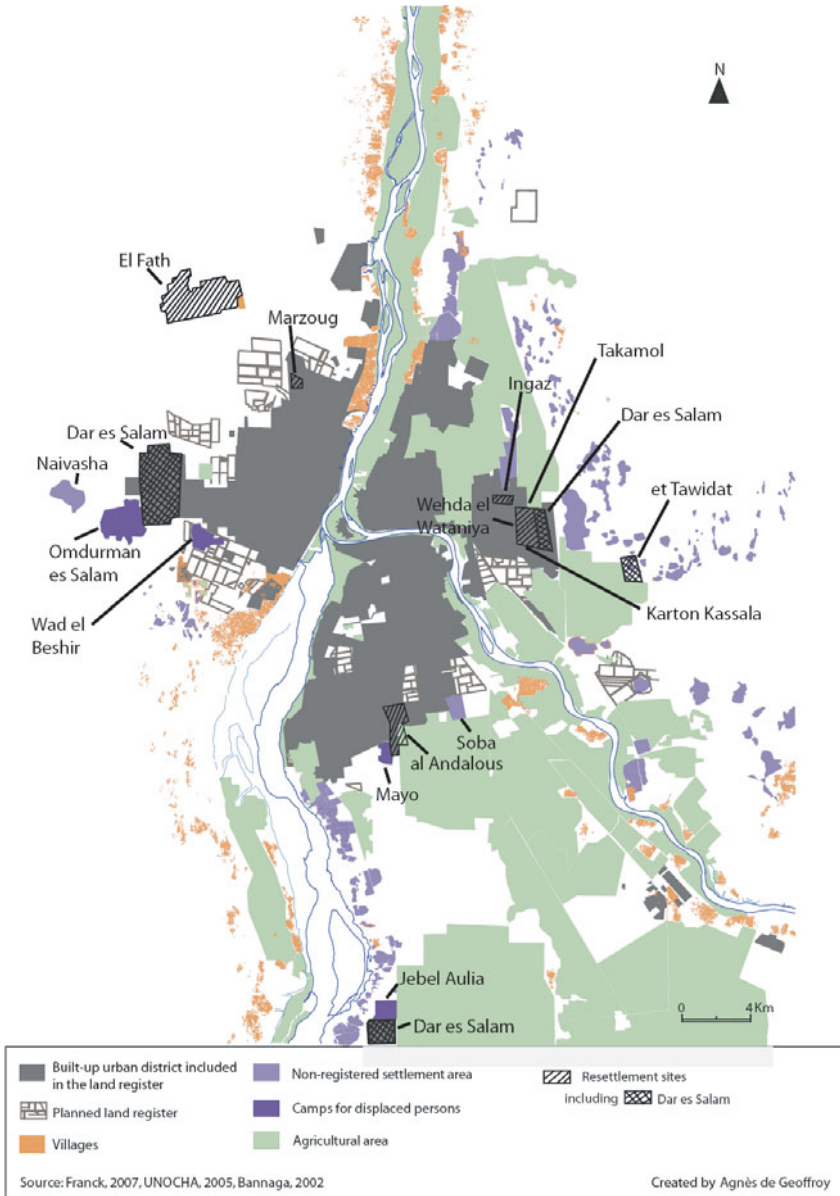
However, as has been shown by the promulgation of a new policy (however ineffective), it will be seen in the following paragraphs that the subject of displaced persons has gained greatly in value for the political players in Sudan since the signing of the Comprehensive Peace Agreement between North and South Sudan in 2005. The subject is also of high diplomatic value for a country where humanitarian issues have become an imperative topic in the relations it entertains with third countries.

Living on the urban fringe

Examination of the location of displaced people in the Khartoum and Bogotá conurbations has revealed one feature that they have in common – which, in fact, is not surprising, and that is that most of the displaced persons live on the urban fringe. This location on the periphery is due to several factors. Displaced people are pushed out to the urban fringe both by market forces and by State regulatory measures and planning. It is less expensive to live in the outskirts than to live in the city (price of land and housing, whether for rent or for sale, rates charged for 'public' services, and cost of basic necessities), and in the case of Khartoum the booming property market has exerted particularly strong pressure on the vulnerable populations living in the pericentral districts of the city. In Bogotá, the city districts are classed according to the socio-economic characteristics of their inhabitants as a basis for pricing public services: the richer the inhabitants, the higher the rates. The aim of this progressive pricing is to achieve greater social justice, but it also has the negative effect of grouping and settling the most vulnerable population segments on 'poor man's lands'. The measures taken by the State are fairly strong and more or less authoritarian, and they take on different forms. In Khartoum, the State exerts direct authoritarian pressure on the location of displaced persons in the conurbation by demarcating districts where they can set up home (Dar Es Salam, created towards the end of the 1980s, and camps for displaced persons, which were set up in 1991) and through mass evacuation measures and the creation of re-settlement districts for these population groups that have been driven out of the city. In the 1990s, the public authorities cleared squatted districts en masse in this fashion by means of forced evacuations coupled with the demolition of entire districts and the transfer of the populations to more peripheral areas.¹⁴ In the early

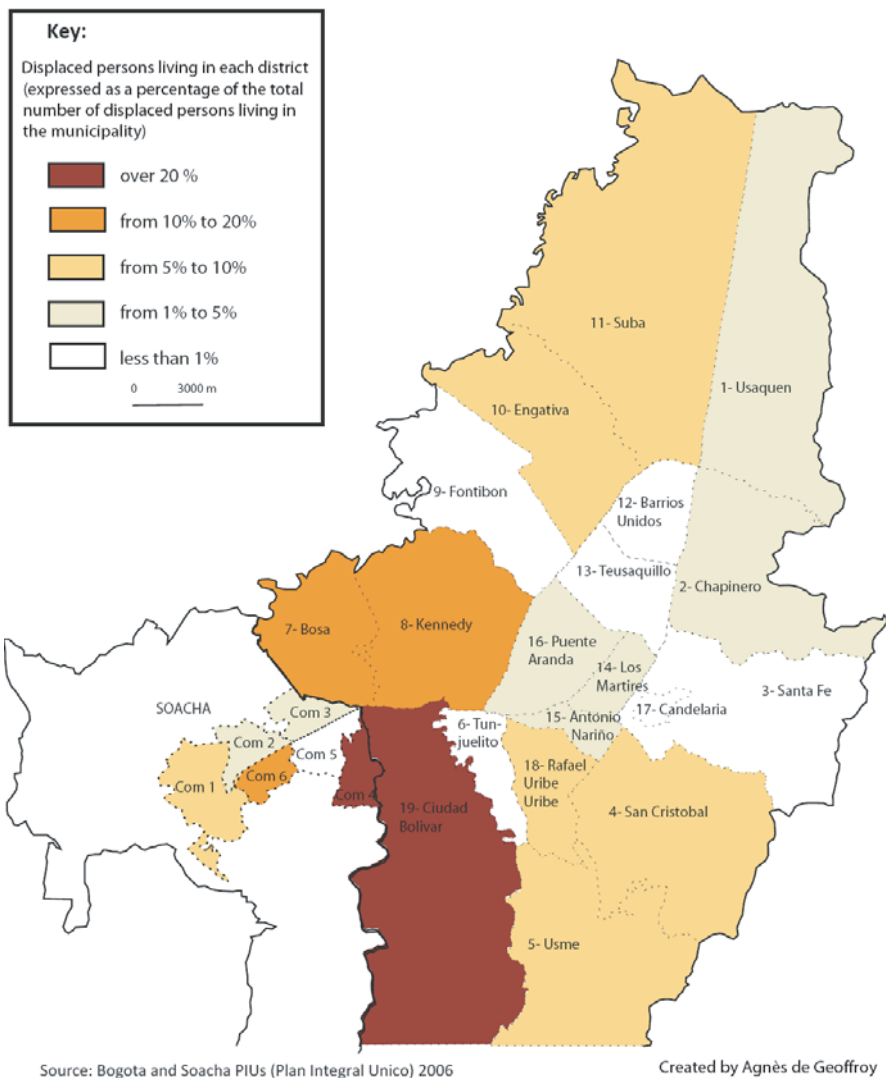
13 No quotation marks have been used for this definition, since there is as yet no official English translation of the document, which was published in Arabic.

14 Sharaf el Din Bannaga, *Peace and the displaced in Sudan*, Habitat Group/Swiss Federal Institute of Technology (School of Architecture), Zurich, 2002, 289 pp.



Map 1. Districts and sites where displaced persons have settled in the Greater Khartoum area¹⁵.

15 Sources: Alice Franck, *Produire pour la ville, produire la ville: étude de l'intégration des activités agricoles et des agriculteurs dans l'agglomération du Grand Khartoum (Soudan)*, Thesis (Geography), University of Paris X, Nanterre, 2007, 508 pp.; UN Office for Co-ordination of Humanitarian Affairs (OCHA), *Sudan Maps*, 2005, available at <http://www.unsudanig.org/library/mapcatalogue/sudan/index.php> (visited 9 September 2009); Bannaga, above note 14.



Map 2. Distribution of the displaced population by district in the Greater Bogotá area.

2000s, the State embarked on a new phase of legalization of squatted areas, proceeding in the same way as before but this time also extending its action to the camps for displaced persons.

In Bogotá, as is the case in Khartoum, the fact that displaced persons have settled in the outskirts of the capital on a massive scale poses a considerable challenge to urban planning. The 625,000 displaced persons who arrived in Bogotá

between 1985 and 2006¹⁶ account for over 8.5% of the total population of the municipalities of Bogotá and Soacha:¹⁷ (7,242,123 inhabitants). Khartoum has an estimated displaced population of 2 million, some 40% of the total population of the conurbation (4.5–5 million)¹⁸. This population influx is thus far from negligible and contributes dynamically to urban growth in these capitals. The policy choices and the measures taken to accommodate the displaced in the city obviously depend on how the various actors analyse the situation, and in particular on whether they regard the presence of these displaced populations as an interim situation. What is more, certain characteristics of the displaced population that are common to both Sudan and Colombia are a further obstacle to their integration in the city. The great majority of these people come from rural areas and thus do not have the necessary skills for finding employment in an urban context when they arrive,¹⁹ and the fact that they have a lower level of education than the rest of the population in the municipality adds to already restrictive hiring practices. Due to the trauma that they have suffered and the fact that they have lost their property and the greater part of their social networks, their isolation and vulnerability are particularly acute.²⁰ This statement must be qualified, however, since there are several networks of solidarity that endure in both Bogotá and Khartoum, despite displacement, or which have come into being as a means of coping with the adversity that follows in its wake. In Sudan, for example, belonging to a tribe plays a major role in displaced persons' choice of location when they arrive, and in Colombia the Catholic Church stands for a national network of mutual aid. Displaced populations in urban areas are thus marginalized on two scores – their social marginality is exacerbated by spatial marginality.

A population that is threatening for the capital

For several reasons, the displaced population seems threatening for the capital, where many residents see the arrival and settlement of displaced people as an

16 Figure quoted in Pastoral Social Sección de la Movilidad Humana and Consultoría para los Derechos Humanos y el Desplazamiento (CODHES), *Gota a gota, Desplazamiento forzado en Bogotá y Soacha*, CODHES, Bogotá, 2007, p. 20.

17 Soacha, the municipality bordering on the south of Bogotá, also hosts a large concentration of displaced persons. The seamless intermingling of the built-up areas of these two municipalities makes Soacha an integral part of the Bogotá conurbation.

18 These figures are a tentative estimate. We have already mentioned the ideological nature of the definition of displaced persons and the way they are counted. In the case of Sudan, we only have estimates at our disposal, since the results of the most recent census, which was carried out in 2008, have not yet been published. The previous census was conducted in 1993.

19 Pastoral Social Sección de la Movilidad Humana and CODHES, above note 16.

20 Karen Jacobsen, *Internal Displacement to Urban Areas – the Tufts-IDMC Profiling Study, Case 1 Khartoum, Sudan*, Feinstein International Centre (Tufts University) in collaboration with IDMC, Geneva, 2008, 60 pp.

additional security risk. Each case must be examined separately, for the factors of tension and the dangers, whether real or imagined, that are associated with the displaced in the city are specific to each context.

Khartoum, a besieged city?

In Khartoum, the displaced population is particularly large for the capital in numerical terms, and its arrival upset the demographic balance. It is estimated that 1.1 million of the 2 million displaced people living in Khartoum have come from South Sudan; the remainder come mainly from the Nuba Mountains and Darfur. The South Sudanese are very different from the people from North Sudan, since they are designated as African, as opposed to the North Sudanese, who define themselves as Arab and, for the most part, are not Muslim. They have distinct physical features and dress, and their origins are not to be concealed. The ethnic composition of the population of the capital has thus changed drastically as the result of the arrival of the displaced populations. Many North Sudanese regard this ethnic diversity as a threat and even as an adulteration of the Arab Muslim identity advocated by the regime in Khartoum. The feeling of being threatened is no doubt related to irrational factors, which are found in many other contexts connected with unfamiliarity and fear of others but also with objective factors of potential destabilization. Displaced persons, by definition, come from regions in conflict and are thus considered to have a dubious past: they may be partisans of the rebellion, they may have supported it, or they may still be supporting it. Politically, they generally support opponents of the regime. The camps for displaced persons and the districts where they live are areas where there is a strong Sudan People's Liberation Movement (SPLM) presence (the SPLM is the political branch of the Sudan People's Liberation Army, an armed group that fought the armed forces in North Sudan during the war between the North and the South). Several events have in fact confirmed that displaced people can become a significant factor of destabilization for the capital. First, the riots that broke out after the death of John Garang on 30 July 2005 made a lasting impression on the inhabitants of Khartoum. Following the announcement that the helicopter that was bringing the South Sudanese leader back from Uganda had crashed, there was an uprising of South Sudanese living in Khartoum, who invaded the streets of the capital and took it out on the North Sudanese, who were the symbols of the regime of oppression. Scores of people were killed in these riots, which were led first by the South Sudanese and then in retaliation by the North Sudanese against the southerners. A more recent event, the Omdurman attack, which was led by the Darfur rebel group Justice and Equity Movement, was followed by a government crackdown on people from Darfur living on the outskirts of Khartoum. Again scores of people were killed in this attack, which exacerbated the climate of distrust of displaced people from the west of the country. The security risk associated with the influx of displaced people into the capital is thus very real, though no doubt exaggerated by the regime, for which it provides facile justification of segregation and discriminatory measures.

Bogotá, urbanization of the conflict and urban violence

The displaced persons in Bogotá are not as markedly different from the local population as is the case in Khartoum. However, the conflict afflicting Colombia is of a different nature, pervasive and rampant, and is gradually permeating the various spheres of life in the country – economic life, political life, and people’s private lives. Bogotá has in general been spared by this seemingly interminable conflict, with the exception of certain dark episodes in its history. The relative tranquillity enjoyed by Bogotá is the result of police control and a national defence strategy that aims to protect the capital, the seat of power, but it is also maintained by political discourse that invariably denies the possibility of the conflict penetrating the city. The noose has been tightening for several years, however, and it is becoming more and more difficult to deny the obvious: the conflict is infiltrating certain parts of the city. The FARC modified their military strategy in the 1980s, aiming to ‘take the cities’, and they were followed by paramilitary groups in the 1990s who tried to counter that move.²¹ Although many political actors are continuing to deny this trend, armed groups are present on the outskirts of the capital, and as the result of the recent measures to demobilize the paramilitaries these groups have gained a stronger foothold in Bogotá. ‘Obscure individuals’ have moved into these districts on the periphery, where they swell the ranks of the urban militia groups that contend for control of territories and for the economic and social control of these districts. The displaced population is frequently associated with this phenomenon of the urbanization of the conflict. ‘If they (the displaced people) are here, there’s a reason – they’ll have done something.’ Their mysterious past soon becomes dubious in the eyes of the inhabitants of Bogotá, and they are often held responsible for the troubles that afflict them. Poverty, isolation and the trauma of displacement have made families vulnerable – particularly the children of displaced people, who become the prime targets and recruits for the local underworld. The displaced are thus often associated with the violence of which they are the victims. It is an undeniable fact, however, that the arrival and settlement of displaced persons in the capital has actually enabled and is still enabling armed groups to infiltrate the city on the sly. The arrival of these persons makes the city boundaries more porous and complicates the control of population movements. The infiltration of members of armed groups into the registers of displaced persons has been exposed on several occasions. This phenomenon means that the infiltrated members can be concealed and maintained, but on the other hand it discourages the registration of authentic displaced persons, who are afraid of being spotted mixing with former paramilitaries or former members of the guerrilla. Displaced persons who settle in the city are disturbing for a resident population that has become distrustful after decades of conflict, but what is more, they also facilitate the infiltration of the armed groups and the proliferation of the gangsters of whom they are the primary victims.

21 On FARC, see Daniel Pécaut, *Les FARC, une guérilla sans fin?*, Lignes de Repères, Paris, 2008, 169 pp.

Although the challenges and problems raised by the arrival of these populations in the cities are fairly similar (adapting infrastructures and services to urban growth, controlling the new demographic balances and new population groups), it will be seen in the following section that the political responses in Khartoum and Bogotá and, consequently, the ways in which aid actors are involved in that response are very different.

Bogotá, an approach that focuses on individuals and on their rights

The law that was passed in Colombia in 1997 guarantees special attention for the displaced population. As Angela Carillo explains in detail in her article,²² obtaining displaced person status confers the right to what is termed emergency aid for a renewable period of three months (although due to administrative and logistical delays this aid is generally delivered once the immediate urgency is over) and then to socio-economic stabilization aid. The aid system is run through the Acción Social agency under the authority and direct coordination of the President's Office and is designed to provide comprehensive aid for displaced persons throughout the various stages of displacement, a further objective being to restore and protect their rights. As in the 1991 Constitution, the entire legislative framework relating to displaced persons is based on human rights. The response that has been developed to address the issue of forced displacement is thus profoundly social and involves lasting commitment and responsibility on the part of the State, since it is not merely a question of short-term policy but one of legal responsibility. What has actually been achieved obviously falls short of these extremely high ambitions, but the Constitutional Court has constantly urged the executive to honour its commitments to the displaced and has required it to do so in various rulings. The budgets allocated by the State to this comprehensive aid for displaced persons have risen steadily, with significant increases since 2004 (the year in which the Constitutional Court issued Ruling No. T025).

The Colombian State's response to displacement certainly is not perfect, but it is definitely improving, although the persistence of considerable needs and continuing vulnerability within the displaced population would seem to contradict this. One alternative is to call for ever-increasing commitment on the part of the State and the actors involved to improving the aid system; another is to devote thought to the actual effectiveness and relevance of the aid system that has been established in Colombia.

Aid actors in Colombia have to decide precisely where they stand in this dilemma. The great majority of the actors (donors, international organizations, UN agencies and NGOs) play a direct part in the operation of the comprehensive

22 See Carillo, above note 10.

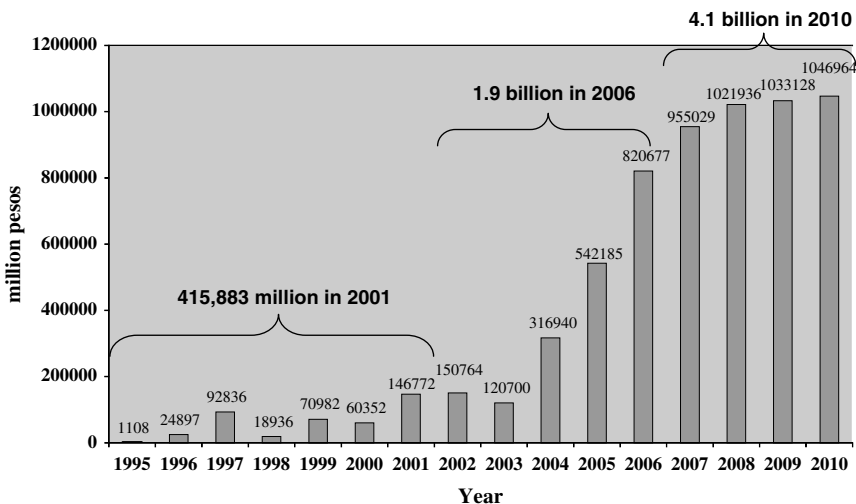


Figure 1. Budgets allocated by the government to aid for the displaced population (1995–2010)²³.

aid system that is co-ordinated by the State. USAID (United States Agency for International Development), for example, supports the State’s efforts in aid of displaced persons and finances part of the integrated aid system. International organizations such as the FUPAD (Fundación Panamericana para el Desarrollo) and the IOM (International Organization for Migration) have two sources of funding – Acción Social and USAID, and participate to the full in the implementation of national policy in aid of displaced persons. The complex chain of funding sources and ‘sub-contracting’ contracts make this national aid system a vast and sprawling, convoluted mechanism. Many international organizations and agencies as well as national and international NGOs play a role in the various components of this policy: emergency aid, socio-economic stabilization (training, income-generating activities, microcredit), psycho-social aid, education, health care, housing, etc. Some of these organizations are more critical of State policies than others, and some try to exert pressure on the government to improve its practices and commitment.

On the fringe of the aid system, several determined national and international NGOs are staging a trial of strength with the government, calling for action to improve or to reform the aid system. Civil society in Colombia is particularly strong and structured, and Colombian NGOs are not to be outdone when it comes to the political pressure movement. The trial of strength is mainly in the legal field, since the legal framework and legal institutions are particularly conducive to defending individual and collective rights. The Constitutional Court has

23 Source: Acción Social, *Hechos y avances en la atención a población desplazada*, June 2008, available at http://www.accionsocial.gov.co/documentos/Boletin_Hechos/Boletin_Desplazados_jun_2009.pdf (visited 9 September 2009).

on many occasions ruled in favour of displaced persons, exerting considerable pressure on the government and its administration. Some NGOs thus take up and support the complaints filed by displaced people and demand that their rights be respected and that the law be applied to the full. Others work more in upstream activities providing education, promoting civic and militant emulation and structuring the displaced population in grassroots organizations.

In this climate, displaced persons' protest campaigns abound. The strong political and trade union culture characteristic of Colombia is also to be found in the displaced populations, which are a breeding ground for NGO empowerment practices. Many leaders have emerged, and continue to emerge, championing the collective cause and structuring demands. Moreover, the law makes provision for the participation of displaced persons' organizations in the development of local aid plans, which set out how national policy on displaced persons is to be implemented at the local level. Displaced people take advantage of this opportunity to influence policy, but they also use the legal instruments at their disposal (petitions and trusteeship actions). In addition, they resort sporadically to more spectacular action, which consists of occupying public or symbolic premises, to try to break the silence and indifference and to win their case. Although these practices bring benefits in the short and medium term enabling the displaced to obtain their claims by force when the State is dragging its heels, they also widen the gap between the displaced and the rest of the population and exacerbate the climate of distrust and incomprehension between the displaced and civil servants and sometimes even between the displaced and aid actors.

Be that as it may, this panorama is only representative of the situation in the capital city of Bogotá and is without prejudice to the extent to which national policy on aid for displaced persons is being implemented or to the structuring and dynamism of the displaced population in the rest of the country.²⁴ The presence of the State is incomparably more marked in the capital, where the administration is also infinitely more efficient. National and international NGOs also have a strong presence, and the displaced population is also more thoroughly organized. Despite all of these remarks, which ought to mean that the displaced population is better integrated, and despite legal machinery which is extremely favourable for that population and is gradually increasing the responsibilities devolving on the State with regard to protection and assistance, most displaced people are still marginalized and particularly vulnerable, and there seems to be no solution to the gulf of distrust and incomprehension that separates them from the rest of the population. The Colombian experience must thus be questioned; perhaps it should be seen as a laboratory rather than as an example to be followed. Indeed, many donors and actors are currently seeking a model on which to focus attention, a model that

24 For a comparative study of humanitarian response to IDPs needs in Colombia, see ICRC/World Food Programme (WFP), *Una mirada a la población desplazada en ocho ciudades de Colombia: respuesta institucional local, condiciones de vida y recomendaciones para su atención*, ICRC/WFP, Bogotá, 2007, 82 pp., available at [http://www.icrc.org/WEB/SPA/sitespa0.nsf/htmlall/p_CICR-PMA/\\$File/ICRC_003_CICR-PMA.PDF](http://www.icrc.org/WEB/SPA/sitespa0.nsf/htmlall/p_CICR-PMA/$File/ICRC_003_CICR-PMA.PDF) (visited 9 September 2009).

would provide a way out of the rut and a means of permanently improving the situation of displaced people in their new living environment.

Khartoum, a spatial approach guided by security imperatives and political constraints

In Sudan, the approach to the displacement phenomenon is diametrically opposed to the Colombian model. Although there is no legislation on displaced persons, there are several reference documents establishing the regime's policy guidelines on the issue. An agreement between the North Sudan government's Humanitarian Aid Commission and its South Sudan equivalent that was signed in 2004 provides a framework for the return of displaced people to the South. The Government of National Unity recently decreed a new general policy on displaced persons (in 2009), but here again the vagueness of the terms employed is liable to reduce its significance.

The authorities in Khartoum have adopted two main lines of policy in response to displacement: spatial control and urban regulation on the one hand, and the return of displaced populations to South Sudan on the other. In order to cope with the imbalance resulting from the arrival of displaced persons en masse in Khartoum, the government has tightened up police and military control in the districts where they settle. Police checkpoints control movements in these districts. Police 'raids' in which houses are searched and the inhabitants are checked are particularly frequent, and outsiders must have an official permit in order to enter these zones. Civilian informants, who often live in the area and are paid by the government, also play a role in the control of these districts. People's committees (*lijan sha'biya*), which were introduced when Omar el Beshir came to power in 1989, are a further mechanism of social and political control. These grassroots units, which are set up at district level (one committee per 10,000 inhabitants) play a fundamental role in the administration of local affairs (particularly regarding access to basic services and access to land ownership). In theory, they are elected, but in actual fact they are a local relays of the ruling party, the NCP (National Congress Party), and the members are generally also NCP members. Urban policies, a further instrument of spatial control, are guided mainly by security imperatives and economic issues. Urban regulation and policies for legalizing districts and allocating land are an effective means of driving the most vulnerable population groups further out to the gates of the city and of controlling who obtains access to land in the capital while at the same time drawing financial benefits. The government's methods are authoritarian, and the legalization of districts involves the indiscriminate evacuation of the population and the demolition of homes by bulldozer followed – after several weeks or even months – by the allocation of demarcated plots. Access to land is governed by strict preconditions: Sudanese nationality (candidates must hold a birth or military service certificate), a dependent family (they must hold a marriage certificate), length of residence in the district, ability to pay the land access tax (in some districts the land is sold for a

symbolic amount or even given away, but candidates must be able to pay the duties and fees involved in the procedures), and, in theory, they must have no other place of residence in the State of Khartoum. These legalization measures give rise to underhand practices, and corruption is rife, depending on the populations of the districts concerned. They also provide an opportunity for widespread land speculation, where displaced people rarely stand to win. Although the legalization of districts enables part of the displaced population to own land, it also results in the eviction of all those who are too vulnerable to participate in the system and in their relocation further into the outskirts. Although this process can cause considerable material losses for the inhabitants of a district, they are nevertheless very much in favour of it, since they apparently consider that the potential benefits (i.e. the possibility of holding a legal title to land) by far outweigh the losses involved.

Since the 1980s, when the first waves of displaced persons began to arrive en masse, the NGOs working in Khartoum improved the new settlement areas and then sought to attenuate the consequences of the government's authoritarian and discriminatory policy. They thus provided basic services in the camps, sank and serviced wells, built health centres and schools, and distributed food aid.²⁵ At the end of the 1990s, the mass withdrawal of humanitarian actors from Khartoum left the inhabitants of the camps for displaced persons in a precarious situation, since they were still extremely dependent on aid. There has been a veritable humanitarian 'invasion' in Khartoum in the last few years with a view to rebuilding the South following the signing of the Comprehensive Peace Agreement in 2005 and the crisis in Darfur. Several actors launched projects in the capital on that occasion, mainly in aid of the displaced population. When the mass destruction and legalization of districts was resumed in 2003, in which the State began to extend its action to include the camps for displaced persons, the international community endeavoured to denounce and monitor the government's practices in the urban policy field. The pressure exerted by the international actors failed to halt the process, however, and the State only agreed to set up several joint committees (composed of Sudanese authorities and international actors). The most successful initiative was certainly the initiative launched by the Delegation of the European Commission, which made part of EU aid to Khartoum contingent on the signing of a commitment by the Governor of Khartoum to respect fundamental principles in compliance with human rights and the Guiding Principles. With the support of the UN Resident Co-ordinator, this memorandum of understanding between the international community and the local Sudanese authorities finally came into being and was signed in 2007. It is difficult to say what the tangible effect of this document has been, however, since the authorities have now legalized the vast majority of the districts in Khartoum. The climate is tense for aid actors and is not conducive to their taking a bold stance. All sorts of red tape and administrative delays

25 Munzoul Assal, *Whose rights count? National and international responses to the rights of IDPs in the Sudan*, Development Research Centre on Migration, Globalisation and Poverty, University of Sussex, Brighton, 2006, 48 pp.

and bottlenecks at times jeopardize access to the target groups and indeed the actual running of the project.

The measures to support the return movement, the other component of government policy on the displaced population, have received strong support from the international community. The governments of North and South Sudan and the United Nations signed a Joint Return Plan in 2006 for the organized return of 150,000 displaced persons in addition to the spontaneous returns that have been taking place since the signing of the ceasefire in 2004. The international community has contributed considerable financial support to the return process. The IOM has been selected to co-ordinate logistical support for the return movement, and many NGOs and agencies have become involved in the various phases of the Plan, organizing activities ranging from pre-departure information campaigns to assistance and protection during the return journey and on arrival in the resettlement areas. Numerous difficulties have had to be coped with – logistic (inadequate infrastructures and communication channels, areas that are inaccessible during the rainy season, etc.), social (difficulties arising in the reintegration of returnees into their communities of origin), and political (counterpressure exerted by the North and South Sudan authorities). When the Global Peace Agreement was signed in 2005, the displaced persons issue took on a new dimension as the displaced population that had settled in the North acquired new ‘political value’ in view of several approaching deadlines. The 2008 census is to be taken as the basis for distributing resources between the regions, and in the referendum that is scheduled for 2011 the people of South Sudan will be called upon to decide between a united Sudan and independence for the South. In this context, the numerical weight of displaced people living in the North, as in Khartoum, for example, is an asset for the regions of the North, since the budgets they will be allocated will be calculated accordingly. As for the 2011 referendum, the displaced South Sudanese are more likely to opt for a united Sudan if they are living in the North than if they return to the South. Since the voting procedures for the referendum have not yet been decided, however, it is not yet certain that people from South Sudan who are living outside the South will be able to vote. These general policy issues are compounded by local considerations of a more individual nature. Displacement has brought upheaval for the sultans, the traditional political leaders whose legitimacy has been based on the tribal system and territorial affiliation. There are now at least three types of sultan in the displaced population in Khartoum: there are the traditional sultans who arrived in Khartoum with their villagers; then there are sultans who were appointed after their arrival in Khartoum and whose legitimacy can be based either on lineage or on the influence they have acquired as individuals; and there are other sultans who have been established and are paid by the government (or, to be more precise, by the ruling party, the NCP) and who enjoy much less support from the people but often have more influence due to their connections with the ruling party. In the case of the sultans who were appointed after arrival in Khartoum, return to the South jeopardizes their function: they are liable to lose recognition and thus be deposed. Pressure is thus exerted at many levels on the displaced people in Khartoum: by the government of South Sudan and the regional

governors, who are doing their utmost to encourage them to return to the South, by the government of North Sudan, which often pursues an ambiguous policy on the displaced, marginalizing them and at the same time trying to settle them in the North, at least temporarily (and the process of legalizing districts and allocating plots of land is an extremely powerful tool in this context), and by the sultans, some of whom urge the people to return whilst others seek first to consolidate their foothold in the North before attempting any return to the South.

The displaced population is an uprooted population living in a no-man's land between war and peace, between here and there. As the result of violence and uprootedness, it is slipping into a new condition²⁶ that seems to be never-ending. The Colombian approach, although in theory appropriate in all respects, traps displaced people in a separate status and does not seem to promote their reintegration into society; on the contrary, it keeps them on the fringe. The legal framework and the aid system have thus strayed off target, despite the continuing efforts of part of civil society. Displaced people are becoming entangled in demands and action to defend their rights, and opposition to the political authorities and the administration is becoming more firmly entrenched. In Sudan, the stigma and discrimination attached to displaced persons has become State policy. The political interest they are now arousing is an opportunity that brings the hope that the political actors will commit themselves to longer-term choices and solutions. However, in view of the highly strategic nature of the displaced population the situation is often analysed in political terms and it is difficult for the stances adopted to be neutral. When working with displaced persons, humanitarian actors are liable to see their neutrality rapidly compromised and are often caught up in internal political struggles against their will. It is not always desirable for these actors to take a stand, nor is such siding welcome, but the fact remains that they enter the arena of national politics. The displaced are indeed a nagging thorn.

26 See Michel Agier, *Gérer les indésirables, des camps de réfugiés au gouvernement humanitaire*, Flammarion, Paris, 2008, 347 pp.

Internal displacement in Colombia: humanitarian, economic and social consequences in urban settings and current challenges

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Abstract

This article provides an overview of internal displacement and the internally displaced person (IDP) assistance system in Colombia. It analyses the humanitarian consequences faced by IDPs when they move to an urban environment, and examines the impact of the influx of IDPs into cities on the different actors involved, such as the government, national and international organizations and host communities.



The internal conflict in Colombia has led to the displacement of between 2,650,000 and 4,360,000 people, making it the country with the largest IDP population after Sudan.¹ This is the result of a situation where various illegal groups are fighting for territorial control, and the civilian population is subjected to direct

* This article was prepared with the valuable collaboration and contributions of Christina Oberli, co-ordinator of the ICRC Humanitarian Assistance Department in Colombia. The views expressed in this article are those of the author and do not necessarily reflect those of the ICRC.

attacks, forcible recruitment, threats, disappearances, deaths and selective executions:

‘... armed groups stage deliberate attacks on civilians to depopulate the area and thereby extend their control, reduce the combat power of the enemy and extract money from the area [...] the expulsion of the population is also a war strategy to prevent collective action, destroy social networks and intimidate people, as a means of controlling the civilian population.’²

IDPs flee in fear for their lives, abandoning their assets and their social and family network. The majority of IDPs move from a rural area to an urban environment, a change that has profound humanitarian, economic and social consequences.

At the individual, family and social level, the emotional impact of their experience affects the ability of IDPs to learn, become self-reliant and build a new life. Within the family, displacement often leads to domestic violence, abuse and separations. Displacement also has a particularly severe impact on certain groups, such as indigenous people and people of African descent, who are cut off from their customs and community organization.

Economically, displacement results in the loss of assets, capital and labour. This and the generally low level of education of IDPs means that their chances of earning a living and achieving a degree of stability are slim. The influx of IDPs into a city contributes to spreading the poverty belt. They have to build their homes from waste materials (cardboard, plastic, boards) in areas where the precarious conditions put their lives at risk. Many families find themselves without the economic resources to meet even their most basic needs. Before displacement, they obtained food directly from the plots that they farmed and the livestock that they kept, or they purchased food at a relatively low cost, but in urban settings they have to rely on help from family and friends and humanitarian aid. In many cases, they have to resort to begging on the street. Poor people in the host communities end up ‘competing’ with IDPs for the social programmes available. The government has to meet an increasing demand for assistance with limited resources and infrastructure.

This complex scenario poses challenges for IDPs as active agents in rebuilding their lives and for the host communities, the government and national and international organizations operating in the country, which have to adapt their programmes and provide a rapid response in a constantly changing environment.

1 As at 2008. See Internal Displacement Monitoring Centre (IDMC), *Global Overview of Trends and Developments in 2008*, IDMC, 2009, p.12.

2 Cited in Ana María Ibáñez, Andrés Moya, Andrea Velásquez, *Hacia una política proactiva para la población desplazada* (Towards a Proactive Policy for the Displaced), Universidad de los Andes, Bogotá, May 2006.

Internal displacement in Colombia

According to government figures, on 31 March 2009 there were 2,977,209 people³ (672,604 households) registered in the Registro Único de Población Desplazada (RUPD – unified IDP register). The actual number of IDPs could be as high as 3,870,371, taking into account an estimated under-registration rate of around 30%.⁴ According to the latter figure, IDPs may therefore account for up to 8.6% of Colombia's total population⁵ and 11.6% of the urban population. It is not known exactly how many IDPs there are in the country because many of them do not report their status to the Ministry of Public Affairs, either through fear or ignorance.

Two types of forced displacement are defined: massive displacement and individual displacement.⁶ Almost 80% of those included in the IDP register were displaced individually.

Internal displacement is caused by the direct or indirect action of illegal armed groups or clashes between such groups.⁷ Faced by this threat, people either remain in their homes at the risk of losing their lives, live in fear or move to another part of the country.

When people flee their homes, they tend to go to the nearest urban centre first. They then move on – although not always – to a larger town or city. Families move to the nearest urban centre first because of its geographical proximity, cultural empathy or because they know the place or have family or friends there. However, the very fact that it is near the place that they are fleeing from means that they still feel threatened by the situation of insecurity, and families generally move on to larger towns or cities, where it is generally thought that opportunities for employment, income generation and education are better in larger centres;

3 Between 1995 and 1998, the Ministry of the Interior and Justice was responsible for collecting information on IDPs in Colombia. In 1999, the *Red de Solidaridad Social* (Social Solidarity Network – RSS) was set up to co-ordinate the *Sistema Nacional de Atención Integral a la Población Desplazada* (National System for Integrated IDP Assistance – SNAIPD), and the formal declaration and registration process, including the unified registration system, was put into operation in 2001. From 2005 to the present day, the *Agencia Presidencial para la Acción Social y la Cooperación Internacional* (Presidential Agency for Social Action and International Co-operation, known as *Acción Social* – the former RSS) is responsible for IDP registration and the compilation of statistics. The figures on IDPs in Colombia provided here refer to the period from 1995 to March 2009.

4 *Comisión de seguimiento a la política pública sobre el desplazamiento forzado* (Commission to monitor public policy on internal displacement), National process to verify the rights of the displaced, Fourth Report to the Constitutional Court, April 2008, p. 58.

5 According to population projections by the *Departamento Administrativo Nacional de Estadística* (National Administrative Department of Statistics – DANE), Colombia has a population of 44,957,758 (2009).

6 Massive displacement is defined as the displacement of ten or more households together, while individual displacement is the displacement of a person or family on its own.

7 In 45.6% of cases, there is no information available about who caused the displacement. 20.5% of IDPs report that they were displaced as a result of a guerrilla group and 12.7% as a result of other groups, 10.8% do not identify the group that led to their displacement, 9.6% blame counterinsurgent and paramilitary groups, 0.5% the armed forces and 0.4% more than one actor. Source: *Acción Social*, March 2009.

moreover, they have a greater institutional capacity to provide assistance and services (as opposed to small towns or villages, where the presence of the State and the availability of social services is limited). Mainly for these reasons, the majority of IDPs move to urban areas. Inflow and outflow patterns based on available figures substantiate this conclusion.

Although displacement caused by armed conflict is a widespread phenomenon in the country, the trend is stronger in some areas than others. This is confirmed by the fact that 16% of all IDPs in the country come from the ten municipalities with the highest expulsion figures. Half of the IDP population is concentrated in 23 municipalities, indicating a definite preference for some places over others (Table 1).

The city that has the largest displaced population in the country is Bogotá (Capital District), followed by Medellín, Cali and Barranquilla, the three other most important cities in Colombia in terms of population and economic development. Eighteen of these 23 municipalities are department capitals, that is, large or medium-sized urban centres.

The influx of IDPs into towns and cities puts a strain on social services and population dynamics (contributing to overpopulation). The pressure index (Table 1) shows the ratio of IDPs in the municipality to the total number of inhabitants. For example, in El Carmen de Bolívar, 42 out of every 100 inhabitants are IDPs. Graph 1 shows that IDPs arriving in towns and cities come from: (i) other departments, (ii) other municipalities in the same department⁸ or (iii) other areas of the same municipality. In the latter case, they come from mainly rural areas.

In conclusion, it can be said that in Colombia, the tendency of displacement from rural areas to urban centres has implications in terms of land management (i.e. the efficient use of land, and overcrowding caused by the influx of IDPs into towns and cities); availability of government services and assistance; and integration of the displaced population into local economies with limited employment and income generation opportunities.

Who are the IDPs in Colombia?

Almost 60% of Colombian IDPs come from rural areas.⁹ In many cases, they have only ever visited the urban centres near where they live and have never been to a big city. They generally farm for a living. IDPs are predominantly

8 In the first two cases, there is no official information on whether IDPs come from rural or urban areas.

9 *Durable solutions for IDPs in protracted situations: three case studies*, Brookings Institution/University of Bern, October 2008, available at [http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnid/Filename/RMOI-7LX2ZX-full_report.pdf/\\$File/full_report.pdf](http://www.reliefweb.int/rw/RWFiles2008.nsf/FilesByRWDocUnid/Filename/RMOI-7LX2ZX-full_report.pdf/$File/full_report.pdf) (visited 30 September 2008). This figure roughly coincides with the one provided by the commission to monitor public policy on internal displacement, which reports that 54.5% of IDPs come from rural areas. Source: *Comisión de seguimiento a la política pública sobre el desplazamiento forzado*, National process to verify the rights of the displaced, First Report to the Constitutional Court, January 2008.

young, with an average age of 23. Displaced families have an average of five members.¹⁰

Vulnerable groups

Half of IDPs are under eighteen years of age (Graph 2), a population group that requires special attention in terms of education (school-age children between 5 and 18) and health, particularly with regard to vaccination, monitoring of growth and development, etc.

Half of IDPs are women (Graph 3), and 49% of these women are of child-bearing age (between 15 and 49). The proportion of displaced women who are pregnant is 5%, a higher percentage than the national figure, which is 4.2% according to the nationwide demography and health survey.¹¹ This is a sizeable group that requires attention during pregnancy (prenatal care, micronutrient supplements) and after the birth during the nursing period.

Figures show that 8% of IDPs are of African descent and 2% belong to indigenous groups, although the information available is patchy (Graph 4). These two groups require assistance adapted to their cultural circumstances.

Almost 1% of IDPs have some kind of disability (Graph 5), although, here again, information is lacking and the figure could be higher. Programmes are needed to provide rehabilitation for them and direct support for their families, as they are economically dependent.

Sixty-one per cent of households are two-parent families, and 84% of them report that the head of household is a man. Single-headed families account for 39% of the total, and 91% of them are headed by women (Graph 6). Single-headed households are likely to be more vulnerable in an urban environment, because of the difficulties of earning income and not having a partner to help look after the children. Female heads of household may benefit from positive discrimination (privileges in food programmes, child care, etc.), while men heading a household on their own seem to be somewhat neglected. This is a subject that warrants further study.

Educational level

The average number of years of education is around 5, although 11% of IDPs have not even attended school for one year. Figures on the level of education of IDPs

10 Official statistics on internal displacement in Colombia are compiled by *Acción Social* and only take into account people registered in the unified IDP register (RUPD). Various studies have been carried out in the country including both registered and unregistered IDPs. The data from some of these studies have been used here as supporting information to determine the characteristics of the IDP population.

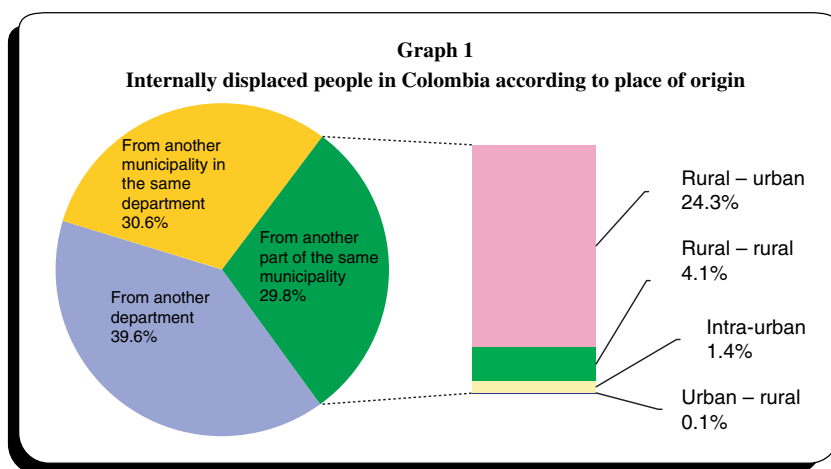
11 *Encuesta Nacional de Demografía y Salud* (National Demographic and Health Survey – ENDS), Profamilia, Bogotá, 2005.

Table 1. The ten cities with the largest IDP populations (Source: *Acción Social*, March 2009)

| No. | Department | Municipality | IDP population | IDPs in municipality as % age of total IDP population | Total population of municipality | Pressure index*** |
|-----|--------------------|----------------|----------------|---|----------------------------------|-------------------|
| 1 | Bogotá | Bogotá** | 244,184 | 8.20% | 7,259,597 | 3.4% |
| 2 | Magdalena | Santa Marta* | 141,520 | 4.75% | 441,831 | 32.0% |
| 3 | Antiquioquia | Medellín* | 135,391 | 4.55% | 2,316,853 | 5.8% |
| 4 | Sucre | Sincelejo* | 83,098 | 2.79% | 252,554 | 32.9% |
| 5 | Valle del Cauca | Buenaventura | 65,270 | 2.19% | 355,736 | 18.3% |
| 6 | Valle del Cauca | Cali* | 61,784 | 2.08% | 2,219,633 | 2.8% |
| 7 | Meta | Villavicencio* | 61,416 | 2.06% | 421,041 | 14.6% |
| 8 | Cesar | Valledupar* | 60,975 | 2.05% | 393,294 | 15.5% |
| 9 | Bolívar | Cartagena* | 58,601 | 1.97% | 933,946 | 6.3% |
| 10 | Caquetá | Florencia* | 57,168 | 1.92% | 154,499 | 37.0% |
| 11 | Norte de Santander | Cúcuta* | 48,812 | 1.64% | 612,273 | 8.0% |

| | | | | | | |
|----|--------------|----------------------|------------------|------------|-------------------|-------------|
| 12 | Atlántico | Barranquilla* | 47,802 | 1.61% | 1,179,098 | 4.1% |
| 13 | Antioquia | Turbo | 46,368 | 1.56% | 135,967 | 34.1% |
| 14 | Cauca | Popayán* | 45,045 | 1.51% | 265,881 | 16.9% |
| 15 | Tolima | Ibagué* | 42,477 | 1.43% | 520,974 | 8.2% |
| 16 | Chocó | Quibdó* | 40,262 | 1.35% | 114,210 | 35.3% |
| 17 | Santander | Barrancabermeja | 39,431 | 1.32% | 191,334 | 20.6% |
| 18 | Santander | Bucaramanga* | 37,191 | 1.25% | 523,040 | 7.1% |
| 19 | Córdoba | Montería* | 33,738 | 1.13% | 403,280 | 8.4% |
| 20 | Huila | Neiva* | 33,386 | 1.12% | 327,618 | 10.2% |
| 21 | Antántico | Soledad | 31,435 | 1.06% | 520,323 | 6.0% |
| 22 | Nariño | Pasto* | 31,157 | 1.05% | 405,423 | 7.7% |
| 23 | Bolívar | El Carmen de Bolívar | 29,327 | 0.99% | 70,397 | 41.7% |
| | Total | | 1,475,838 | 50% | 20,018,802 | 7.4% |

* Department capitals; ** capital city of Colombia; *** ratio of IDPs in the municipality to the total number of inhabitants.



Source: *Acción Social*, March 2009

show that the largest group among over eighteens is formed by those who have not completed primary education (40%) (Graph 7).¹²

The proportion of households with at least one illiterate member is almost 17%. In 3–10% of households, the problem is even more serious, as none of the members is literate.¹³

Poverty

Around 70% of the rural population in Colombia is living below the poverty line, while 99% of people displaced from rural areas to urban areas are living in poverty¹⁴ and 85% in extreme poverty. Before displacement, many of these people farmed their plots and kept small livestock, guaranteeing their food security. They were also able to sell the small surplus that they produced to buy other items.

As these figures show, while conditions in rural areas are precarious, when people are displaced to urban settings, their situation becomes even worse.

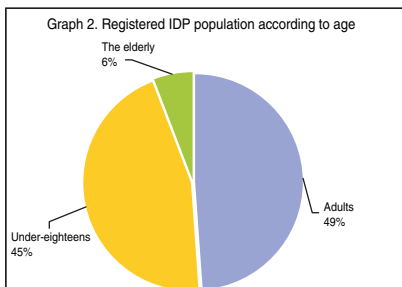
Assistance for IDPs

Law 387 of 1997 establishes the framework for IDP assistance in Colombia. The implementing regulations have been passed in various decrees.

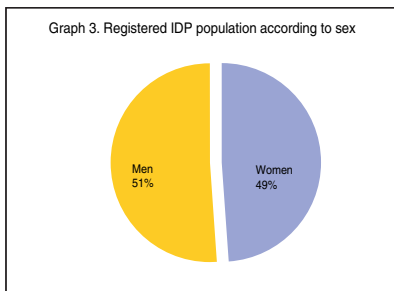
12 *Survey on the socioeconomic conditions of internally displaced persons assisted by the ICRC in Bogotá, Cúcuta, Florencia and Medellín*, ICRC, Bogotá, May 2008.

13 ICRC/World Food Programme (WFP), *Una mirada a la población desplazada en ocho ciudades de Colombia: respuesta institucional local, condiciones de vida y recomendaciones para su atención*, ICRC/WFP, Bogotá, November 2007, available at [http://www.icrc.org/web/spa/sitespa0.nsf/htmlall/colombia-interview-131207/\\$FILE/report-summary-131207.pdf](http://www.icrc.org/web/spa/sitespa0.nsf/htmlall/colombia-interview-131207/$FILE/report-summary-131207.pdf) (visited 21 December 2009).

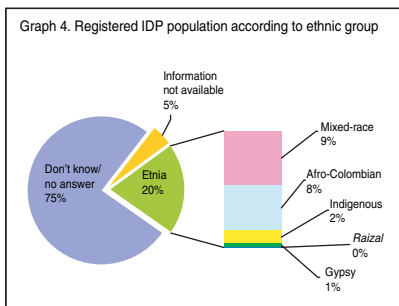
14 *Ibid.*, p. 25.



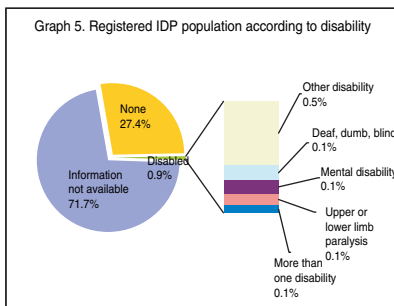
Source: *Acción Social*, March 2009



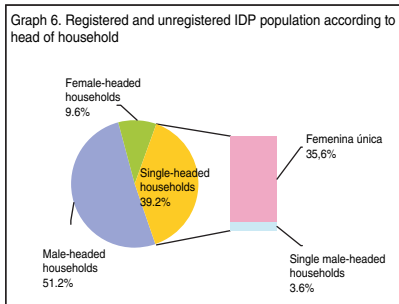
Source: *Acción Social*, March 2009



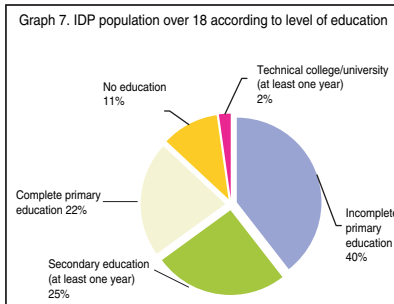
Source: *Acción Social*, March 2009



Source: *Acción Social*, March 2009



Source: *Comisión de seguimiento a la política pública sobre el desplazamiento forzado*, February 2008



Source: *ICRC*, 2008

After a group of IDPs filed a writ for the protection of their rights (*acción de tutela*), the Constitutional Court ruled that the government must provide comprehensive assistance to them immediately and report on the measures taken to this end.¹⁵

15 Constitutional Court of Colombia, Judgement T-025, 22 January 2004.

Since that time, the Constitutional Court has passed a series of writs (*autos*), in which it monitors the progress made in providing assistance to IDPs and provides guidelines on programme design and implementation for specific groups. Writs have been issued on special assistance for displaced women,¹⁶ children,¹⁷ indigenous people and Afro-Colombians.¹⁸

In addition, 2008 was declared the year for the promotion of IDP rights, and the private sector was encouraged to contribute to assisting victims.¹⁹

IDP assistance in Colombia involves a very complex scenario, including a variety of actors, different approaches and a strong State presence.

The national system for integrated IDP assistance (SNAIPD) brings together the various institutions responsible for providing assistance to IDPs and is co-ordinated by *Acción Social*, the presidential agency for social action and international co-operation.

Registered IDPs (with recognized IDP status and included in the official government register) receive aid during the emergency phase (food, hygiene items, psychosocial care, rent and essential household items) for a three-month period. After that, the family is entitled to assistance in the form of education, health, training and support to carry out income-generating projects with a view to achieving financial stability.

IDPs not included in the unified IDP register (RUPD), either because they were rejected (e.g. they made the pertinent declaration to the Ministry of Public Affairs, but were not granted IDP status) or because they did not make the declaration, are not entitled to such assistance, but can receive support from non-governmental organizations.

In addition to government assistance, there are also national and international organizations that provide assistance to both registered and unregistered IDPs during the emergency phase. International organizations include the ICRC, which provides assistance for three or four months, and the World Food Programme (WFP), which provides assistance for four, five or six months. Programmes and services aimed at helping IDPs to achieve stability in their new environment are insufficient and coverage is limited.

Unregistered IDPs are lumped together with the poor and receive the same treatment as this traditional sector of the population.

Although a regulatory framework does exist – the national plan and system for integrated IDP assistance – IDPs are unable to meet their basic needs and achieve long-term stability, because the sheer scale of the problem and limited resources, among other reasons, make it impossible to achieve full coverage.

16 Constitutional Court of Colombia, Writ 092, 14 April 2008.

17 Constitutional Court of Colombia, Writ 251, 10 October 2008.

18 Constitutional Court of Colombia, Writs 004 and 005, 26 January 2009.

19 Colombia, Law 1190, *Por medio de la cual el Congreso de la República de Colombia declara el 2008 como el año de la promoción de los derechos de las personas desplazadas por la violencia y se dictan otras disposiciones* (whereby the Congress of the Republic of Colombia declares 2008 the year of promotion of the rights of persons displaced by violence, and other regulations are announced), 30 April 2008.

Around 80% of IDPs do not want to return to their place of origin because the problem of insecurity persists. They prefer to remain in the place that they moved to when they were displaced,²⁰ which means that assistance must be provided in urban centres.

Consequences of displacement in the urban environment

Internal displacement has humanitarian consequences that take on specific dimensions in urban settings and affect actors such as the government and the host communities.

Economic consequences

The immediate effect of displacement is asset depletion, as people are forced to abandon land,²¹ property, livestock, crops, tools and machinery.

‘...around 55 per cent of displaced households had access to land before they were displaced. As a result of displacement, households lost an average of four hectares, amounting to a national total of 1.2 million hectares.’²²

All aspects of their lives are affected by the loss of their assets. Their access to food is limited, they cannot afford decent housing and, above all, they have no peace of mind or hope for the future.

Registered IDPs are entitled to emergency humanitarian assistance from the government for a three-month period. Although in recent years this assistance has improved in terms of coverage, length and quality, it has also given rise to a worrying tendency, particularly in urban settings. In urban centres, IDPs often fall victim to common crime, and people in the host community sometimes try to cash in on the assistance received by IDPs. There have been cases, for example, of IDPs being robbed when they received aid in the form of cash. IDPs without the means to transport the essential household items from the office issuing them to the place where they are living are often forced to hand over part of the aid received (including vouchers and food), usually an extortionate amount, in payment for transportation of the supplies.

20 For example, a survey showed that, in the city of Cúcuta, only 0.5% of IDPs receiving ICRC assistance wished to return to their original place of residence; 14.8% had not yet taken a decision; 0.9% were considering moving to another country; 4.7% wished to relocate elsewhere in Colombia; and the majority (79.1%) intended to remain in their current place of residence. The figures are similar for Bogotá, Florencia and Medellín. See *Survey on the socioeconomic conditions of internally displaced persons assisted by the ICRC*, ICRC, Bogotá, May 2008.

21 ‘Aggregate figures for assets, properties and land abandoned, ransacked or lost amount to 1.7% of Colombia’s GDP in 2004. Farming income not earned after displacement amounts to 2.1% of agricultural GDP in 2004’. See Ibáñez *et al.*, above note 3.

22 *Ibid.*

Poor people sometimes try to pass themselves off as IDPs in order to receive IDP assistance, which has made it necessary to implement controls and mechanisms to verify IDP status. These cases of fraud cause inconvenience to the government and organizations that provide assistance.

Disputes sometimes arise between IDPs and members of the host community, the latter demanding that the State provide them with assistance too and accusing IDPs of monopolizing social benefits. There have been clashes between the two groups, with people accusing each other of lying about their IDP status.

After the emergency phase, IDPs receive support from the government to help them achieve socioeconomic stability, in the form of training, economic incentives and assistance to implement income-generating projects.

This is the most difficult part of the process. Access to training is very low, with just 12% of registered households benefiting; others are unable to benefit because they do not meet eligibility requirements, because of their lack of education, or because they cannot afford to pay the additional costs involved, such as transport. Additionally, not everyone is business-minded and it is difficult to promote income-generating projects; the projects that are undertaken tend to be related to the informal economy.

When people are displaced, they cannot compete effectively in the labour market, as their farming skills are not easily transferable to an urban environment, where the unemployment rate can be as high as 13%.²³ IDPs have to compete with the resident population for job opportunities, with the added disadvantage of being poorly educated and suffering the stigma of their IDP status.

Even when IDPs do find employment, it is not full-time (average of 15 days work a month). Monthly earnings vary between 233,000 and 316,000 Colombian pesos (COP).²⁴ This is less than the legal minimum wage currently in force in Colombia, which is COP 497,000.²⁵

In urban centres, men usually work in the construction industry or in the personal services sector as *coteros* (loading and unloading goods at the city's markets and other places), street vendors, cleaning cars at traffic lights, etc. Women generally work in domestic service or street vending.

These are all unskilled activities carried out by people with a low level of education in the informal economy. Workers of this kind are not entitled to health or other social benefits, and their earnings depend on the work they do each day. The informal activities that they carry out sometimes involve an invasion of public spaces.

It is common to see women, children and elderly people begging for money on the street, at traffic lights and outside shopping centres with signs saying

23 DANE, *Gran Encuesta Integrada de Hogares* (National Household Survey), available at www.dane.gov.co (visited 30 September 2009).

24 These figures are for the cities of Florencia and Bogotá and are equivalent to USD121 and USD164 at the exchange rate of June 2007. These amounts are 53 and 72%, respectively, of the legal minimum wage in force at that time. See ICRC/WFP, above note 13, p. 6.

25 Equivalent to USD217.15 at the April 2009 exchange rate of USD1 to COP2,288.64.

that they are IDPs. This situation undermines their dignity and self-esteem, although, as they themselves say, it is better to beg than to steal.

In conclusion, IDPs are unable to become self-reliant and meet their basic needs in a sustainable manner, without permanent assistance from the government and humanitarian organizations.

Housing

IDPs usually stay with family or friends when they first arrive in the city, a situation that also affects the economy of the host community. Eventually, they have to find their own place to live. Because they lack resources, they often have to build shacks with waste materials (cardboard, wood and plastic) in ‘invaded areas’,²⁶ where unhealthy living conditions (lack of sewers, drinking water, waste disposal, etc.) and hazards such as landslides, mudslides and floods put their lives at risk.²⁷

An example of the risky living conditions suffered by IDPs is the fire that swept through the Moravia neighbourhood in Medellín in January 2007, in which a five-year-old child died, 200 houses were totally destroyed and hundreds of families lost all their belongings. This shanty town, inhabited mainly by IDPs, is built on a former waste disposal site, and the fire was most probably caused by gases seeping from the ground.

As families invade private and public land to build their homes, they are sometimes evicted by the police, who destroy the shacks as a means of clearing the area. This has been the cause of clashes between IDPs and the authorities.

The government has developed a strategy involving processes to relocate and legalize shanty towns. It also grants housing subsidies,²⁸ although few families receive them because they do not meet eligibility requirements. IDPs argue that the subsidy is not enough to buy a home, which means that families have to pay the rest from their own resources or take out a loan. Cities such as Bogotá and Medellín have therefore approved a supplementary subsidy to match the amount granted by the central government.

Apart from these measures and their implementation, there is another difficulty: there is very little land available on which to build social housing in cities, and the plots that are available are very highly priced. Cities like Medellín and Bogotá are beginning to look at the possibility of relocating IDPs to nearby municipalities.

26 Invaded areas are defined as privately or publicly owned land or waste ground where IDPs build their homes.

27 ICRC/WFP, above note 13, p. 4.

28 Decree 951 of 2001 establishes an amount of up to 25 times the minimum monthly legal wage for the purchase of social or second-hand housing or for home improvements.

Food

Food becomes a critical issue once the emergency humanitarian assistance phase comes to an end. For example, in Bogotá, Sincelejo, Medellín and Villavicencio, almost half of IDP households eat fewer than three meals a day,²⁹ and in the majority of the country's cities, IDPs report that they cannot afford enough food to feed their families properly. Although there are food aid programmes, their coverage is limited and they generally target specific groups, such as children (food at school), pregnant women and nursing mothers.

Whereas families obtained food from the plots they farmed before they were displaced, once in the city they have to beg on the street or scavenge for unsold, damaged or discarded food at marketplaces.

In economic terms, the consequences for the central government and local authorities are enormous. The continuous influx of IDPs into municipalities results in a growing demand not only for specific assistance for this group, but also for social programmes for the poor in general.

Local authorities have three main sources of income: transfers from central government, their own revenues and borrowing. Central government transfers are mainly for education and health³⁰ and are distributed annually among all the municipalities around the country in accordance with their category.³¹

Municipalities are categorized according to the size of their population, and as this information is not permanently updated,³² there can be a gap between a municipality's official population and its real population, swollen by the IDPs arriving day after day. This means that the same revenue has to be stretched to assist more people.

Social consequences

Some of the consequences of internal displacement are not readily visible. It has emotional, family and social effects that take their toll not only on the displaced, but also on the country as a whole.

Displacement has an emotional impact on people, whether it is because they have lost a loved one or because they have had to abandon their way of life, assets, customs and culture. At an individual level, it is manifested as sadness, crying, depression, nostalgia, nervous tension, fear, despair, regression to childhood, aggressive behaviour or an apparently calm demeanour and acceptance of the new situation in people who are not even aware that they have a problem.

29 ICRC/WFP, above note 13, p. 5.

30 Law 715 of 2001 on the general participation system.

31 Law 617 of 2000 establishes six categories of municipalities and a seventh 'special' category. The country's 1120 municipalities belong to one of these categories depending on the size of their population and unearmarked current income.

32 Colombia's last general census was carried out in 2005, and the one before that in 1993. Since 2005, official population figures are based on projections made by DANE.

According to the ICRC-WFP survey conducted in eight Colombian cities, approximately 67% of displaced households report experiencing psychosocial problems. Of these, 24% sought help, although only 15% actually received any care. Therefore, only 2% of those who reported having psychosocial problems received help. There are very few psychosocial services available, and there are no standard assistance protocols in place.

This problem affects all aspects of human behaviour, impairing the capacity to learn (in the case of children and adults who wish to receive education and training), become self-reliant and build a new life.

Displacement can also lead to problems such as domestic violence, abuse, divorce or desertion by one of the partners. Financial difficulties and the change in traditional gender roles and mentalities that displacement entails often cause domestic discord.³³

Social problems also extend outside the home – IDPs normally live in the city's outlying districts, where they are exposed to the risks of common crime, gangs, and other problems, such as drug abuse, etc.

Displacement also cuts people off from their social networks and groups (friends), milieu and community organizations. 'Displacement obstructs the formation of community organizations and contributes to the destruction of social networks and social capital, which are essential to social development and the construction of a new life'.³⁴

Certain groups are more prone to specific problems:

Adult IDPs

Their low level of education makes it difficult for them to cope with everyday activities, such as taking public transport, looking up job offers in the press and understanding the leaflets that they are given at different institutions with information on the procedures to be followed to receive assistance. These constraints are of particular consequence when it comes to finding a job.

School-age IDPs (5- to 18-year-olds)

Although they have access to the education system, they often fail to attend school for various reasons. These include discrimination for not wearing a uniform (because the family cannot afford to buy one), the stigma of IDP status (in some cases, displaced children are refused a place by school authorities or are singled out in the classroom); or difficulties arising from differences in the syllabus and the quality of education between rural and urban areas. Over-age students, very common in rural areas, have difficulties adapting.

33 Living in a city changes the mentality of IDPs; it can empower women, as they become integrated into a more egalitarian society offering greater opportunities for their sex. Roberto Vidal, *Desplazamiento interno y construcción de paz en Colombia* (Internal displacement and building peace in Colombia), 2008.

34 Ibáñez, Moya, Velásquez, *op. cit.*

Adolescents

Adolescents often decide to drop out of school in order to work and earn some money,³⁵ driven by the need to be socially accepted and acquire items, such as clothes, which they need in their new urban environment. While the primary education enrolment rate among the displaced population is close to 90% in some cities, the rate for secondary education is about 15–20% lower.³⁶

Under-fives

Although there are nurseries run by city councils and the *Instituto Colombiano de Bienestar Familiar* (Colombian family welfare institute – ICBF), coverage is limited. When parents have to go out to work, children are often left in the care of other adults, or children are left on their own at home, exposed to the risk of domestic accidents or other dangers.

The elderly

Because of their age, elderly people are unable to carry out economic activities in urban settings and sometimes have to resort to begging, which undermines their dignity. Although there is a specific programme for the elderly (monthly cash benefit), the number of beneficiaries is limited, because they are admitted to the scheme for life. This means that new beneficiaries are only admitted when someone withdraws from the programme or dies.

Men

While men are usually the breadwinners in rural settings, in the city it is often easier for women to find work in domestic service. In such cases, the woman goes out to work and the man stays at home to do the housework and look after the children. Many men find it difficult to accept this change in roles and decide to leave their families.

Indigenous people and minority ethnic groups

The break with community organization is all the more critical in the case of minority and indigenous ethnic groups.

35 'Low school attendance and drop-out rates can also be explained by the pressure on all the members of the household to engage in income-generating activities', *La población desplazada en Colombia: examen de sus condiciones socioeconómicas y análisis de las políticas actuales. Misión para el diseño de una estrategia para la reducción de la pobreza y la desigualdad* (The displaced population in Colombia: study on socioeconomic conditions and analysis of current policy), Departamento Nacional de la Planeación, Bogotá, 2006.

36 ICRC/WFP, above note 13, p. 6.

According to the 2005 census, there are 1,378,884 indigenous people in Colombia (3.4% of the total population), belonging to one of the country's 80 indigenous ethnic groups, the largest of which are the Wayuu, Nasa, Zenu and Embera.

When indigenous people are displaced, they lose their language, customs (such as traditional medicine), organization (own laws and rules and own system of judging those who break them) and, above all, their culture. It is common to find indigenous people in urban centres wearing Western-style clothes. They are also often to be found on the street and outside shopping centres begging for money.

The census also shows that there are 4,261,996 Afro-Colombians, accounting for 9.4% of the country's total population – 5.3% of them are IDPs. The Afro-Colombian population, like indigenous people, have their own particular customs. When they move to the city, however, they stop resolving their problems and needs within the community and begin to act individually in their own interests to ensure their survival.

When they have been in the new urban environment for some time, young people eventually lose interest in their customs and their land. This tendency raises long-term questions about whether there will be enough labour to sow and harvest crops and about how cities can cope with this continuous influx of people.

Challenges posed by internal displacement to urban centres

The situation described above poses a series of challenges for different actors, which need to be addressed in order to ensure not only more and better assistance for IDPs, but also the sustainability of cities in the long term in terms of habitability, overpopulation, mobility and job opportunities.

Government

One of the biggest challenges facing central government and local authorities is that of striking the right balance between assistance for IDPs and assistance for the 'poor', who are beginning to raise their voices in protest against positive discrimination in favour of IDPs.

The most critical issue is helping IDPs to achieve socioeconomic stability in the complex scenario in Colombia, with the Constitutional Court, civil society and IDP organizations demanding concrete results. The problem is exacerbated by the limited resources available, the already high and growing short-term demand and the lack of a favourable macroeconomic environment conducive to job creation.

The strategy of strengthening the institutional capacity of small towns (municipal seats) could be effective in preventing IDPs from moving on to bigger cities, which are already very densely populated. This measure should be accompanied by greater efforts to prevent internal displacement. Better

co-ordination between central government and local authorities, as well as the allocation of earmarked resources for IDPs, are also required in the short term.

Another measure that could contribute to increasing socioeconomic stability and solving the problem of overpopulation in big cities is the granting of rural land to displaced families, so that they can resettle in rural areas and carry out sustainable productive activities.

The biggest challenge in terms of IDP assistance is putting the legal framework that already exists into operation. It is a complex system in which effective co-ordination among the different actors is essential in order to achieve greater coverage, avoid the duplication of efforts and promote the active participation of IDPs in rebuilding their lives.

Humanitarian organizations

A variety of humanitarian actors are involved in providing assistance to the IDP population in Colombia, including – to name but a few – agencies such as the United Nations High Commissioner for Refugees (UNHCR), the World Food Programme and the International Organisation for Migration (IOM); international NGOs such as the Norwegian Refugee Council and Médecins sans Frontières; and local NGOs. The following section will focus on the humanitarian assistance programme of the ICRC, as well as addressing general issues of co-ordination.

The ICRC in Colombia

The ICRC has been carrying out its humanitarian assistance programme in Colombia for the past 11 years. During this time, it has assisted around 1,100,000 people directly in the field (mass displacement) and through its offices around the country (individual displacement).

In the Colombian cities in which it runs its assistance programme, in addition to the emergency humanitarian assistance that it provides for IDPs, the ICRC also implements programmes that provide support to strengthen the *unidades de atención y orientación* (assistance and guidance units for IDPs – UAOs), in conjunction with *Acción Social*, IOM and UNHCR. It carries out activities to change and improve public policy on IDPs, which also extend to areas where it does not provide humanitarian assistance.

Under its humanitarian assistance programme carried out in towns and cities, the ICRC provides relief aid to people who have been displaced individually during the emergency phase for three or four months. It consists of food, hygiene items and essential household items. Food aid is provided in the form of vouchers that can be exchanged in shops and supermarkets near where the beneficiaries live, a system that allows them to retain their dignity and become more integrated. The families receive guidance from the ICRC on how to exchange the vouchers and use the other food items supplied and on the formal process for declaring IDP status, being included in the IDP register and receiving benefits.

Aware of the specific needs of IDPs in urban areas, the ICRC also distributes fortified flour for infants under one year of age and elderly people, and shirts for school. It also provides a transport allowance (voucher or cash to pay a taxi), so that beneficiaries can transport the supplies given to them from the ICRC office back to their homes.

In view of the complex situation in urban centres, in order to ensure that those who really need assistance receive it, the ICRC implements a series of mechanisms to verify the status of the applicant (initial interview, home visits, monitoring), which guarantee personalized attention, detailed information about the beneficiaries and effective referral to the State system.

The ICRC is committed to the ongoing improvement of assistance and services and, to this end, consults beneficiaries on a yearly basis (through focus groups, for example) at the various offices it has around the country. It also conducts a monitoring project based on a survey of the socioeconomic conditions of the beneficiaries before, during and after receiving ICRC assistance. Based on the results of this work, it adjusts the assistance it provides to the needs of the IDP population and their particular requirements in the new urban environment.

The ICRC faces a number challenges in providing IDP assistance through its humanitarian assistance programme in the cities in which it operates. Firstly, the high level of poverty in big cities has led to an increase in the number of cases of attempted fraud. People discover what eligibility criteria are required, what they should say and what 'stories' they should tell. It is increasingly difficult to tell which people have been displaced and which have not. The professionalization of office staff and stricter verification criteria and controls are essential to avoid granting assistance to people who have not been displaced as a result of armed conflict. The biggest challenge, however, is to provide useful advice on State programmes that can help them. At the internal level, measures are also required to ensure the psychosocial self-care of staff who have to deal, on a daily basis, with the emotional distress of IDPs affected by the armed conflict, who come into ICRC offices for help. Ensuring that co-ordination with the government and other humanitarian actors operating in the country is effective and results in complementary aid for IDPs is another important challenge that must be met in order to achieve sustained assistance to help IDPs establish a new livelihood. At the same time, ensuring the ICRC's independence and neutrality in such a context is a major challenge and goal.

The need for co-ordination

The current challenge for national and international organizations operating in the country is to improve co-ordination and join forces to avoid duplicating activities and together contribute to improving IDP assistance. Although all sectors want to contribute to building and achieving peace, they have so far failed to join forces and rally around this common goal, as Colombia is such a polarized country. International organizations, as neutral actors, therefore face the challenge of motivating and helping national actors to work together.

It is also necessary to progress from emergency programmes to development-focused programmes which promote the socioeconomic stability of IDPs. Such programmes should be aimed not only at IDPs, but also at the poor in general, with a view to eliminating the gap between the emergency phase and the stability phase and ensuring a seamless transition. The limitations of the government make it essential for international organizations to provide support in the form of financial aid and technical assistance.

At grassroots level, everyone has a role to play in addressing the challenges faced by IDPs. The attitude of society at large needs to change, as people have become used to displacement and a climate of indifference prevails. It is necessary for everyone to join forces in solidarity. The private sector can make a significant contribution in creating temporary and permanent jobs and supporting micro-initiatives.

As for IDPs themselves, it is important for them to know about and understand how to obtain assistance and the rights they have as IDPs, so that they can access available benefits and services and become fully integrated in their new urban environment.

The major challenge for them is to play an active role in the process of rebuilding their lives and to avoid falling into the trap of dependence on assistance.

Conclusions

In addition to the humanitarian consequences of displacement, IDPs who flee to a big city also have to adjust to a new urban environment, of which they have no experience. Their low level of education, their rural livelihood skills, discrimination and local economic problems, such as high unemployment, make it difficult for them to earn money in urban settings, in spite of the fact that there are programmes in place to help them. As a result, IDPs become part of the cities' poverty belts, which has an adverse impact not only on their living conditions, but also in terms of land use management and the growing demand for services that overstretches the resources of the authorities.

The fall-out extends to national and international organizations operating in Colombia's cities, who are required to adapt their programmes, their criteria and the aid that they provide to the specific needs of people displaced to urban centres. This situation gives rise to a series of short- and medium-term challenges for actors involved in the complex IDP assistance system in Colombia. Meeting these challenges or making at least some progress towards overcoming them would contribute to assisting IDPs more effectively.

The big question, however, is how to rebuild social capital, how to reconstruct the country, when it is still mired in an armed conflict that drives hundreds of people from their homes day after day.

Without order, anything goes? The prohibition of forced displacement in non-international armed conflict

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Abstract

At first glance, merely the ‘ordering’ of displacement seems to be prohibited in non-international armed conflict. However, after interpreting Article 17(1) AP II and Rule 129(B) of the ICRC Customary Law Study with particular regard to State practice and opinio juris, the author concludes that these norms prohibit forced displacement regardless of whether it is ordered or not. On the other hand, the ICC Elements of Crimes for the crime of forced displacement under Article 8(2)(e)(viii) ICC Statute require an order. It remains to be seen whether the ICC adopts that interpretation in its jurisprudence.



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Introduction

Pictures of displaced civilians emerge regularly after an armed conflict has broken out. This often exposes a great humanitarian need and leads to criticism of the parties to the conflict. From the viewpoint of international humanitarian law, it is, however, very important to distinguish between the voluntary displacement caused by the hardship of armed conflict, on the one hand, and forced displacement of the civilian population, on the other. Only the forced displacement of civilians for illegitimate reasons¹ is prohibited under international humanitarian law and can be prosecuted as a war crime. Thus the question arises by which criteria it can be determined whether displacement of the civilian population is forced or not. One criterion for forced displacement seems to be that the displacement must be ‘ordered’ as suggested by the literal meaning of Article 17(1) AP II, Rule 129(B) of the ICRC Customary Law Study² and Article 8(2)(e)(viii) ICC Statute.³ Does that mean that forced displacement which has not been ordered is lawful? The question was not discussed in the *travaux préparatoires* of Additional Protocol II and no declarative interpretations or reservations have been made on Article 17(1) AP II.

However, in the literature, the question of whether an order is required for a violation of Article 17(1) AP II has in isolated cases been answered in the affirmative, although it was only treated in passing.⁴

The issue has also been raised by the Defence in the Gotovina *et al.* case at the International Criminal Tribunal for the former Yugoslavia (ICTY). The Defence argues that Ante Gotovina was unduly indicted for the crime against humanity of ‘deportation and forcible transfer’ because it alleges that this is an offence applicable in international armed conflict only. Instead, Gotovina should have been indicted for the crime against humanity of ‘forced movement of civilians’ which is in the opinion of the Defence the equivalent to forcible transfer in non-international armed conflict. In that case, the Prosecution would have to prove that Gotovina ‘ordered’ the displacement. The Defence derives this ‘order’ requirement from the literal meaning of Article 17(1) AP II, Rule 129(B) of the ICRC Customary Law Study, Article 8(2)(e)(viii) ICC Statute and the ICC

1 Illegitimate reasons are those which are not covered by the exceptions in Additional Protocol II (APII). Article 17(1) AP II does not prohibit the displacement of the civilian population ‘if the security of the civilians involved or imperative military reasons so demand’. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 609 (Additional Protocol II, AP II).

2 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, Cambridge, 2005, Vol. I, pp. 457–462.

3 Statute of the International Criminal Court (ICC Statute), adopted 17 July 1998, entered into force 1 July 2002, 37 ILM 1002.

4 See e.g. Carlyn Carey, ‘Internal Displacement: Is Prevention through Accountability Possible? A Kosovo Case Study’, *American University Law Review*, Vol. 43, 1999, p. 267.

Elements of Crimes.⁵ Trial Chamber I rejected the Defence's argument mainly for the reason that the Defence derives the 'order' requirement from a war crime, a category which has – in the opinion of Trial Chamber I – no relevance when adjudicating crimes against humanity.⁶ Trial Chamber I elaborated that Article 5 ICTY Statute, giving the ICTY jurisdiction over crimes against humanity, does not require an order.⁷ The Appeals Chamber held that the Defence did not raise a proper jurisdictional challenge, but that the Defence merely submitted a different *interpretation* of a crime, a challenge to be raised on the merits.⁸ Thus neither the Trial Chamber nor the Appeals Chamber addressed the question of whether an order is required for a violation of Article 17(1) AP II or of customary international law.

The ICTY held that persecution by way of forcible transfer as a crime against humanity can take place through coercion and that it does not require an order.⁹ However, if the opinion of Trial Chamber I in the Gotovina *et al.* case is followed, such conclusions concerning crimes against humanity do not necessarily apply to war crimes.

Terminology

In international armed conflict, Article 49(1) GC IV prohibits 'forcible transfer' within and 'deportation' from occupied territory.¹⁰ As for non-international armed

5 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Gotovina et al.*, Defendant Ante Gotovina's Preliminary Motion Challenging Jurisdiction Pursuant to Rule 72(A)(i) of the Rules of Procedure and Evidence, 18 January 2007, IT-06-90-PT paras. 7–9; ICTY, *Prosecutor v. Gotovina et al.*, Defendant Ante Gotovina's Interlocutory Appeal Against Decision on Several Motions Challenging Jurisdiction Rendered 19 March 2007 by Trial Chamber I, 3 April 2007, IT-06-90-AR72.1, para. 69 and paras. 31–36 (for the Defence's argument on the distinction between war crimes and crimes against humanity); ICTY, *Prosecutor v. Gotovina et al.*, Pre-Trial Brief of General Ante Gotovina, IT-06-90-PT, 5 April 2007, para. 157. The Gotovina Defence argues that crimes against humanity are derived from war crimes. Therefore, the requirements of a war crime need to be applied when addressing whether or not the corresponding crime against humanity has been committed. The Defence elaborates that Rule 129 of the ICRC Customary Law Study (Henckaerts and Doswald-Beck, above note 2) indicates that the crime of 'deportation and forcible transfer' is only applicable in international armed conflict. The corresponding offence in non-international armed conflict is the 'forced movement of civilians'. Based on the Defence's assumption that the Trial Chamber considered the armed conflict during Operation Storm of non-international nature, it concludes that Ante Gotovina was illegally indicted for the crime against humanity of 'deportation and forcible transfer'.

6 ICTY, *Prosecutor v. Gotovina et al.*, Decision on Several Motions Challenging Jurisdiction, 19 March 2007, IT-06-90-PT, fn. 61 referring to the above, i.e. paras. 24–28; Trial Chamber I held that regimes of war crimes and crimes against humanity exist 'separately and independently' of each other. Article 5 of the ICTY Statute applies in international and non-international armed conflict and does not require the application of the laws and customs of war.

7 *Ibid.*, fn. 61.

8 ICTY, *Prosecutor v. Gotovina et al.*, Decision on Ante Gotovina's Interlocutory Appeal against the Decision on Several Motions Challenging Jurisdiction, 6 June 2007, IT-06-90-AR72.1, para. 15.

9 See e.g. ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Judgement, IT-02-60-T, 17 January 2005, para. 596.

10 Traditionally 'forcible transfer' is a displacement within the territory of a state, and 'deportation' takes place beyond internationally recognized state borders (*Ibid.*, para. 595).

conflict, Article 17 AP II is titled ‘forced movement of civilians’, which covers both the ordering of displacement within a territory (Article 17(1) AP II) and the compelling of civilians to leave their territory (Article 17(2) AP II). The present article will only deal with ‘forced displacement’, defined as the forced movement of civilians within a territory during non-international armed conflict. ‘Ordered displacement’ or similar formulations, which imply that civilians do not leave voluntarily, have the same meaning as forced displacement.¹¹

Article 17(1) AP II

Three possible interpretations of the scope of Article 17(1) AP II will be discussed: first, the most restrictive view of Article 17(1) AP II, that an order of displacement has to be addressed to the civilian population (‘Interpretation 1’); second, the interpretation that an order does not necessarily have to be announced but that it can also be given within the chain of command of a State or of an armed group (‘Interpretation 2’); and third, the interpretation whereby Article 17(1) AP II prohibits forced displacement regardless of whether it was ordered or not (‘Interpretation 3’).

Article 31(1) of the Vienna Convention on the Law of Treaties¹² stipulates that ‘a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.’¹³ These means of interpretation will be used to discuss the three different interpretations of Article 17(1) AP II. The abundant subsequent treaty practice¹⁴ will be central when evaluating Interpretation 3. The *travaux préparatoires*¹⁵ will only play a minor role as they are merely a supplementary means of interpretation, and because the term ‘order’ was not discussed at the Diplomatic Conference 1974–1977.

11 For the broader notion of ‘arbitrary displacement’ see *Guiding Principles on Internal Displacement*, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, Principle 6.

12 Vienna Convention on the Law of Treaties (VCLT) (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

13 According to its Article 4, the VCLT applies only to treaties after the VCLT’s entry into force in 1980. However, its rules of interpretation were considered as declaratory of customary international law before. See Bundesverfassungsgericht (Constitutional Court of the Federal Republic of Germany) (1971) 40 BVerfGE pp. 141–179, p. 166; *Golder v. UK* (App. No. 4451/70) (1975) Series A, No. 18, pp. 5–22, paras. 34–35. It is thus possible to apply the rules of treaty interpretation, stipulated in the VCLT, to treaties concluded before 1980, including Additional Protocol II. Heribert Köck, *Vertragsinterpretation und Vertragsrechtskonvention: Zur Bedeutung der Artikel 31 und 32 der Wiener Vertragsrechtskonvention 1969*, Duncker & Humblot, Berlin, 1976, p. 79; Georg Ress, ‘The Interpretation of the Charter’ in Bruno Simma *et al*, *The Charter of the United Nations: A Commentary*, Oxford University Press, Oxford, 2002, p. 18.

14 Art. 31(3)(b), VCLT.

15 Art. 32(a), VCLT. Recourse may be had to preparatory works in so far as the interpretation resulting from Article 31(1) ‘leaves the meaning ambiguous or obscure’ or leads to a manifestly unreasonable result.

Interpretation 1: for a violation of Article 17(1) AP II an order of displacement needs to be given to the civilian population

In favour of this interpretation, it could be advanced that such a requirement was intended to prevent a party to the conflict being accused of forced displacement too easily. If an order to the civilian population were necessary, a party to the conflict could be certain of not being accused of forced displacement in cases where displacement was caused by lawful military operations.

Another argument in support of such an order requirement could be based on the fact that Article 17(1) AP II was also drafted in order to restrict the practice of governments to move civilians from the conflict zone with the intention of depriving insurgents of the support they might attain from the civilian population.¹⁶ Indeed, before the entry into force of Additional Protocol II, governments often regarded displacement of their own civilian population in non-international armed conflict as their right.¹⁷ Thus the argument would continue, State representatives at the Diplomatic Conference 1974–1977 intended to prohibit a State from officially ordering the civilian population to leave. They might not have considered that a State would displace civilians through coercion (rather than an order) to hide its intentions because, prior to the entry into force of Additional Protocol II, it was not conventionally prohibited for States to displace the civilian population in non-international armed conflict. In addition, State representatives might not have considered the possibility that non-state actors would displace the civilian population in ‘classical guerrilla’ warfare between a State, which exercises control over its territory, and an armed opposition group. Indeed, in such a scenario the members of an armed group had little interest in displacing civilians, as they could hide and seek support among those civilians.

However, these arguments are speculative as they do not find support in the *travaux préparatoires*. Moreover, requiring an order to be addressed to the civilian population is neither an interpretation in good faith nor in accordance with the object and purpose of Additional Protocol II to ‘ensure a better protection for the victims of [...] armed conflicts’.¹⁸ This is the case because such a requirement would encourage governments to use indirect means of coercion to displace the civilian population. Indeed, the *travaux préparatoires* support the view that displacement caused by indiscriminate military operations is prohibited too. Before Article 17 of AP II was formally proposed, the insertion of an Article which prohibits forced displacement was contemplated by the ICRC. In the ICRC’s

16 Michael Bothe *et al.*, *New Rules for Victims of Armed Conflicts, Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff Publishers, The Hague, 1982, p. 691.

17 See e.g. Report of Committee III, Second Session, CDDH/215/Rev. 1; vol. XV, p. 259, para. 150.

18 Preamble, AP II.

report, the phrase ‘displacement by force’ was used, with ‘force’ being understood to include indirect means:

‘Force’ may be direct or indirect: in the former case the civilian population would be displaced *manu militari*; in the latter, the displacement, because of military operations, would be labelled ‘spontaneous’.¹⁹

The fact that a ‘spontaneous’ displacement caused by military operations is included as a form of ‘displacement by force’ shows that there was an understanding that the displacement of civilians need not take place as the result of an order addressed to them directly. For the above-mentioned reasons, Interpretation 1 is not very convincing.

Interpretation 2: for a violation of Article 17(1) AP II, an order of displacement needs to be given within a chain of command

Arguments in favour of Interpretation 2

Interpretation 2, that an order to displace can be given within a chain of command, is more reasonable than Interpretation 1 because it would at least cover cases of indirect forced displacement (e.g. by mistreatment of civilians so as to make them leave), provided that they were ordered by a superior to combatants or ‘fighters’ under his/her command.

Like Interpretation 1, one could also argue in favour of Interpretation 2 that the ordinary meaning of the phrase ‘the displacement of the civilian population shall not be ordered’ seems to require a formal order.

The context lends some support to this interpretation. Article 17(2) AP II provides that ‘civilians shall not be *compelled* to leave their own territory’. The ‘compelling’ of civilians is possible by indirect means; the term clearly does not require an order.²⁰ If State representatives had wanted to draft an unambiguous provision not requiring an order, they would have done so by also using ‘compel’ in Article 17(1) AP II, which deals with the forced displacement of the civilian population from their territory. It could be imagined that a higher threshold was intended for Article 17(1) AP II (which also covers the forced displacement of civilians within their territory) than for the forced displacement of civilians beyond their territory (Article 17(2) AP II). In that vein, an earlier draft of what is now Article 17(1) AP II stipulated that the ‘displacement of civilians shall not be

19 ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts 24 May–12 June 1971*, Vol. VI, p. 29, fn. 9 (background document for the Conference based on expert consultations).

20 The ordinary meaning of ‘compel’ is to ‘bring about an action by force’ – *The Concise Oxford Dictionary of English*, Oxford University Press, Oxford, 1991, p. 232. ‘Force’, as opposed to ‘order’, covers indirect acts. *Ibid.*, p. 459. See also Yves Sandoz *et al.* (eds), *Commentary on the Additional Protocols*, ICRC/Martinus Nijhoff Publishers, Geneva/Dordrecht, 1987, p. 1474.

ordered *or compelled*.²¹ The fact that ‘or compelled’ was removed from the text could be interpreted as an indication that the drafters intended to restrict the scope of Article 17(1) AP II and limit it to a prohibition of forced displacement that is ‘ordered’. Indeed, some State delegates voiced concerns that Article 17(1) AP II would restrict the sovereign right of a State to displace its own population.²² However, as there is no debate reported which clarifies why the word ‘ordered’ was chosen and why the term ‘compelled’ was dropped, such conclusions remain speculative.

Arguments against Interpretation 2

As a reminder, according to Interpretation 2, Article 17(1) AP II only prohibits the ordering of displacement. Much like Interpretation 1, Interpretation 2 is hard to reconcile with the principle that a treaty must be interpreted in good faith and in accordance with its object and purpose (in the case of Additional Protocol II, to ‘ensure a better protection for the victims of [...] armed conflicts’).²³ The protection of civilians would be seriously compromised if forced displacement were only illegal pursuant to an order. This holds true especially where a whole campaign is being conducted to displace the civilian population. An order to displace civilians which is given within the chain of command may also be very difficult to prove.

Moreover, Interpretation 2 is problematic considering that States are responsible for acts committed *ultra vires*, a norm well-established in international law before 1977.²⁴ According to this rule, actions and omissions of an agent of a State, who acts in an official capacity but in contravention of instructions, need to be attributed to that State.²⁵ The rationale is that State agents who act in an official capacity should engage the responsibility of the State regardless of whether their acts were ordered or not. This was already eloquently explained by the Spanish government in 1898:

If this [that all Governments should always be held responsible for all acts committed by their agents in their official capacity] were not the case, one would end by authorizing abuse, for in most cases there would be no practical way of proving that the agent had or had not acted on orders received.²⁶

21 Conference of Government Experts 1972, Report, Vol. I, para. 2503, Vol. II CE/COM II/85, p. 50 (emphasis added).

22 Mr Wolfe (Canada), Mr Cristescu (Romania), Miss Ahmadi (Iran), Meeting of Committee III, 4 April 1975 (CDDH/III/SR. 37; XIV, 387) reprinted in Howard Levie (ed), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, Martinus Nijhoff Publishers, Dordrecht, 1987, pp. 531, 537–538.

23 Preamble, AP II.

24 See State practice and *opinio juris* quoted in *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part Two, as corrected, pp. 45–46.

25 Draft Articles on Responsibility of States for Internationally Wrongful Acts, Article 7, in *YILC*, *ibid.* p. 45.

26 *Note verbale* by Duke Almodóvar del Río, 4 July 1898, *Archivio del Ministero degli Affari esteri italiano*, Serie Politica P, No. 43, quoted in Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *YILC*, above note 24, p. 45.

If Interpretation 2 were applied, however, responsibility for unordered displacement would not be engaged, as this type of displacement would not be considered a breach of an international obligation (thus not fulfilling the requirement for an internationally wrongful act set out in Article 2(b) of the ILC Articles on State Responsibility).²⁷ Thus responsibility would be denied on the basis of the primary rule prohibiting forced displacement and not on the basis of the secondary rule of attribution. Nevertheless, the outcome would render the secondary *ultra vires* rule meaningless, as the State would effectively escape responsibility purely on the basis that its officials were not instructed to perform the acts.

Of course, from a strictly legal point of view, States are at liberty to adopt a primary rule of international law which requires an order for a breach of international law to materialize.²⁸ However, Additional Protocol II is a treaty of international humanitarian law regulating armed conflict, i.e. in situations where control over one's subordinates is essential and for which the responsibility of a State for the acts of its armed forces has long been accepted.²⁹ Therefore, it would be hard to conceive that State representatives negotiating Additional Protocol II tried to circumvent the rule that acts *ultra vires* are attributable. For these reasons, Interpretation 2 is not satisfactory either.

Interpretation 3: Article 17(1) AP II prohibits the act of forced displacement

According to Interpretation 3, forced displacement does not need to have been ordered for a violation of Article 17 AP II to materialize. This is an interpretation in good faith and in accordance with the object and purpose of Additional Protocol II. Interpretation 3 can also be reconciled with the text of Additional Protocol II: if ordering of displacement is prohibited, this seems to imply that the act of forced displacement is prohibited too. The substance of Article 17(1) is to prohibit the displacement itself, not merely the order; therefore, if it is to be effective, displacement needs to be prohibited regardless of the means used to accomplish this, be it through an order or through indirect means (such as indiscriminate attacks)

27 According to Article 2 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts: 'There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.' *YILC*, above note 24, p. 34.

28 *YILC*, above note 24, p. 47.

29 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, adopted 18 October 1907, entered into force 26 January 1910, in De Martens, *Nouveau Recueil général de Traités*, Series 3, Vol. III, 461, Article 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, adopted 8 June 1977, entered into force 7 December 1978, 1125 UNTS 3, Article 91. Admittedly, these are provisions applicable in international armed conflict only, but Rule 149 of the ICRC Customary Law Study (Henckaerts and Doswald-Beck, above note 2) extends the content of these provisions to non-international armed conflict. It does not need to be discussed whether or not Rule 149 was customary in non-international armed conflict in 1977. The point that is made is simply that military discipline and State responsibility for violations are important principles in international humanitarian law.

which create a situation that forces civilians to leave. Otherwise, civilians who are coerced to leave an area without an order having been given – neither in the chain of command nor to the civilians directly – would not be considered as forcibly displaced. If this were correct, the prohibition of forced displacement would be void of any substance and could be easily circumvented. Interpretation 3 also finds support in the treaty practice subsequent to Article 17(1) AP II, which will be considered below after a brief outline on the standard for the interpretation of subsequent practice.

Standard for the interpretation of subsequent treaty practice

Subsequent practice is dealt with in Article 31(3)(b) of the Vienna Convention on the Law of Treaties, which reads:

There shall be taken into account, together with the context [...] any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.

The exact level of consent needed for ‘agreement of the parties’ being ambiguous, recourse to the *travaux préparatoires* of Article 31(3)(b) may be had.³⁰ The International Law Commission considered ‘that the phrase “the understanding [later changed to agreement] of the parties” necessarily meant “the parties as a whole”.’³¹ Gerald Fitzmaurice, Special Rapporteur on the Law of Treaties, specifies that ‘at least the great majority’ of the parties suffices.³²

Moreover, the International Law Commission pointed out that not every party to the treaty ‘must individually have engaged in the practice [...] but it suffices that it should have accepted the practice’³³ by ‘its reaction or absence of reaction to the practice’.³⁴ The view that acquiescence, i.e. ‘tacit consent’, can lead to an ‘agreement’ in the sense of article 31(3)(b) is confirmed by the jurisprudence.³⁵ A lack of reaction can only be interpreted as acquiescence, if it is customary to react to a certain act.³⁶ For this reason, resolutions adopted at the United Nations (UN) are a very good indication of subsequent practice, as States will necessarily endorse or react to a certain practice by voting on the resolutions.

30 Art 32, VCLT (chapeau).

31 *YILC*, 1964, Vol. 2, p. 199.

32 Gerald Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, Cambridge University Press, Cambridge, 1995, p. 796.

33 *YILC*, 1966, Vol. II, p. 222.

34 *Ibid.*, p 99. In the above quote, the ILC referred to the term ‘understanding’ rather than ‘agreement’. The drafting committee changed ‘understanding’ to ‘agreement’, not in order to alter the meaning of article 31(3)(b), but in order to attain consistency between the different authoritative language versions. See also International Court of Justice, *Kasiliki/Sedudu Island Case (Botswana/Namibia)*, Public Sitting held on 17 February 1999, Arguments by Namibia, para. 8, available at <http://www.icj-cij.org/docket/files/98/4749.pdf> (visited 17 September 2009).

35 *Beagle Channel Arbitration (Argentina v. Chile)*, International Law Reports, Vol. 52, p. 224, para. 169.

36 Wolff Heintschel von Heinegg, ‘Die weiteren Quellen des Völkerrechts’ in Knut Ipsen (ed), *Völkerrecht*, Verlag C.H. Beck, Munich, 2004, p. 239.

The treaty practice subsequent to Article 17(1) AP I supports Interpretation 3

There are numerous instances of practice that set out the prohibition of forced displacement in non-international armed conflict and clarify that Article 17(1) AP II prohibits forced displacement regardless of whether it was ordered or not.

In the context of the armed conflict in Bosnia and Herzegovina, the UN General Assembly condemned in Resolution 46/242 ‘massive violations of human rights and international humanitarian law, in particular the abhorrent practice of “ethnic cleansing”’.³⁷ The General Assembly did not discuss the question of whether or not forced displacement had been ordered. Only Yugoslavia voted against Resolution 46/242 for obvious reasons. All other States, including Croatia and Bosnia and Herzegovina (admitted to the United Nations on 22 May 1992) agreed with the interpretation in Resolution 46/242, or at least acquiesced to it. Thus all States (but Yugoslavia) agreed that forced displacement regardless of an order is illegal under Article 17(1) AP II. Considering that the UN already had almost universal membership in the 1990s, Resolution 46/242 shows wide acceptance of that interpretation.

Moreover, the UN Security Council condemned ethnic cleansing as a violation of international humanitarian law on several occasions and reaffirmed that ‘those that commit or order the commission’ of such acts are individually responsible.³⁸ The Security Council considered the armed conflicts in the former Yugoslavia to be, in part, of non-international nature.³⁹ The only treaty norm that protects civilians against forced displacement in non-international armed conflict is Article 17(1) AP II. The former Yugoslavia was a State Party to AP II and the secessionist States from Yugoslavia succeeded to these treaties. The fact that the Security Council did not discuss the question whether these forced displacements were ordered indicates that it did not consider this necessary to conclude that a violation of Article 17(1) AP II had taken place.

This construction of Article 17(1) AP II is also confirmed by jurisprudence in national law. The Colombian Constitutional Court held the following:

Protocol II also prohibits ordering the displacement of the civilian population for reasons related to the conflict [...] As regards the situation in Colombia, application of these rules by the parties to a conflict is particularly binding and important, since the armed conflict currently affecting the country has

37 UN General Assembly, Res. 46/242, UN Doc. A/RES/46/242, preamble (136-1-5). Even though the condemnation is found in the preamble, it is still a good indication of *opinio juris*. The objective of ethnic cleansing is to change the ethnic composition of a territory, primarily through displacement but also through other means. See Henckaerts and Doswald-Beck, above note 2, Vol. I, pp. 461–462.

38 UN Security Council, Res. 771, 13 August 1992, UN Doc. S/RES/771, para. 2; Res. 787, 16 November 1992, S/RES/819, para. 7; Res. 819, 16 April 1993, UN Doc. S/RES 819, para. 7; Res. 820, 17 April 1993, UN Doc. S/RES/820, para. 6; Res. 941, 23 September 1994, UN Doc. S/RES/941, para. 2.

39 *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, paras. 75–77.

seriously affected the civilian population, as evidenced by the alarming data on the forced displacement of persons included in this case. The Court cannot disregard the fact that, according to the statistics compiled by the Colombian Episcopacy, more than half a million Colombians have been displaced from their homes as a result of the violence and that, as stated in the investigation in question, the principal cause of displacement involves violations of international humanitarian law associated with the armed conflict.⁴⁰

First, the Court stated that the 'ordering' of displacement is prohibited based on Article 17(1) AP II. In a passage below, the Court found that the forced displacement was caused by violence and violations of international humanitarian law in particular (which were not necessarily ordered). This is another clear indication that Interpretation 1 is incorrect, and that Article 17(1) AP II does not require a formal order to the civilian population. Second, the Court did not address the question of whether or not these violations of international humanitarian law leading to displacement had been ordered within the chain of command and is unlikely to have known, especially with regard to the Revolutionary Armed Forces of Colombia (FARC), whether orders were actually given. This suggests that the Court considered Interpretation 3 to be correct, i.e. that Article 17(1) AP II prohibits forced displacement whether it is ordered or not.

There is much more subsequent practice in support of Interpretation 3, including the fact that many States implemented Article 17(1) AP II by prohibiting forced displacement in non-international armed conflicts without making reference to an order. Moreover, States have condemned forced displacements in non-international armed conflicts that took place on the territory of States party to AP II such as Georgia and the former Yugoslavia at the beginning of the 1990s (in the former Yugoslavia the conflicts were at least partly of non-international nature). In none of these condemnations was the question of an order raised and it cannot be assumed that State representatives always knew with certainty that an order had been given.⁴¹

40 Constitutional Court of Colombia, *Constitutional revision of Additional Protocol II and the Law 171 of 16 December 1994, implementing this Protocol*, Judgement, Constitutional Case No. C-225/95, 18 May 1995, para. 33.

41 The following instances of practice contain an explicit reference to non-international armed conflict: Canada's Law of Armed Conflict (LOAC) Manual (2004), p. 17-6 (under the heading of violations of Additional Protocol II); Colombia's Basic Military Manual (1995), p. 77; Netherlands, Military Manual (1993), p. IX-7; New Zealand, Military Manual (1992), para. 1823(1); Georgia, Criminal Code (1999), Article 411(2)(f); Tajikistan, Criminal Code (1998), Article 374(1). Tajikistan's law is ambiguous as it refers to international armed conflict or non-international armed conflict but then sets occupation as a condition; Report on the Practice of Egypt, 1997, chapter 5.5; Report on the Practice of France, 1999, chapters 5.5 and 5.7; The relevance of the following practice for non-international armed conflict is indirect (in most instances there is a reference to armed conflict thus comprising non-international armed conflict): 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons; Cotonou Agreement (Liberia peace agreement), p. 2911, para. 29; Guiding Principles on Internal Displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998, Principle 6(2)(b); 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, Part IV, Art. 3(7); France LOAC Manual (2001), p. 65; Colombia, Law on Internally Displaced Persons (1997), Articles 2(7) and 10(5); Colombia, Penal Code (2000), Article 159; Côte d'Ivoire, Penal Code as amended (1981), Article 138(3); Estonia,

A much smaller number of States and non-state actors have used the formulation in Additional Protocol II to prohibit the ‘order’ of displacement in non-international armed conflict, or agreed in a treaty to abstain from giving such an order.⁴² The fact that the number of instruments where the original formulation of Additional Protocol II is used is relatively small is in itself remarkable, since it is common practice to incorporate treaty formulations into other instruments. Moreover, the prohibition to ‘order’ displacement in these instruments would seem to comprise a prohibition on forced displacement where no order was necessarily given. This is the case because all of the States that prohibit the ‘ordering’ of displacement under national legislation voted in favour of Resolution 46/242,⁴³ which suggests that they do not regard an order as necessary to find a violation of Article 17(1) AP II.

Conclusion on the interpretation of Article 17(1) AP II

The examples quoted above support the interpretation that no order is necessary for a violation of Article 17 AP II. The argument put forward in favour of Interpretation 2 (based on the context and *travaux préparatoires*) that a distinction was intended between Article 17(1) AP II (prohibition to order displacement within the territory) and Article 17(2) AP II (prohibition to compel civilians to leave their territory) must be dismissed, as the majority of States have not retained that distinction in their national implementation, nor have they taken it into consideration in public condemnations of cases of forced displacement. For all

Penal Code (2001), para. 97; Ethiopia, Penal Code (1957), Article 282(c); Mali, Penal Code (2001), Article 31(g) and (i)(8); Nicaragua, Military Penal Code (1996), Article 58; Niger, Penal Code as amended (1961), Article 208.3(6); Slovenia, Penal Code (1994), Article 374(1); Japan, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 21; Netherlands, Letter from the Minister of Defence to the Lower House of Parliament, 1994–1995 Session, Doc. 22 181, No. 109, p. 6; New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 22; Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3344, 4 March 1994, p. 6; Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8; Report on the practice of Russia, 1997, chapter 5.5; Botswana, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 9; Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8; Spain, Statement before the UN Security Council, UN Doc. S/PV.3325, 22 December 1993; UK, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 36; UN Security Council, Res. 752, 15 May 1992, UN Doc. S/RES/752, para. 6; UN Security Council, Res. 819, 16 April 1993, S/RES/819, preamble; UN Security Council, Res. 822, 30 April 1993, UN Doc. S/RES/822, preamble; UN Security Council, Res. 918, 17 May 1994, UN Doc. S/RES/918, preamble; UN Security Council, Res. 1009, 10 August 1995, S/RES/1009, para. 2.

42 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, quoted in Henckaerts and Doswald-Beck, above note 2, Vol. II, p. 2911, para. 28; UNTAET Regulation No. 2000/15, Section 6(1)(e)(iii); Argentina, Law of War Manual (1989), para. 7.08; Bosnia and Herzegovina, Federation, Criminal Code (1998), Article 154(1); Bosnia and Herzegovina, Republika Srpska, Criminal Code (2000), Article 433(1); Croatia, Criminal Code (1997), Article 158(1); Report on the Practice of Jordan, 1997, chapter 5.5. Most of the practice quoted in this and in the preceding footnote can be found in Henckaerts and Doswald-Beck, above note 2, Vol. II, Part 2, chapter 38 on displacement, p. 2908ff.

43 Argentina, Bosnia and Herzegovina, Croatia and Jordan voted in favour. For the voting record, see UN General Assembly, 91st Plenary Meeting, 25 August 1992, UN Doc. A/46/PV.91.

these reasons, Interpretation 3 must be favoured, i.e. forced displacement does not need to have been ordered for a violation of Article 17(1) AP II to materialize.

Rule 129(B) ICRC Customary Law Study

Rule 129(B) of the ICRC Customary Law Study prohibiting the forced displacement in non-international armed conflict restates Additional Protocol II in large parts:

Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.

It would be reasonable to interpret Rule 129(B) in a manner analogous to Article 17(1) AP II, as the latter had a significant impact on the formation of the former. This would justify the hypothesis that the prohibition of an ‘order’ of displacement in Rule 129(B) comprises the prohibition of forced displacement through coercion. However, in order to confirm that interpretation, the practice of States not party to Additional Protocol II, or practice in relation to displacement on their territory, will be reviewed.⁴⁴

In Resolution 55/116 adopted in 2000, the UN General Assembly expressed its deep concern about the

serious violations of human rights and international humanitarian law by all parties in particular [...] [t]he occurrence, within the framework of the conflict in southern Sudan, of cases of [...] forced displacement of populations [...].⁴⁵

Sudan only acceded to Additional Protocol II on 13 July 2006. Therefore, all condemnations of forced displacement in non-international armed conflict, prior to that date, are based on the customary prohibition of forced displacement. The armed conflict between the Sudanese government and South Sudan was of non-international nature. Resolution 55/116 does not mention or discuss an order, nor is it likely that the drafters knew with certainty whether or not the forced displacement was ordered. Thus it can be argued that all States in favour of Resolution 55/116 implicitly shared the opinion that no order is required to trigger the application of the customary rule, which outlaws forced displacement in non-international armed conflict. The Resolution passed by 85 votes to 32, with 49 abstentions. Important States not party to Additional Protocol II were not

44 This includes practice prior to the publication of the ICRC Customary Law Study (Henckaerts and Doswald-Beck, above note 2), as it is practice from which the rules in the ICRC Customary Law Study were deduced.

45 UN General Assembly, Res. 55/116, 4 December 2000, UN Doc. A/RES/55/116, para. 2(a)(ii).

opposed: Israel voted in favour whilst the United States and India abstained.⁴⁶ None of the States, that voted against or abstained, protested against the implicit understanding of the customary prohibition of forced displacement in it, even though they had a forum to do so. Rather, their voting needs to be explained with a very broad understanding of sovereignty and internal affairs of a State and a perceived selectivity of UN General Assembly pronouncements on human rights issues.⁴⁷

In Resolution 1556 (2004) concerning the armed conflict in Darfur, the UN Security Council condemned ‘all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis, in particular by the Janjaweed, including [...] forced displacements’.⁴⁸ As the conflict in Darfur is of non-international nature, the same argument made above in relation to the conflict in South Sudan applies to Darfur *mutatis mutandis*, i.e. that the Security Council pronounced itself on the customary prohibition of forced displacement in non-international armed conflict. No State voted against Resolution 1556 and there were only two abstentions. Of the States not party to Additional Protocol II, the United States voted in favour of the resolution whereas China and Pakistan abstained.⁴⁹

In 2004, the UN Human Rights Commission condemned without a vote the ‘widespread violations and abuses of human rights and humanitarian law [including] the forced displacement of civilians’.⁵⁰ The armed conflict in Somalia was of non-international nature at that point. As Somalia is not a party to Additional Protocol II, the Commission must have pronounced itself on the basis of the customary prohibition of forced displacement in non-international armed conflict. The UN Human Rights Commission never addressed the question of whether or not the forced displacements had been ordered, and was unlikely to have known whether each of these forced displacements had in fact been carried out pursuant to an order. This suggests that it did not consider an order necessary for a finding of forced displacement.

In Resolution 61/232, the UN General Assembly expressed grave concern at the ‘attacks by military forces on villages in Karen State and other ethnic States in Myanmar, leading to extensive forced displacements’⁵¹ in the context of violations of human rights and international humanitarian law. Myanmar is not a party to

46 UN General Assembly, 81st Plenary Meeting, 3 December 2000, UN Doc. A/55/PV.81, pp. 23–24.

47 See e.g. Yemen which declined to vote on any human rights resolution (Mr Al-Ethary), UN General Assembly, 81st Plenary Meeting, 3 December 2000, UN Doc. A/55/PV.81, p. 21. The States which voted against the Resolution were Algeria, Bahrain, Chad, China, Comoros, Cuba, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Djibouti, Egypt, Gambia, India, Indonesia, Iran (Islamic Republic of), Jordan, Kuwait, Lao People’s Democratic Republic, Lebanon, Libyan Arab Jamahiriya, Mauritania, Morocco, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syrian Arab Republic, Togo, Tunisia, United Arab Emirates, Vietnam.

48 UN Security Council, Res. 1556, 30 July 2004, UN Doc. S/RES/1556, preamble.

49 UN Security Council, 5015th Meeting, UN Doc. S/PV.5015, p. 3.

50 UN Commission on Human Rights, 21 April 2004, UN Doc. E/CN.4/RES/2004/80.

51 UN General Assembly, Res. 61/232, 22 December 2006, UN Doc. 61/232, para. 2(b), voting record: 82-25-45.

Additional Protocol II and the conflict referred to was of a non-international character. Again, the General Assembly did not discuss whether or not these forced displacements had been ordered. States not party to Additional Protocol II such as Afghanistan, Andorra, Angola, Israel, Mexico, Morocco and the United States voted in favour of Resolution 61/232.⁵² States which voted against it did not criticize the interpretation that forced displacement is prohibited under customary international law regardless of whether it is ordered or not. Therefore, Resolution 61/232 is interpreted in support of the view that there is no requirement for an order in the customary prohibition of forced displacement.

Although the US are not a party to Additional Protocol II, Article 17(1) AP II 'reflects general US policy'.⁵³ At the same time, as has been mentioned, the US condemned forced displacement in Darfur⁵⁴ and Myanmar⁵⁵ without discussing whether each of these displacements had been ordered. Azerbaijan and India, which are not party to Additional Protocol II, have prohibited forced displacement in non-international armed conflict without requiring an order.⁵⁶

State practice and *opinio juris* of States not party to Additional Protocol II, and in relation to armed conflicts on the territory of such States, shows that the customary prohibition on forcible displacement also covered displacement which was not the result of an order.

Article 8(2)(e)(viii) ICC Statute and its implementing legislation

Article 8(2)(e)(viii) ICC Statute

According to Article 8(2)(e)(viii) of its Statute, the ICC has jurisdiction over forced displacement in non-international armed conflict. The crime is defined as follows:

Ordering the displacement of the civilian population for reasons related to the armed conflict, unless the security of the civilians involved or imperative military reasons so demand.⁵⁷

The Elements of Crimes require, *inter alia*, that the 'perpetrator ordered a displacement of the civilian population'⁵⁸. Knut Dörmann indicates that this formulation was chosen in order

52 UN General Assembly, 84th Plenary Meeting, 22 December 2006, UN Doc. A/61/PV.84, pp. 14–15.

53 Report on US Practice, 1997, chapter 5.5, referring to a Message from the US President Transmitting AP II to the US Senate for Advice and Consent to Ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 17, quoted in Henckaerts and Doswald-Beck, above note 2, para. 17.

54 UN Security Council, 5015th Meeting, UN Doc. S/PV.5015, p. 3.

55 UN General Assembly, 84th Plenary Meeting, 22 December 2006, UN Doc. A/61/PV.84, p. 15.

56 Report on the Practice of India, 1997, chapter 5.5, para. 103; Azerbaijan Criminal Code, 1999, Article 115.2 (quoted in Henckaerts and Doswald-Beck, above note 2, Vol. II, at paras. 103 and 70, respectively).

57 Article 8(2)(e)(viii), ICC Statute.

58 International Criminal Court (ICC), *Elements of Crimes*, ICC-ASP/1/3(part II-B), adopted and entered into force 9 September 2002, p. 42, Element 1.

to implicate the individual giving the order, not someone who simply carries out the displacement (this fact does not exclude the possibility that the person carrying out the displacement can be held individually responsible, for example for participation in the commission of the crime; see Article 25 of the ICC Statute dealing with other forms of individual criminal responsibility).⁵⁹

The Elements of Crimes also proscribe that the ‘perpetrator was in a position to effect such displacement by giving such an order.’⁶⁰ According to Dörmann this

would cover both *de iure* and *de facto* authority to carry out the order, so that the definition would cover the individual who, for example, has effective control over a situation by sheer strength of force.⁶¹

In sum, the Elements of Crimes for Article 8(2)(e)(viii) of the ICC Statute require an order by a person with authority as a means of establishing individual criminal responsibility at the top of the hierarchy. Thus the Elements of Crimes do not require that an order of displacement is addressed to the civilian population publicly; an order within the chain of command is also sufficient.

It remains to be seen whether the ICC will follow the Elements of Crimes which ‘shall assist’ the ICC ‘in the interpretation and application of Articles 6, 7 and 8’.⁶² According to the prevailing view, the ICC Elements of Crimes are only a subsidiary means of interpretation.⁶³ Some even argue that the Elements of Crimes are not binding on the ICC.⁶⁴ In that regard, Otto Triffterer opines that the Elements of Crimes are a ‘proposal’ which the ICC may accept, alter or refuse in its interpretation.⁶⁵

At any rate, even if Article 8(2)(e)(viii) ICC Statute requires an order, this does not limit or prejudice the scope of Article 17(1) AP II and Rule 129(B) of the ICRC Customary Law Study as interpreted above. This follows from Article 10 of the ICC Statute which reads:

Nothing in this part [including the definition of war crimes] shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law for purposes other than this Statute.

59 Knut Dörmann, *Elements of War Crimes under the Rome Statute*, Cambridge University Press, Cambridge 2002, p. 472.

60 ICC, *Elements of Crimes*, above note 58, p. 42, Element 3.

61 Dörmann, *Elements of War Crimes*, above note 59, p. 473.

62 Article 9(1), ICC Statute.

63 See e.g. Mauro Politi, ‘Elements of the Crimes: an overview’, in Antonio Cassese, Paola Gaeta and John R.W.D. Jones (eds), *The International Criminal Court: A Commentary*, Oxford University Press, Oxford, 2002, Vol. I, p. 447; Erkin Gadirov, in Otto Triffterer (ed), *Commentary on the Rome Statute of the International Criminal Court*, Nomos Verlagsgesellschaft, Baden-Baden, 1999, p. 309.

64 Dörmann, *Elements of War Crimes*, above note 59, p. 8. According to Dörmann, Article 9(3) of the ICC Statute is *lex specialis* to Article 21(1)(a) ICC Statute.

65 Otto Triffterer, in Bernd Schünemann et al. (eds), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001*, De Gruyter, Berlin, 2001, p. 1430.

Implementing legislation of Article 8(2)(e)(viii) ICC Statute

Article 10 of the ICC Statute stipulates that Part 2 of the ICC Statute must not be interpreted as limiting rules of international law. However, it cannot be excluded that implementing legislation of the ICC Statute has a restricting effect on customary international law. In the present case, States could restrict the customary prohibition of forced displacement by incorporating the Elements of Crimes in their national law.

Although the principle of complementarity certainly gives States an incentive to incorporate the crimes in the ICC Statute into their domestic law,⁶⁶ the ICC Statute does not expressly oblige States to do so. Nor are States bound to follow the ICC Elements of Crimes if they choose to implement the crimes set out in the ICC Statute. Some States have indeed chosen not to incorporate the crimes in the ICC Statute into their national law when implementing the rules on co-operation with the ICC. Moreover, there are still many States Parties to the ICC Statute which have not yet implemented the Statute. Thus it is not yet clear to what extent precisely States will follow the definition of crimes in the ICC Statute and in particular in the ICC Elements of Crimes or how national courts will interpret the prohibition of forced displacement in practice.

This being said, there seems to be a trend to simply restate the war crimes of the ICC Statute in national legislation, including the term ‘ordering’ in Article 8(2)(e)(viii).⁶⁷ Germany is an exception, which criminalizes forced displacement as such.⁶⁸ With the exception of Australia,⁶⁹ States tend not to implement the ICC Elements of Crimes, which gives national courts some flexibility in their interpretation of the equivalent to Article 8(2)(e)(viii) ICC Statute under national legislation. Even if States followed the ICC Elements of Crimes, this would most likely not have an impact on the prohibition of forced displacement in non-international armed conflict (which would remain illegal whether ordered or not). Indeed, practice shows that the criminalization of ‘ordering’ does not mean that forced displacement without an order is legal. In that vein, both Canada and New Zealand, which have adopted Article 8(2)(e)(viii) ICC Statute *verbatim* in criminal legislation,⁷⁰ prohibit forced displacement in non-international armed conflict in their military manuals without requiring that it be ordered.⁷¹

66 See Article 17, ICC Statute.

67 See e.g. Australia, ICC (Consequential Amendments) Act, 2002, Schedule 1, para. 268.89; Canada, Crimes Against Humanity and War Crimes Act, 2000, Schedule; New Zealand, International Crimes and ICC Act, 2003, Section 11(2); Trinidad and Tobago, Draft ICC Act (1999), Section 5(1)(a); United Kingdom ICC Act, 2001, Sections 50(1) and 51(1). The latter three acts are quoted in Henckaerts and Doswald-Beck, above note 2, at paras. 124, 144 and 148, respectively.

68 See Germany, Law Introducing the International Crimes Code (2002), Article 1, para. 8(1)(6), quoted in Henckaerts and Doswald-Beck, above note 2, para. 100.

69 Australia, ICC (Consequential Amendments) Act (2002), Schedule 1, para. 268.89.

70 See above note 67 and corresponding text.

71 Canada’s Law of Armed Conflict (LOAC) Manual (2004), p. 17-6; New Zealand, Military Manual (1992), para. 1823(1) quoted in Henckaerts and Doswald-Beck, above note 2, para. 54.

In sum, it is still an open question whether or not the ICC will follow the order requirement in the Elements of Crimes for Article 8(2)(e)(viii). At any rate, the order requirement in the Elements of Crimes is very unlikely to have a limiting impact on customary international law.

Conclusion

It has been argued that Article 17(1), AP II not only prohibits orders of forced displacement, but also the coercion of civilians to leave an area. This is an interpretation in good faith and in accordance with the object and purpose of Additional Protocol II to ‘ensure a better protection for the victims of [...] armed conflicts’.⁷² Otherwise, parties to a non-international armed conflict could circumvent the prohibition laid down in Article 17(1) AP II by forcibly displacing the civilian population through coercion and claiming that this displacement had not been ordered. Moreover, the conclusion that an order is not necessary is evidenced by treaty practice subsequent to Article 17(1) AP II. In their implementation of Article 17(1) AP II in military manuals and penal codes, many States Parties to Additional Protocol II have dropped the term ‘ordered’. In addition, the UN Security Council and the UN General Assembly condemned forced displacement in resolutions adopted unanimously or by large majorities without discussing whether the forced displacements had been ordered.

As in Article 17(1), AP II, the prohibition on ordering displacement in Rule 129(B) of the ICRC Customary Law Study includes unordered forced displacement. This holds true because States not party to Additional Protocol II have prohibited forced displacement regardless of whether it has been ‘ordered’ in their domestic legal systems. In addition, States condemned forced displacement on the territory of States not party to Additional Protocol II without considering whether or not these forced displacements had been conducted in pursuance of an order.

On the other hand, in order for forced displacement to constitute a crime, the ICC Elements of Crimes expressly require that the perpetrator ordered the displacement of civilians. This does not need to be an order to the civilian population, but may be an order within the political or military chain of command. Future jurisprudence will reveal whether the ICC will adopt this order requirement in the Elements of Crimes. However, it follows from Article 10 of the ICC Statute that Article 8(2)(e)(viii) of the Statute, even if interpreted in accordance with the corresponding Elements of Crimes, is without prejudice to the interpretations of Article 17(1), AP II and Rule 129(B) of the ICRC Customary Law Study above.

This leaves the question open as to exactly which elements constitute forced displacement in non-international armed conflict. All three rules under consideration (Article 17(1), AP II, Rule 129(B) of the Customary Law Study, and Article 8(2)(e)(viii) ICC Statute) prohibit forced displacement ‘unless the security

72 Preamble, AP II.

of the civilians involved or imperative military reasons so demand'. Moreover, if civilians leave an area and this cannot be justified by these two exceptional reasons, displacement could nevertheless be lawful if it was entirely voluntary. Under which circumstances can displacement be considered voluntary and under which it is not? It has been pointed out above that the criteria for forcible transfer as a crime against humanity cannot necessarily be used to clarify forced displacement as a war crime.⁷³ However, there is no reason why this could not be done in order to determine the voluntariness of displacement. In this regard, the ICTY used the following criteria in *Blagojević and Jokić*:

It is the 'forced character of displacement and the forced uprooting of the inhabitants of a territory' that give rise to criminal responsibility. The requirement of 'forcible' describes a situation where individuals do not have a free or 'genuine' choice to remain in the territory where they were present. The element of 'forcible' has been interpreted to include threats or the use of force, fear of violence, and illegal detention. It is essential therefore that the displacement takes place under coercion. Even in cases where those displaced may have wished – and in fact may have even requested – to be removed, this does not necessarily mean that they had or exercised a genuine choice. The trier of fact must consequently consider the prevailing situation and atmosphere, as well as all relevant circumstances, including in particular the victims' vulnerability, when assessing whether the displaced victims had a genuine choice to remain or leave and thus whether the resultant displacement was unlawful.⁷⁴

In determining whether displacement was forced, only unlawful violence, e.g. violence which is indiscriminate or specifically directed against the civilian population, should be taken into account. Indeed, the flight of the civilian population from lawful military operations, where parties have taken precautions to spare civilians and civilian objects, can hardly be equated to forced displacement caused by coercion of civilians.

73 See paragraph accompanying note 9 above. In the above, the ICTY jurisprudence on crimes against humanity was not used in order to ascertain whether an order is necessary for a violation of Article 17(1) AP II, also because Article 5 of the ICTY Statute does not require an order for crimes against humanity.

74 ICTY, *Prosecutor v. Blagojević and Jokić*, Trial Judgement, IT-02-60-T, 17 January 2005, para. 596, referring, *inter alia*, to ICTY, *Prosecutor v. Krnojelac*, Appeal Judgement, IT-97-25-A, 17 September 2003, para. 229.

Humanitarian assistance to migrants irrespective of their status – towards a non-categorical approach

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Abstract

Humanitarian organizations dealing with migrants have long prioritized such people according to legal and institutional categories, therefore focusing on those fleeing conflict, violence or persecution. In a departure from this tradition, it was recommended at the 30th International Conference of the Red Cross and Red Crescent that the Movement should take an inclusive approach towards addressing the humanitarian dimension of migration, irrespective of the status of the migrants of concern. This article discusses the shift towards such an approach, and how it has been implemented in the International Federation of Red Cross and Red Crescent Societies' migration policy.



The year 2007 was a turning point for the Red Cross and Red Crescent Movement as this was the year when its high governance, including the 30th International Conference of the Red Cross and Red Crescent, acknowledged for the first time that migration, in a broad sense of the term, is one of its major strategic challenges of the future. Moreover, the recommendation issued in 2007 was that, in addressing the humanitarian dimension of migration, the Red Cross and Red Crescent should take an inclusive approach, irrespective of the status of the

migrants of concern. Therefore, the needs and vulnerabilities of migrants should prevail over the legal (or other) category to which they belong.

Adopting such a non-categorical approach requires a departure from a long-standing tradition. Humanitarian organizations have long been used to prioritizing the different categories of uprooted people according to international law and their institutional mandates. Thus they had the tendency to consider those whose move was linked to conflict, violence or persecution of special concern. ‘Economic migrants’ and others falling under non-specific international legal regimes were rather subsumed under the general humanitarian action.

As a consequence of the 2007 call for a strategic rethinking, the International Federation of Red Cross and Red Crescent Societies developed a general policy, setting out a strategic framework on the humanitarian dimensions of migration. The policy provides directions on how to avoid categorization and focus on the humanitarian dimensions in a more inclusive manner.

In particular, the policy is based on a descriptive concept of migration that allows for a direct and consistent focus on humanitarian concerns rather than typologies. Furthermore, it is clearly addressed to community-based staff as the primary actors that translate the humanitarian imperative into action, rather than to governmental or paragonovernmental audiences who act under the imperative to promote and guarantee legal mandates, rules and categories.

The traditional approach to categorizing migrants

In the eyes of politicians and the general public today, migration is often perceived exclusively as a challenge in terms of the management and regulation (or prevention) of ‘demographic pressures’ and ‘migratory fluxes’. Reinforced by the common notion of ‘the foreigner as a threat’, this perception has increasingly tended to deflect attention away from the humanitarian dimensions of migration.

The work of humanitarian organizations, on the other hand, has traditionally emphasized the plight of uprooted people whose movement is related to conflict, violence and persecution.

The development of international refugee law, and the efforts of the UN High Commissioner for Refugees as the agency mandated to safeguard it, have been indispensable in strengthening and sharpening international protection for a special category of uprooted people. The adoption of the 1951 Convention relating to the Status of Refugees, as well as its 1967 Protocol and several regional refugee conventions,¹ created sharply defined categories of refugees who as individuals are entitled to special protection and special humanitarian assistance. Accordingly,

1 In particular, the Organisation of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969, as well as the (non-binding) Cartagena Declaration on Refugees, 1984.

special procedures were also established, primarily at national level, to determine the asylum status of each claimant on an individual basis.²

This said, international refugee law also reflects the preoccupation of states with narrowing down the category of persons entitled to protection and assistance. Thus it had the side-effect of reinforcing the view that migrants who move due to socio-economic pressures and constraints, or simply voluntarily, merit only secondary, if any, humanitarian attention. Often labelled 'economic refugees' or 'economic migrants', these persons were assumed to have a space of choice enabling them to avoid distress and suffering. Their uprootedness was not considered a source of special vulnerability requiring a strategic humanitarian response. If such migrants faced difficulties, it was assumed that the response would fall under the general social and humanitarian responsibility of governments but was not of any special international concern.

One development towards a more inclusive and global approach was the emergence, in the 1990s, of the wider concept of 'forced migration'. Besides refugees under the 1951 Convention, this concept encompasses all 'people displaced by natural or environmental disasters, chemical or nuclear disasters, famine, or development projects'.³ Yet the concept still excludes the migrant who moves in search of better economic and social opportunities, in spite of the ample evidence that such people often face hardship and hostility. Thus the concept of 'forced migration' still does not capture the humanitarian reality of migration in its entirety.

The exclusive approach focusing on specific groups of migrants is also reflected in the history of the International Red Cross and Red Crescent Movement. Throughout the 20th century, the terms 'migrant' and 'migration' are absent from the statutory language of the International Conferences of the Red Cross and Red Crescent. Instead, the Conferences designated more specific categories – be that in the context of humanitarian protection under international humanitarian law, be that for general humanitarian relief. It is striking to look at the terminology that was used: 'Prisoners of war, deportees, evacuees and refugees' (1921), 'Stateless persons, refugees of war, war victims' (1948), 'Refugees, returnees and displaced persons' (1981), 'Refugees, asylum seekers and displaced persons' (1986) 'Refugees and internally displaced persons' (1995 and 1999).⁴

2 The institution of 'prima facie refugee', i.e. of a provisional refugee status granted to a person or group without individual status determination, as implicitly stipulated under the broader definition of refugees in the OAU Convention, or also foreseen in provisions of national law or administrative regulations in many countries, is clearly an exception for situations of rapid onset displacement of large numbers of people across international borders, normally due to armed conflict and/or generalized violence.

3 See Forced Migration Online, *What is forced migration?*, available at <http://www.forcedmigration/whatisfm.htm> (last visited 29 September 2009).

4 10th International Conference, March 1921, Geneva: Resolution 15; 27th International Conference, August 1948, Stockholm: Resolution 31; 24th International Conference, November 1981, Manila: Resolution 21; 25th International Conference, October 1986, Geneva: Resolution 17; 26th International Conference, December 1995, Geneva: Resolution 4; 27th International Conference, November 1999, Plan of Action, Goal 2.3.

It seems, therefore, that in the past, the high governance of the Red Cross and Red Crescent considered principally those uprooted people whose movement was linked to conflict, violence or persecution to be of special and strategic humanitarian importance. This appears, by the way, quite a logical consequence of the bloody history of the 20th century, marked by the two World Wars and the numerous conflicts of the Cold War. General humanitarian attention and the operational priorities basically led to a strong focus on those migratory phenomena that were linked to conflict, violence and persecution.

This certainly does not mean that migrants not fitting under these criteria were systematically ignored by National Societies. Given the dispersal of archival evidence from today's 186 National Societies, it is extremely difficult to take full stock of past activities. This said, early examples do exist of assistance afforded to migrants of all categories, such as medical services to immigrants awaiting re-settlement, integration aid to post-war returnees, or basic health care for poor rural migrants. Deep research, in particular in the archives of immigration countries, may even bring to light some evidence of early strategic programming on migration at National Society level.

Nevertheless, for the Red Cross and Red Crescent, as a global Movement, no evidence can be found before the last decade of the 20th century that would indicate an acknowledgement of migration as a common, strategic and constitutive concern.

The 2007 turning point: Recognition of migration as an encompassing concern

It is only in the mid-nineties of the last century that a wider awareness began to emerge, of which a decision of the International Federation's General Assembly in 1995 is the earliest example. Noting, in particular, 'the restrictive measures taken by host countries and the expressions of racism, xenophobia and discrimination among some of them', this decision, 'requests National Societies to consider action in favour of migrant populations [...]', 'invites [them] to encourage migrants to take part in their activities', and underlines the need for co-operation with governments and international specialized institutions.⁵ From this instance onwards, migrants and migration slowly became a reference at governance level of the Movement – although still rarely so, and rather in passing.⁶

5 10th session of the General Assembly of the International Federation of Red Cross and Red Crescent Societies, Geneva, 1995, Decision 12: 'Red Cross and Red Crescent Work with Migrants'.

6 See for example: 27th International Conference, Geneva, 1999, Reference Document (Goal 1.1: Protection of victims of armed conflict through respect of International Humanitarian Law; Goal: 3.1: Strategic partnership to improve the lives of vulnerable people); Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, November 2001, Resolution 4: 'Movement Action in favour of Refugees and Internally Displaced Persons'; Council of Delegates, Geneva, August 2003: 'Tolerance, Non-discrimination, Respect for Diversity', Document prepared by the International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies.

The real strategic change towards a new understanding of migration as a truly encompassing humanitarian concern came bottom-up: it is one of the very features of the Red Cross and Red Crescent Movement, as a community-based network, that humanitarian concerns often ‘filter up’ from the work on the ground, and therefore take time to get fully through to the sphere of high governance. Thus it was foremost at the level of Red Cross and Red Crescent Regional Conferences that the issue of migration as a grand humanitarian concern was discussed in depth, and the call for a comprehensive humanitarian engagement on their behalf became insistent (Berlin and Manila 2002, Santiago de Chile 2003, Athens, Istanbul and Guayaquil 2007).⁷

As the Movement’s Council of Delegates put it rather diplomatically in 2007:

‘[...] Feedback from the different components of the Movement shows that [the] statutory decisions do not always provide sufficient guidance for the Movement in its work to address the plight of persons in need of assistance and protection in the course of their migratory movements’.⁸

Consequently, in November 2007 the General Assembly of the International Federation of Red Cross and Red Crescent Societies reacted by mandating the development of a global policy on migration,⁹ requesting that this Federation policy should also benefit from the expertise of the International Committee of the Red Cross. In this manner, it announced a new, comprehensive, and far-reaching ambition.

Perhaps even more significant in terms of an official recognition of the issue as an encompassing humanitarian challenge was the declaration *Together for Humanity*, subsequently adopted by the 30th International Conference of the Red Cross and Red Crescent.¹⁰ One of the four sections of this declaration deals exclusively with ‘Humanitarian concerns generated by international migration’.

Alongside the 186 National Societies, the International Conferences include the 194 States party to the Geneva Conventions. Therefore, it is striking how far the declaration went in acknowledging the dimensions of the problem:

‘We are particularly concerned that migrants, irrespective of their status, may live outside conventional health, social and legal systems and for a variety of

7 6th European Regional Conference of the Red Cross and Red Crescent, Berlin, April 2002; 6th Asia and Pacific Regional Conference of the Red Cross and Red Crescent, Manila, November 2002; XVII Inter-American Conference of the Red Cross, Santiago de Chile, April 2003; 10th Mediterranean Conference, Athens, March 2007; 7th European Regional Conference of the International Federation of Red Cross and Red Crescent Societies, Istanbul, May 2007; XVIII InterAmerican Conference, Guayaquil, Ecuador, June 2007.

8 Council of Delegates of the International Red Cross and Red Crescent Movement, Geneva, November 2007, Background Paper: ‘International Migration’, p. 1.

9 16th Session of the General Assembly, Geneva, Switzerland, 20–22 November 2007, Decision 12: ‘Migration’.

10 30th International Conference of the Red Cross and Red Crescent, Geneva, November 2007, Resolution 1: ‘Declaration: Together for Humanity’, available at: <http://www.ifrc.org/Docs/pubs/events/intconf07/adopted/declaration-en.pdf> (last visited 29 September 2009).

reasons may not have access to processes which guarantee respect for their fundamental rights'.¹¹

On the basis of this acknowledgement, the Conference then calls for '[reinforced] international co-operation at all levels to address the humanitarian concerns generated by international migration'. Spelling out a number of specific areas of concern, it underlines the 'role of the International Red Cross and Red Crescent Movement' and concludes by recognizing, in particular, the role of National Societies 'in providing humanitarian assistance to vulnerable migrants, irrespective of their legal status'.¹²

In this way, the language of the 30th International Conference lays out an encompassing and inclusive concept of migration as a humanitarian challenge. Its insistence on the needs of migrants 'irrespective of their (legal) status'¹³ precludes any limitation of humanitarian assistance and protection to specific categories.

Towards a non-categorical humanitarian approach

When it comes to formulating a global policy on migration for the Red Cross and Red Crescent, the consequences of the non-categorical approach stipulated by the International Conference in 2007 are indeed far-reaching. There are considerable obstacles and problems to overcome.

'Rights-based programming' – the method used by many humanitarian organizations in recent years – justly highlights the fact that the degree to which a person enjoys, or is denied, his/her rights is a co-determinant of vulnerability. However, the method has also encouraged many humanitarian workers to think first and foremost in legal categories rather than in an encompassing manner.

This being said, even for adherents of the conventional 'needs-based approach' it is difficult to avoid creating certain types of beneficiary categories, and aligning programmes accordingly – whether these categories are built on legal status, or on other single distinguishing qualities. As a matter of fact, special programming is often vital for certain basic categories, such as children.

Moreover, as pointed out earlier, the humanitarian mainstream of the past was precisely focused on specific categories, in particular refugees and asylum seekers, rather than migration in a broad sense, as a source of humanitarian concern. This tradition is reflected in today's programming of many National Societies. Broadening the focus, without losing the specific expertise and capacities acquired over decades, requires major changes in strategic programming and the use of structures and resources.

11 *Ibid.*

12 *Ibid.*

13 *Ibid.*

For example, it is only natural for a National Society benefiting from public contracts in conducting its support programmes for asylum seekers and refugees to be reluctant when it comes to enlarging its activities by setting up additional assistance for migrants who are deemed irregular: the specific expertise acquired over years in working with asylum seekers and refugees is often not easily transposable onto irregular migrants. Additional funding for assistance to irregular migrants may also be difficult to obtain; moreover, in many countries such assistance programmes would be considered as a transgression, and could endanger the public funding for assistance to groups who are deemed by the state to be legitimate, namely asylum seekers and refugees.

In fact, there is a wide-spread and legitimate concern that a broad humanitarian approach to migration – one that admits that irregular and regular migrants are equally entitled to basic humanitarian assistance and protection, based on a strict concept of human needs and vulnerabilities – will undermine the special protection that is due to asylum seekers and refugees. Yet we know in the meantime – the 30th International Conference has left no doubt about it – that the humanitarian dimensions of migration go well beyond the boundaries that traditionally served the Movement in targeting its action to those uprooted persons it considered of special concern.

Besides, it is in the very nature of humanitarian action that it cannot wait for clean definitions and proper processes to sort out who is of concern and who is not. Instead, it must continuously redefine itself to shape an adequate response to the complexity of social phenomena as they evolve. Migration is, undoubtedly, a typical example of such a complex and evolving phenomenon: there is no binding, internationally accepted definition of migration. The terminology in use today is diffuse and often politically charged.¹⁴ In addition, migrants' status and situation change along the migratory trails. Nevertheless, we know that the humanitarian needs and vulnerabilities accompanying the phenomenon are pressing and require a strategic readjustment.

There are no easy answers, of course, as to how a new approach should be articulated – the debate must go on. However, the policy on migration, developed under the lead of the Federation's Reference Group on Migration appointed following the decision of the 2007 General Assembly, provides a first direction.¹⁵ Its two most general tenets are outlined in the sections that follow.

14 For example, who exactly is an 'illegal' or 'irregular' migrant? In many contexts – particularly in regions where borders have been drawn arbitrarily, cutting through ethnic and historical entities – making the difference is impossible. And even where the legal instruments to draw a distinction exist, these can be in contradiction to other law: If the act of crossing a border elsewhere than at official entry points is made a criminal act – what about the migrant who crosses in this manner but under constraints that constitute a claim to protection under international refugee law?

15 International Federation of Red Cross and Red Crescent Societies, *Policy on Migration*, May 2009, available at: <http://www.ifrc.org/Docs/pubs/who/policies/migration-policy-en.pdf> (last visited 29 September 2009). The document was approved by the Federation's Governing Board on 3 May 2009. The Board requested that implementation of the policy should go underway, in anticipation of its final endorsement by the General Assembly in November 2009.

Taking a descriptive and open approach to who is considered a migrant

An essential assumption in humanitarian work is that beneficiaries at all times present a range of qualities, which will cumulatively determine their assistance and protection needs. Exclusive categories formed on the basis of a single criterion or quality are perhaps helpful for theoretical purposes, but they are of little use when it comes to formulating an adequate response to actual needs in their diversity. Classifications such as ‘refugee’, ‘migrant’, etc. are abstractions that do not reflect the complexities on the ground.

This is also the reason why a legal typology of migrants falls short of the humanitarian reality. It may reveal their qualities as related to specific rights¹⁶ but other qualities (origin, state of health, gender, age, motivations, and so many others) are equally important and need to be taken into account simultaneously.

This said, a basic understanding of the subject of our attention is indispensable in order to align our work under a common policy that makes sense, i.e. is targeted and specific. The way forward may be an approach that does not define migrants as belonging to a category formed on the basis of sharp criteria for inclusion and exclusion, but rather describes migrants as belonging to a ‘family of concerns’ with overlapping similarities, but where no single characteristic necessarily must be common to all.¹⁷

As an example, evidently a migrant is not a migrant simply because of his or her humanitarian vulnerabilities and needs – there are many migrants that require no assistance. Inversely, a vulnerable person in need of assistance is not necessarily a migrant. However, humanitarian needs and vulnerabilities are a ‘family resemblance’ that occurs quite frequently among migrants. As another example, a migrant is not necessarily a person ‘on the move’ just as a person ‘on the move’ is not necessarily a migrant. However, migratory movement is, indeed, a frequent feature in migrants’ lives – though this is again not always the case, for example for second generation migrants. Lastly, migrants whose move is entirely voluntary are rare, and for many, the pressures and constraints that induce them to migrate are considerable. Yet conversely, migration cannot be characterized merely as a forced movement. So the ‘family resemblance’ here could be that migration is, usually but to a certain and limited degree, a deliberate and planned move.

Thus, by using multiple ‘soft criteria’ on a sliding scale, one arrives at a description of the phenomenon that will allow a direct assessment of what

16 Indeed, in many contexts (although not all), legal considerations constitute an important determinant helping us to formulate a template for migrant’s needs, vulnerabilities, potentials, and prospects inasmuch as they relate to the realization or denial of one or the other specific right. Thus for many contexts, including migration, they do deserve special mention in terms of the operational instruments as well as the arguments for advocacy they can provide to humanitarian action with (see International Federation of Red Cross and Red Crescent Societies, *Policy on Migration*, above note 15, section 4: ‘*Recognizing the Rights of Migrants*’).

17 In philosophical terms, this is following the concept of ‘family resemblances’ used by Ludwig Wittgenstein in arguing against Aristotelian categorization.

humanitarian response may be required, without having to take a preliminary sharp and artificial decision as to what subject to include or exclude.

The use of ‘soft criteria’ does not preclude differentiations between migration and other forms of human mobility. For example, the Federation policy keeps migration distinct from displacement, as two separate, if interrelated, ‘families of concern’.¹⁸ On the one hand, migration usually occurs individually or in small groups and is characterized by complex migratory motivations. The pressures and pull-factors that induce migration make themselves felt over time. Displacement, on the other hand – be it across borders (e.g. refugee exoduses/influxes) or internal (e.g. due to disasters or armed conflict) – is usually more of a collective, unplanned, involuntary phenomenon due to a sudden-onset crisis; the displaced must move as a temporarily coping mechanism, but with the intent to return as conditions allow.¹⁹

From an operational point of view, the difference is evident, but again the distinction is not rigid and categorical: migration normally requires a social care approach, involving a range of individual choices, perspectives, and constraints; also, given the humanitarian principle of neutrality, migration should neither be discouraged nor encouraged. Displacement normally involves relief and ‘care and maintenance’ operations, combined with efforts aiming at collective durable solutions, with return often the one of predilection; also, in principle, the displacement of populations must be prevented.

In sum, the descriptive approach, based on a ‘family of concerns’, rather than sharp ‘categories’, is best suited to capture directly and integrally the humanitarian concerns arising under the complex universal phenomenon of migration. Therefore, it is this approach that the Federation’s policy on migration has taken. In its introduction, it gives a description of the wide range of difficulties that migrants may encounter, concluding:

‘In order to capture the full extent of humanitarian concerns [...], our description of migrants is deliberately broad: migrants are persons who leave or flee their habitual residence to go to new places – usually abroad – to seek opportunities or safer and better prospects. Migration can be voluntary or involuntary, but most of the time a combination of choices and constraints are

18 International Federation of Red Cross and Red Crescent Societies, *Policy on Migration*, above note 15, art. 9.1: ‘Situations of displacement of populations are often linked to migration’ because ‘[p]eople in displacement may not be in a position to return or to stay where they have sought refuge. Thus, they may take the path of migration to reconstruct their lives elsewhere’.

19 A more systematic presentation of the sliding scale of multiple criteria for differentiating between migration and displacement might look as follows:

| | MIGRATION | | DISPLACEMENT |
|--------------------------------|-----------------------------|---------|--------------------------|
| (1) <i>Subject</i> | Individual or small group | ←.....→ | Collectives, populations |
| (2) <i>Cause</i> | Slow-onset pressure or pull | ←.....→ | Sudden impact |
| (3) <i>Movement</i> | Slow-continuous | ←.....→ | Rapid-accelerating |
| (4) <i>Predetermination</i> | Premeditated move | ←.....→ | Precipitated flight |
| (5) <i>Intent/time-horizon</i> | Longer-term intent | ←.....→ | Temporary move |
| (6 etc) | | | |

(additional criteria on a sliding scale)

involved. Thus, this policy includes, among others, labour migrants, stateless migrants, and migrants deemed irregular by public authorities. It also concerns refugees and asylum seekers, notwithstanding the fact that they constitute a special category under international law.²⁰

Focusing on community-based staff as the primary humanitarian actor

The challenge is not merely which conceptual approach to migration should be adopted; much will also depend on who is to translate the approach into humanitarian action. After all, it is at this level that the assistance, irrespective of status, will be provided.

The question of who the policy audience within National Societies ought to be is delicate: National Societies play an important role as humanitarian auxiliaries in support of public authorities. Thus authorities on the ground may interpret this to mean that National Societies, through their action, should participate in the promotion of law, including by enforcing legal categorizations in the assistance to migrants.

This would, however, be a misunderstanding of the auxiliary role. A precondition of the role is the recognition and respect by public authorities of the principles proper to the Red Cross and Red Crescent – principles that are different from those that underlie governmental action. Maintaining this difference is crucial in order to allow National Societies to respond directly and without partiality to the humanitarian dimensions of migration. This is why it is essential to understand the profile of the primary audience that a Federation policy on migration must primarily address.

It goes without saying that humanitarian programming must be responsive to and respectful of its beneficiaries. Programmes should be constructed on the basis of a direct relationship with beneficiaries as well as other stakeholders on the ground. The rooting of National Societies of the Red Cross and Red Crescent in their communities is fundamental. It is at this level that the humanitarian imperative is translated into action, and from this source that Red Cross and Red Crescent work derives its humanitarian pertinence. A National Society lacking this field-based operational backbone becomes a ‘stranger to its own community’, ineffective in its relations with counterparts, and unresponsive to needs.

Therefore, the Federation policy on migration is geared towards those whose action it intends to align and reinforce, i.e. the community-based National Society staff. Such a policy must be fundamentally different from one aimed at bearers of governmental functions who must act as promoters and guarantors of legal mandates, rules and categories. National Society staff on the ground should act, first and foremost, under the imperative for neutral and impartial humanitarian action. While their action, like any action, must respect the legal

20 International Federation of Red Cross and Red Crescent Societies, *Policy on Migration*, above note 15, Introduction, p. 3.

frameworks, their prime objective is not to promote and guarantee the rule of law but rather to assist and protect those vulnerable and in need.

The 30th International Conference reaffirmed this difference by underlining the special role of National Societies in providing humanitarian assistance to vulnerable migrants, ‘irrespective of their (legal) status’. There are contexts and situations in which the very identity of a government official restricts his or her capacity to assist without differentiation²¹ – this is where the Red Cross and Red Crescent must come in to accomplish its specific humanitarian task!

This is why the Federation policy on migration has been formulated with a clear focus on Red Cross and Red Crescent staff as its primary audience. It is only through their action that the Movement can maintain a ‘primary focus on migrants whose survival, dignity, or physical and mental health is under immediate threat’.²² It is only through them that activities can be integrated to link ‘direct assistance [with] legal advice, referrals to relevant organisations, and different forms of advocacy’;²³ and it is only at their level that we can realize and support ‘community linkages [as] part of National Societies’ overall engagement in promoting the social inclusion and integration of migrants’.²⁴

Conclusion

The general way forward projected by the International Federation in view of its new approach to the humanitarian dimensions of migration is thus as follows:

1. First of all, we must abstain from following categories of inclusion and exclusion in conceiving the humanitarian subject of migration. Instead we should group the subject under a description of the humanitarian needs that migrants may face, describing the latter as members of one ‘family of concern’. Therefore, the guidance required should centre on areas of action, rather than types of beneficiaries.²⁵
2. Secondly, we need to leverage the guidance systematically at the level of community-based humanitarian staff where the humanitarian imperative is

21 Increasingly, government officials are even obliged to hinder or block assistance to certain categories of migrants. This is the case where governments are focusing more and more exclusively on curbing migration, including by legal or administrative measures aimed at reducing to a minimum any assistance to irregular migrants, or even at simply outlawing it.

22 International Federation of Red Cross and Red Crescent Societies, *Policy on Migration*, above note 15, section 1: ‘Focusing on the Needs and Vulnerabilities of Migrants’.

23 *Ibid.*, section 5: ‘Linking Assistance, Protection and Humanitarian Advocacy’.

24 *Ibid.*, section 7: ‘Working Along the Migratory Trails’.

25 Thus the general principles enunciated by the Federation Policy are formulated along an axis of action rather than of typology: ‘1. Focus on the Needs and Vulnerabilities of Migrants, 2. Include Migrants in Humanitarian Programming, 3. Support the Aspirations of Migrants, 4. Recognize the Rights of Migrants, 5. Link Assistance, Protection and Humanitarian Advocacy for Migrants, 6. Build Partnerships for Migrants, 7. Work Along the Migratory Trails, 8. Assist Migrants in Return, 9. Respond to the Displacement of Populations, 10. Alleviate Migratory Pressures on Communities of Origin.’

translated into action, rather than at the governmental level where mandates, rules and categories must be maintained and enforced.

The way forward thus appears clear. As mentioned earlier, the member States of the 30th International Conference of the Red Cross and Red Crescent encouraged this path by implicitly recognizing the difference between the governmental sphere – with its limits in providing for migrants that ‘may live outside conventional health, social and legal systems’ – and the humanitarian sphere that can provide ‘humanitarian assistance to vulnerable migrants, irrespective of their legal status’.²⁶

Nevertheless, the reality on the ground looks somewhat more complicated. As previously explained, there is a tendency in many regions for governments to hinder or block assistance to certain categories of migrants, thus actually curbing the access ‘to processes which guarantee respect for [migrants’] fundamental rights’.²⁷

The challenge for the Movement, and in particular National Societies of the Red Cross and Red Crescent, will therefore be substantial: to acquire from governments the necessary humanitarian access to all categories of migrants – so that their volunteers and staff on the ground can develop their work, pursuing a non-categorical and insistently humanitarian perspective on migration – and doing so in all confidence as their leaders lend them the indispensable backing, in accordance with the Movement’s high governance.

26 30th International Conference, ‘Declaration: Together for Humanity’, above note 10.

27 *Ibid.*

Immigration controls and free movement in Europe

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Abstract

Effective control of cross-border activities is nearly impossible in market-economy regimes which, in order to remain viable, have to keep their borders open to goods, capital and services. This article exposes the tensions between a legal system predicated on openness and a groundswell of security-driven rhetoric justifying coercive and ostracizing practices against foreigners.



The principle of free movement – a core value of the European Union

From the outset, the crucial role of the free movement of goods, capital, information and services in what is now the European Union was enshrined in the Treaty of Rome.¹ Free movement of services supposes free movement of labour. As a result of normative importance of the Treaty on the Single European Act of 1992² (which set out to make Europe something more than a common market), and in keeping with the consistent case law of the European Courts regarding family reunification, the concept of free movement was explicitly defined as the free movement of persons. The persons in question were defined as all individuals living on the territory of the European Union, i.e. citizens of the Member States of

the Union plus all third-country nationals residing legally within Europe's borders.³

This conception of free movement of persons has created a distinction between internal borders (i.e. borders between European Union countries) and external European Union borders (i.e. national borders that also serve as the outer borders of the Union). The Schengen Agreement and its implementation treaty officially instituted this distinction when they came into force in 1995, by providing for controls to be lifted at internal borders within the Union and concomitantly reinforced at the Union's external borders.⁴ However, this simple idea is not always reflected in practice. There has also been no significant dip in cross-border flow of persons, despite the advent of a form of 'policing at a distance' aimed at blocking foreigners upstream before they leave their own countries, tracking systems that pick up the traces left by people moving from one country to another, and even, in some countries, moves towards expulsion and forced return, involving inter-State co-operation with countries of transit and origin.

The proliferation of laws on immigration has given rise to enormous legislative efforts, some virulent debates, a degree of legal uncertainty as to the law applicable to the facts in a given case, and procedural ambiguities that give police considerable latitude. However, this has not changed the demographic and economic realities.⁵ There have doubtless been serious consequences for the legal status of individuals living on the territory, but it should be clearly stated that the legal measures and public policies adopted by politicians have not had the intended impact. The political will to curb immigration, buoyed up as it has been by popular sentiment, has had next to no impact in terms of effective control of cross-border practices in market-economy regimes whose borders have to remain open to goods, capital and services in order to remain viable.⁶

- 1 Treaty Establishing the European Economic Community, signed in Rome on 25 March 1957, entered into force on 1 January 1958.
- 2 Treaty on the European Union, signed in Maastricht on 7 February 1992, entered into force on 1 November 1993.
- 3 E. Guild and J. Niessen, *The Developing Immigration and Asylum Policies of the European Union*, Kluwer Law International, The Hague/London, 1996.
- 4 Didier and Elspeth Guild Bigo, *La Mise à l'Ecart des Etrangers: Le Visa Schengen*, L'Harmattan, Paris, 2003; Vendelin Hreblay, *La libre circulation des personnes: les accords de Schengen, Politique d'aujourd'hui*, Presses Universitaires de France, Paris, 1994; Alexis Pauly (ed.) *Schengen en panne*, European Institute of Public Administration, Maastricht, 1994.
- 5 Didier Bigo, *Polices en réseaux. L'expérience européenne*, Presses de Sciences Po, Paris, 1996.
- 6 James Anderson and Liam O'Dowd, 'Borders, border regions and territoriality: contradictory meanings, changing significance', *Regional Studies*, Vol. 33, No. 7, 1999; Peter Andreas and Timothy Snyder (eds); *The Wall around the West. States Borders and Immigration Controls in North America and Europe*, Rowman and Littlefield, Lanham/Boulder/New York/Oxford, 2000; Didier Bigo, 'Criminalisation of "Migrants": The Side Effect of the Will to Control the Frontiers and the Sovereign Illusion', in Ryszard Cholewinski Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives*, Martinus Nijhoff Publishers, Leiden, 2004; Stephen Castles, 'Migration and Community Formation under Conditions of Globalization', *International Migration Review*, Vol. 36, No. 4, 2002; Gustav Mohar and Maria-Elena Alcarz, 'U.S. Border Controls: A Mexican Perspective', in Peter Andreas and Timothy Snyder (eds), *The Wall around*

Free movement of persons called into question?

The speeches of the French Minister of Immigration, Integration and Identity, Brice Hortefeux, and his successor Eric Besson – stating the government's will and ability to effectively send home all illegal migrants and to prevent the entry of the new ones – seemed to call into question the very principle of free movement of persons, restricting its understanding to a 'European only' free movement. Many NGOs have reacted strongly to this new wave of populist argument played out in France, Italy and Austria. In any case, beyond the modulations of discourses by politicians, it is central to understand that this symbolic politics calling for opening or closure – always playing with a very narrow construction of European cultural identity – has no effect on the reality of illegal entries and re-entries into the territory. As demonstrated by the Frontex statistics on passages across the Union's borders,⁷ there is a veritable abyss between the politicians' desire to control borders more or less tightly through discourses and law making, and the effective practices of bordering the EU. The swiftness with which the government attempts to send people home gives rise to arbitrary treatment of certain individuals, but does nothing to solve the problem. Detention and expulsion of foreigners are not effective solutions, and raise issues of legitimacy and fundamental rights.⁸ Immigration policy based on policing is a massive failure, albeit not yet recognized as such, and as far as possible this failure is being kept under wraps. This approach is the clumsy application of an American policy to a non-federal entity which, even in its original context, is not particularly effective.

As pointed out by several reports to the European Parliament and Commission, Member States' intention to go no further along the path to 'communitarization' than the institution of police measures (relating to entry at borders, stays of less than three months, visas, countering document fraud, and possibly expulsions) creates an almost farcical situation. Checks are rigorously applied in some places such as airports where it is easy to institute them, but are totally lacking along thousands of kilometres of land or sea borders that cannot be policed except at a prohibitively high cost.

It is vital to have a long-term economic and social policy on migration that provides for decent conditions of family unification, equal wages and pension rights, and cross-border movements facilitated by international agreements. Free movement of persons definitely entails problems in terms of fraud, but a prohibitionist policy creates more problems than it solves inasmuch as it does not prevent fraud, but causes it to become professionalized. This type of policy always

the West. States Borders and Immigration Controls in North America and Europe, Rowman and Littlefield, Lanham/Boulder/New York/Oxford, 2000.

7 See FRONTEX, *General Report 2008*, p. 12, available at http://www.frontex.europa.eu/gfx/frontex/files/justyna/frontex_general_report_2008.pdf (visited 9 September 2009), which reports 175,000 instances of illegal border crossing into the EU in 2008, a 20% increase compared with the year before.

8 Carolina Kobelinsky and Chowra Makaremi, 'Confinement des étrangers: technologies et acteurs', *Cultures et Conflits*, No. 71, 2008.

costs the tax-payer more than alternative approaches and has a highly deleterious effect on the way foreigners are treated. There is therefore a knock-on effect in terms of foreign and even security policy. However, the package of proposals currently in the pipeline turns its back on the results of research and perpetuates belief in the dogma of a border that is open but totally controlled ('smart border'), and would allow each State to act more or less as it sees fit.

Pact on immigration

The Pact on Immigration,⁹ put forward by the French presidency and adopted in 2008, aimed at remedying some of these aberrations by calling for a longer-term policy. It partially dissociates itself from the policing and security vision – or perhaps it would be more accurate to say that it presents that vision as a necessary step on the way to a further goal in the form of a compromise between various States on expulsion rationales and their impact on human rights and the Union's image abroad. However, even if it is reinterpreted in that light, the Pact is far from being a solution. It again aims to divest the European Commission of its powers at a time when it might finally be able to use them, and seeks to give the Council of the European Union and Member States the means to undermine the principles of free movement and move towards 'Eurosurveillance', i.e. systematic control of foreigners entering the territory of the Union and even control of EU citizens within the Union's borders, in the name of the fight against terrorism and illegal immigration. In particular, the Pact system seeks to prevent illegal immigration arising as a result of people overstaying legally obtained three-month tourist visas. At the same time, the borders would be opened up to a larger number of (qualified) people entering through legal immigration channels.¹⁰

A tiny group in charge of technical systems within the European Commission is playing into the hands of a handful of Member States that wish to call into question the free movement of persons, and propose in its place a speedy movement of persons under high surveillance with no physical obstacles (as in the special access corridors in airports for those who have accepted beforehand to give all their personal data and to submit themselves to multiple biometric identifiers) that would then create the impression that there is still freedom, because of that speed. There is a tendency to align the Union's policy with Australian and American practices, despite the fact that they have been almost unanimously criticized by jurists and international courts. This comes at the risk of setting up extremely expensive systems that will be condemned by national and European courts as soon as they come into effect.

9 Adopted by the Council of the European Union, 24 September 2008, available at <http://register.consilium.europa.eu/pdf/en/08/st13/st13440.en08.pdf> (visited on 10 August 2009).

10 See Julien Jeandesboz, *An analysis of the Commission communications on future development of Frontex and the creation of a European border surveillance system (EUROSUR)*, Briefing Paper, European Parliament Directorate-General Internal Policies of the Union, Brussels, June 2008, available at http://www.libertysecurity.org/IMG/pdf_JeandesbozEN.pdf (visited 27 August 2009).

This trend is extremely worrying, as the previous European Union regime drew its very strength and legitimacy from the promotion of the values of free movement of persons that other regional groups of States, including the North American Free Trade Agreement (NAFTA) made up of the United States, Canada and Mexico, had restricted to the utmost. By making free movement a key value in its relations with neighbouring countries and promising that they too will be able to share in these great freedoms of movement in the future even if they do not join the Union's political institutions, the European Union has raised hopes beyond its borders. However, if it follows the example of the other regional blocs that focus almost exclusively on the security dimension, it will sow the seeds of discontent and transform its neighbours into potential enemies. Coercive measures ostensibly justified by security concerns are often the first to foment insecurity and the very violence they purport to combat. It is therefore necessary to think hard before launching into a technological regime that primarily benefits the security industry and does not necessarily help the citizens of the Union.

Free movement of persons – the end of a European specificity?

This policy of openness advocated by the Commission, particularly in those units linked to the first pillar,¹¹ emphasizes the role of borders as meeting points rather than as barriers. It is worth noting that in their public communications, when seeking to differentiate Europe from George Bush's America and its ultimatum in the war against terrorism, both the Commission and the Council refer to free movement of persons and extol the Union's values. However, these statements have not prevented them from adopting projects within the third pillar that will 'normalize' the Union as part of a trans-Atlantic security area.

For the time being, Eurosur and the European Entry-Exit system are still under consideration. They have not yet been accepted and a keen struggle is going on around them. The European Commission and Parliament take the view that the principle of free movement of persons is not just empty rhetoric that could be disavowed in the name of the fight against illegal migration. According to their arguments, which are based on law and the interpretations of the courts, the post-Amsterdam European governance system has so far constrained governments to abide by their previous undertakings. In so doing it has prevented certain powerful States from reneging on their European and international commitments, notwithstanding promises by their governments to close borders, better control illegal immigration by all possible means, challenge family unification, put an end to the

11 Three 'pillars' form the basic structure of the European Union: the first pillar corresponds to the three Communities (European Community, European Atomic Energy Community and the former European Coal and Steel Community); the second pillar is devoted to common foreign and security policy; the third is devoted to police and judicial co-operation in criminal matters – see EUROPA, *Glossary: Pillars of the European Union*, available at http://europa.eu/scadplus/glossary/eu_pillars_en.htm (visited 9 September 2009).

‘asylum-seeker scandal’ and more generally, to protect their citizens from ‘foreigners’. On the other side of the argument, Member States and the Council of the European Union are seeking to free themselves from what they perceive as the trammels created by the lobby of fundamental rights lawyers and pro-Federalists who, they claim, have not grasped the significance of the state of emergency Europe faces, and of popular calls for protection.

Focus on state security

In earlier deliberations on the European concept of Integrated Border Management, the Council stated unequivocally that ‘[b]order management is a security function in which all Member States have a common interest that stems from the Schengen arrangement. First and foremost, border management is an area of policing, where security interests have to be met while fully recognizing the commitments in the field of international protection and human rights’.¹² Only the last part of the sentence pays lip service to human rights, while the first part focuses on operational measures. This attempt by several governments to whitewash their real intentions is not merely a symptom of the post-11 September security syndrome.¹³ It is a manifestation of the populism or ‘government xenophobia’ that has affected many political parties, including ones on the left, and has made huge inroads into the tabloid press distributed by a handful of major international press groups. It has flourished by taking advantage of human-interest stories featuring crimes perpetrated by foreigners, illegal entry of foreigners into the country, their plight and their perceived role as scroungers taking advantage of the bounty of a welfare state to which they have made no contribution.¹⁴ Following a sort of watered-down McCarthyist logic, minority parties outside national parliaments – or in some cases even within coalitions – have attacked governments for their inability to resolve the problem of illegal immigration and stem the flow of foreigners into the country or the naturalization of their children. Some have even advocated procedures that would ‘clarify’ (i.e. screen for) allegiance based on identity, claiming that a citizen’s bond with his country has a quasi-sacred quality that goes beyond territorial links and cultural integration.

The Self and the Other

There is scarcely a country in Europe – be it Austria, Denmark, the Netherlands, France, the United Kingdom, Hungary or Bulgaria – that, over the past fifteen years, has not experienced this temptation to indulge in the rhetoric of rejection of

12 Council of the European Union, *Integrated Border Management; Strategy Deliberations*, 13926/06, FRONT 207/COMIX 826, Brussels, 2006, p.3.

13 Didier Bigo, Laurent Bonelli and Thomas Deltombes, *Au nom du 11 Septembre, les démocraties à l’épreuve de l’antiterrorisme*, La Découverte, Paris, 2008; Didier Bigo and Anastassia Tsoukala, *Terror, Liberty, Insecurity: Illiberal practices of liberal regimes, Liberty and security*, Routledge, London, 2008.

14 Jérôme Valley, ‘Xénophobie de gouvernement, nationalisme d’Etat’, *Cultures et Conflits*, No. 69, 2008.

the Other in the name of protection of the Self. The focus may be on the State's national security interests, on economic growth supposedly threatened by foreigners' cheating the system, or on the threatened identities of majorities under the impression that they are becoming minorities in their own countries and alarmed by the eclipse of their own values as central and quasi-monopolistic values in the society in question.¹⁵

A host of individual voices pointing to specific dangers and linking them to the arrival of foreigners or their presence in the country link up to form a network and refer to one another as portents of an overarching truth. The word 'immigrant', which may refer to 'others' already in the country and those entering it, has generally been ethnicized and 'racialized' by association with the idea of the non-Community immigrant or third country national. The concept of a 'third' country almost invariably conjures up in the imagination images of the poorer countries of the South and almost never of countries like the US, Japan or Australia. The immigrant of the popular imagination, who comes from the South and does not have sufficient resources to be a good consumer, has become the scapegoat for many of society's ills. He is held responsible for organized crime and trafficking in drugs.

We have tried to show in detail how transfers of legitimacy may operate, semantically and organically, between instruments used in the fight against terror and organized crime.¹⁶ For these transfers to operate (and who would not favour the arrest of dangerous terrorists?), all it takes generally is for the communications of public or private security agencies to connect these phenomena. For example, techniques of enquiry developed to combat terrorism or organized crime could also be used against a person using a prohibited software programme. It then remains for these agencies to focus on individuals or 'target groups' whose profile suggests that they may move from harmless to more dangerous categories.

Insecurity continuum

At European level, emphasis is placed on the fact that the acts in question take place across at least one State border. We have referred to this as an insecurity continuum, whose focus is often the migrant. This continuum sets out to feed the impression that we are threatened by insecurity on a world scale in which crime, war and political violence are inextricably bound up, thus forcing the police, the army and the intelligence services to work together both at national level and internationally.¹⁷ Anastassia Tsoukala and Alessandro dal Lago have also

15 Arjun Appadurai, 'Dead Certainty: Ethnic Violence in the Era of Globalization', *Public Culture*, Vol. 10, No. 2, 1998.

16 As well as the fight against other phenomena such as drugs, hooliganism, money-laundering, human trafficking, trafficking in goods, works of art or money, petty transfrontier crime, delinquency and unruly behaviour in the inner cities, protests accompanied by violence and hate rhetoric, or even computer piracy.

17 Didier Bigo, 'Security and Immigration: Toward a Critique of the Governmentality of Unease', *Alternatives*, No. 27, Supplement, 2002, pp. 63–92; Christina Boswell, 'Migration control in Europe after

demonstrated how this insecurity continuum is propagated in the media and how it is implicitly echoed even by pro-migrant communications.¹⁸

The European players in control policies

It is tempting to ascribe these opposing tendencies to specific groups according to their ideological colouring (populist right, pro-open-borders left) or institutional affiliations, with some Member States and the Council taking a pro-sovereignty stance, while the Commission advocates an open policy and the European Parliament and the courts (the Court of Justice of the European Communities and the European Court of Human Rights) position themselves as guardians of the rule of law and free movement. However, although the empirical studies carried out over the past few years do not fundamentally call these assumptions into question, they nevertheless reveal a much more complex picture. In many cases, past outcomes of struggles between these different groups, including some compromises, have not been the fruit of in-depth discussions on European migration policy. On the contrary, almost all these groups have avoided addressing the subject in all its ramifications and have deeply divided the debate.

'Three-month' policy, myopia on migration

For many years, in their public statements, policy-makers at national and European level responsible for police and border issues have focused almost exclusively on illegal border crossings, people smugglers and all the consequences of the 'three-month' policy. The matter of people entering legally and overstaying tourist visas seemed too complex to mobilize opinion, and would not always have drawn attention to the population groups who were the primary targets, even though experts were fully aware that people overstaying tourist visas represented almost 75% of so-called unlawful migration flows. Those responsible for asylum matters, on the other hand, preferred to focus on the idea of fraud and 'asylum shopping' instead of discussing contemporary conditions of persecution and the status of camps; their counterparts in charge of criminal justice policy have left the media free rein when it comes to reporting on insecurity in the inner cities and the correlation between crime and foreigners. This is despite the fact that overall levels of homicide and robbery have dropped, and that when it comes to violence, criminological studies have long shown that we should be more afraid of our spouses or ex-spouses than of foreigners.

9/11: explaining the absence of securitization', *Journal of Common Market Studies*, Vol. 45, No. 3, 2007, pp. 589–610.

18 Alessandro Dal Lago, *Non-persone: l'esclusione dei migranti in una società globale*, Interzone, Feltrinelli, Milan, 1999; A. Tsoukala, 'The perception of the "other" and the integration of immigrants in Greece', in A. Geddes and A. Favell (eds) *The Politics of Belonging: Migrants and Minorities in Contemporary Europe*, Ashgate, Aldershot/Brookfield/Singapore/Sydney, 1999.

Particularly in the early days, in order to justify their role, the European agencies often tended to overstate the cross-border dimension of crime and talk about international drug or organized crime rings on a world scale. However, arrest patterns have rather tended to indicate the presence of local pools of criminals circulating within a fifty-mile radius but crossing, for example, the borders between France, Belgium, the Netherlands and Luxembourg.

Police-driven approach

Heads of State have often acknowledged that migration policy is almost exclusively the preserve of their home affairs and justice ministries. The labour, industry and trade ministries have remained on the periphery while security and identity issues and, more recently, integration from an assimilationist standpoint, have remained at the heart of the debate. The justice and home affairs ministries, either at home or collectively within the Council or particular groups (Schengen in its early days, and now Prum) see themselves as 'laboratories': in practice, they or the officials they have seconded to the Directorate-General (DG) for Home Affairs (which subsequently became the DG for Justice and Home Affairs and is now the DG for Justice, Freedom and Security) will always favour a police-driven approach to activities linked to free movement and crossing of borders. This approach supposes a degree of respect for individual rights, but where compromises are necessary, it will always favour efficient policing over other considerations.

Often, within the different directorates, officials' allegiances to their origins give rise to differences of sensibility when it comes to the degree of latitude police forces should be allowed. Within Europol, the point of view of those police forces who support a strict 'criminal investigation' approach (in which the information gathered is validated by magistrates and which consequently allows for a high degree of trust between the various stakeholders) has been undermined by those who seek to maximize proactive intelligence gathering (even where the information is of doubtful origin and unconfirmed). The latter view is justified on the grounds that it may help when it comes to suspects or groups of people whose profiles are similar to those of others who have committed crimes, even if there is no evidence that they are guilty of criminal conduct.

Faith in the ability to detect 'high-risk' individuals using technological means and profiling techniques based on expert systems combining human police knowledge and psycho-sociological criteria, or GPS systems built into mass screening software, has led to a merging of intelligence and prevention concerns with the traditional police concerns of investigating crime and punishing the guilty. The fact that the current Director of Europol and his predecessor are both Germans has probably heightened this trend. Both were influenced by their experiences at the German Federal Criminal Police Office, which has limited operational powers but has been able to gain recognition by developing this type of expertise.

Collection of data on individuals who cross borders or on foreigners with criminal records has been considered a priority since 1996. The proposal to harmonize criminal law at European level (*corpus juris*) and create a European

prosecution service has been dropped in favour of a more intergovernmental vision of ‘mutual trust in each other’s rules’ rather than harmonization of categories. The upshot of this will be a Eurojust that will fall far short of a real European justice system and will improve the prosecution’s procedural options without any corresponding Europeanization of the right to defence. As a result, the justice and freedom panels of the triptych will remain sketches, while the security panel has come to focus more and more on an investigative, forward-looking vision. This is a vision that embraces surveillance of the movements of foreigners who enter the European Union and are liable to remain there illegally, as well as their children born in the EU who have retained their parents’ faith or continued to identify with it.¹⁹

Anti-terrorist measures

It would therefore be inaccurate to refer to 11 September 2001 as *the* critical juncture. Moves to step up security around immigration and the association of immigration with terrorism go back considerably further than that. However, the US decision of 13 September 2001 to give the President emergency powers plainly sped up these procedures in Europe, and was grist to the mill of all those who were already calling for a proactive approach based on prevention, technological intelligence gathering and more intrusive and comprehensive surveillance.

The list of anti-terrorist measures that have an impact on migration flows is impressive. The fight against terrorism has clearly served as a justification for strengthening control mechanisms whose efficacy in combating clandestine organizations is far from proven, but which ‘help’ the police in their surveillance and control of foreigners living in the Union. However, it should be pointed out that communications specific to migration policy or asylum have not necessarily used the argument of terrorism *per se*. It has never been said in so many words that migrants and their children or people who profess the Muslim religion were potential terrorists. Rather, at national and European level, the ploy has been an intensified call for the allegiance of these groups, requiring that they shout from the rooftops their rejection of the terrorism of Al Qaeda.

Several governments have tried to mobilize criminology and political sciences to help them distinguish between good and bad Islamists (the latter are often called Salafists, although analyses of perpetrators of terrorist attacks in Europe do not reveal any serious correlation between any specific tendency within political Islam and recourse to violence). These governments have vigorously condemned certain imams for terrorism apologia, giving many Muslims the impression that profession of their faith had become a suspicious sign and causing defenders of fundamental rights to fear for freedom of opinion. The integration tests policy has not helped to create an image of openness, particularly where it has

19 Didier Bigo *et al.*, *The field of the EU internal security agencies, Cultures et Conflits*, L’Harmattan, Paris, 2007.

been accompanied by a visa policy increasingly linked to biometric identification technologies.

Fortress Europe ...

Many analysts have spoken about Fortress Europe, an electronic walls policy, a tendency to cling to a white nationalist identity tending towards racism, a war on immigrants who are viewed as a negligible human surplus that can be thrown out if the needs of the economy so require, or a militarization of the European borders via the States of the southern Mediterranean and the support operations of the Frontex agency. Some localized events like those in Lampedusa, Ceuta and Melilla show that at times, national political games and European support mechanisms come into play that unfortunately reinforce the tendency towards coercion disproportionate to the circumstances, highly reminiscent of the old colonial practice of deterrence by group punishment with no concern for individual cases.

... within the rule of law

At the same time, we have seen massive protest movements against this type of practice. Governments have pulled back from their initial projects for fear of condemnation. International obligations of non-refoulement and the prohibition on mass expulsions have, on the whole, been complied with. The 'exceptionalist' rhetoric used to justify coercive actions by intelligence services and military special forces, so in vogue in the United States, has been largely contained. There has been no resort to policies prohibiting ships from landing, such as the ones applied by the US to Haitians and by Australia to Indonesians.

Still more importantly for the future, in a new institutional structure in which the immense majority of governments recognize the role of the courts and the importance of the European Human Rights Convention, there are a number of factors that may change the balance of power. This change may then limit the impact of the rejectionist populism promoted by certain press groups, as well as its instrumentalization by politicians or the European institutions and agencies. Among these factors are: the dismantling of the pillar systems (despite the fact that the new restrictions concerning police and national security matters will remain in place); the extension of the powers and obligations of the European Parliament to areas where it previously had no role; the growing role of the European data-protection controller and his links with national data-protection offices; the role of the Agency for Fundamental Rights; and even the role of mediators.

The complexity of the mechanisms, which cannot be reduced to a simple opposition between two sides, means that we should beware of hasty conclusions. The opening up of Europe was always ambiguous, even among its advocates in the 1950s (with their idea of 'European preference'), and, despite efforts after the fact to ensure that the status of European citizens does not become too disparate, the failure of a positive concept of European citizenship applicable to all those living on the territory was doubtless a key moment. The development of sectoral policies

within the so-called ‘pillars’ has undoubtedly had an even more negative impact on migration policies, and has been one reason for their gradual shift towards the security and crime-fighting vision. Other negative factors include the mounting climate of insecurity worldwide, and the gradual erosion of State power, including the monopoly on even large-scale forms of violence.

Tension between legal systems and security-driven rhetoric

Moreover, European (in)security professionals, be they European agencies, informal networks and their national affiliates, or private groups taking part in police work or providing police forces with technologies, have played on widespread fears and threats to justify a vision of Europe that is often not compatible with free movement. They have also constituted powerful and convergent networks of interests, despite internal disputes as to the threats that need to be combated on a priority basis. It would not be an exaggeration to speak of these (in)security professionals as a ‘field of forces’.

At the same time, other sectors have been active in resisting these trends, opposing them by legal means, for example by mobilizing social and political pressures among foreigners, their children or groups that support them, as in the case of the demonstrations by the ‘*sans-papiers*’. Opposition has also taken place by setting constitutional mechanisms in motion, and by tapping into people’s desires for a richer political life, a smaller democratic deficit at European level, and more binding obligations on national governments to entrench the rule of law and ensure respect for international treaties and fundamental rights.

At the same time, the process of affirming the rights and guarantees to which foreigners are entitled, the reform-treaty process, and the increase in avenues of appeal all help to contain national political dynamics of rejection, and often impose minimum standards and good practices. In the current context, the important thing to grasp is this tension between a legal system predicated on openness on one hand, and the groundswell of security-driven rhetoric justifying coercive and ostracizing practices against foreigners on the other. It is of course always tempting to look only at one side. The aim of this brief overview is to provide some additional parameters in order to enable everyone to form a judgement based on a more complete picture.

The absorption of migration issues into policy responses to security concerns is the result of a broad gamut of actions by politicians, security professionals and some media outlets, but it is not necessarily linked to any strategic intention.²⁰ Moreover, because of a certain resistance to fundamental rights, legal cohesiveness, social and political mobilization, as well as the wide range of issues subsumed under the terminology of migration, those most affected in practice are the most

20 A shorter version of this paper was published in the journal *Migrations Société* (Vol. 20, No. 116, 2008) under the title ‘Le «phagocytage» des questions de migration et de libre circulation en Europe par les enjeux de sécurité?’

vulnerable foreigners, second-generation immigrants and Muslims who are most visible in the practice of their faith, as well as people blocked in their countries because they are refused a visa. At the same time, the flows continue unabated – the will to control borders and screen foreigners on an individual basis remains an unrealistic technological dream that could, however, become a nightmare for us all. The result is arbitrariness in some places and some areas, and a total failure to meet the broader challenges effectively.

REPORTS AND DOCUMENTS

Movement policy on internal displacement

Document prepared by the International Committee of the Red Cross in consultation with the International Federation of Red Cross and Red Crescent Societies for the Council of Delegates of the International Red Cross and Red Crescent Movement, Nairobi, Kenya, 23–25 November 2009

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Introduction

For decades, severe and sudden crises have caused massive displacements¹ of population groups within national boundaries.² These have required an urgent humanitarian response. The International Red Cross and Red Crescent Movement (the Movement) has developed a combination of humanitarian responses and every year comes to the aid of several million displaced people with varying needs and vulnerabilities, in acute emergencies and in protracted situations. The Movement alone cannot meet all the needs caused by displacement but it must make the best use of its combined means and capacities. It must concentrate on needs after giving due consideration to the specific situation involved, and avoid as far as possible inhibiting competition, either between different components of the Movement or between the Movement and other organizations.

When large groups of people are displaced within a country, the public authorities – who have the primary duty of care – can find their resources overstretched and weakened. The components of the Movement have the mission to provide essential humanitarian aid, either alone or in partnership.

The Movement sees displacement as a dynamic and often recurrent process with several phases.³ Displacement has serious consequences for many different groups. It is covered by the legal framework (national law, international humanitarian law where applicable, and international human rights law) protecting the displaced themselves, those left behind and the host communities who share their resources with the displaced group.

The Movement's primary goal is to protect people against arbitrary displacement⁴ and to reduce the risk of displacement caused by natural and man-made hazards. If people are nevertheless displaced, the Movement takes action particularly during acute crises when essential needs are no longer met, regardless of the duration, for the purpose of alleviating the suffering of the individuals. When basic needs are covered by existing services and infrastructure but insufficiently so, such as in chronic crises, the aim is to facilitate progress towards a durable response to the victims' plight.

In its approach to internal displacement, the Movement has the advantage of having deep roots in the community and a privileged access to the authorities. It takes impartial, humanitarian action to directly meet the urgent needs of people at risk, while supporting authorities in an auxiliary capacity and, if necessary, reminding them of their obligation to care for the affected population.

The policy guidelines on internal displacement build on and complement Movement resolutions relating in particular to action to help refugees and internally displaced people (IDPs)⁵. The policy acknowledges that forced

1 The definition of internal displacement used by the Movement is set out in the Guiding Principles on Internal Displacement, which states that "internally displaced persons (IDP) are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border". (UN Doc. E/CN.4/1998/Add.2 of 11 February 1998)

2 In 2009, more than half of the people who had been affected by a severe and sudden crisis said that they had experienced displacement, having been forced to leave their home and live elsewhere. See summary report: Afghanistan, Colombia, Democratic Republic of the Congo, Georgia, Haiti, Lebanon, Liberia and the Philippines, opinion survey, 2009. Our World. Views from the field. IPSOS/ICRC 2009.

3 Protection against forced displacement is the phase in which the causes of displacement may be eliminated or reduced. Understanding the events that cause displacement is critical in efforts to prevent their recurrence. Acute displacement is the phase of displacement characterized by frantic flight by people taking often desperate measures in search of solutions that frequently prove extremely difficult. Stable displacement is characterized by a relative 'settling' of the IDPs in order to wait out the crisis (in camps, with hosts, or independently). Sustainable durable solutions depend on a resolution of the crisis or can be considered when conditions which are conducive to restoring 'normalcy' in the lives of the IDPs have been restored.

4 Article 6(1) of the Guiding Principles on Internal Displacement states that every person has the right to be protected against arbitrary displacement from his or her place of habitual residence. Evacuation and permanent relocation must be used as measures of last resort predicated on absolute necessity, imminent threat to life, physical integrity and health. They should be taken in keeping with IHL and human rights.

5 The Movement has established a number of policies and regulations to govern its emergency operations and its activities in protracted conflict and other disasters. Among the more recent are the *Code of Conduct for the International Red Cross and Red Crescent Movement and NGOs in Disaster Relief*, the *Principles and Rules for Red Cross and Red Crescent Disaster Relief*, the Seville Agreement and other mechanisms in force for coordination within the Movement. More specifically regarding IDPs, the 2001 Council of Delegates adopted a major resolution on the Movement's work to help refugees and IDPs,

displacement may be linked to migratory phenomena and that a coordinated approach is important in order to allow for possible connections between the challenges of displacement and migration. The International Federation's 2009 policy on migration⁶, together with the (draft) policy on displacement, will serve to harmonize and strengthen the work of the Movement in addressing the needs and the vulnerabilities of both migrants and displaced persons.

The policy guidelines set out below recall the Movement's commitment to individuals and communities affected by internal displacement as well as the specific nature and strength of the Movement's work. They reaffirm the value of a Movement-clear coordinated response to displacement crises. The guidelines provide clarity, focus and guidance for the Movement's approach to displacement. They also cover coordination with other entities dealing with displacement. These guidelines aim to create greater consistency in the Movement's response to internal displacement, to reaffirm its role and to maximize the positive impact it can have on those at risk.

Policy principles and guidance

- 1. We in the International Red Cross and Red Crescent Movement serve all those affected by internal displacement – the people actually displaced, host communities and others – and make decisions according to the most pressing needs for humanitarian services.**

The vulnerability and needs of the individuals or groups affected by crises take precedence over all other considerations. IDPs may not always be the most at risk. Those left behind may be just as vulnerable or even more so. Host communities and resident communities are often as vulnerable as the displaced themselves.

We must therefore:

- ensure that all our choices and priorities for action are driven by needs and reflect our fundamental principle of humanity and impartiality;
- ensure that our response covers assistance and protection needs and identifies sectors of the population that are particularly vulnerable to the risk and effect of displacement and whose specific needs and rights must be promptly recognized and responded to;
- ensure that our responses are based on the concept of overall health,⁷ are multidisciplinary in nature, and aim to meet the essential needs of the affected group;

calling for a strategy to guide that work. A further resolution in 2003 included a document entitled *Minimum elements to be included in operational agreements between Movement components and their external operational partners*. It was intended to boost the Movement's image and credibility.

6 The International Federation's new 2009 Policy on Migration replaces the earlier Federation policy on refugees and other displaced people.

7 The WHO's definition of health implies physical, psychological and social well-being. This definition has often been used as a reference by the Movement.

- ensure that IDPs and affected communities can progress to at least relatively “stable” situations in which their essential needs are met, pending a durable solution;
 - make clear that policy of forced confinement in camps is generally not favoured and that alternatives to camps should be considered to the extent that they are feasible and will work satisfactorily;
 - do everything possible to ensure that people affected by internal displacement are informed of the situation and the whereabouts of their loved ones so that family links can be restored and, if possible, people reunited with their relatives.
- 2. We make full use of our privileged access to communities at risk and as well as to decision-makers.**

With our network of Red Cross and Red Crescent staff and volunteers, we are anchored in the community and often have privileged access to decision-makers. Being viewed as relevant, credible and sure to deliver on promises is crucial for our acceptance by all concerned and for obtaining access and providing protection and assistance to those who need them most.

We must therefore:

- develop and maintain contacts with all those having a significant impact on the course of the crisis;
- secure from the decision-makers, to the fullest extent practicable, unrestricted access to persons and communities affected by internal displacement;
- facilitate a substantial exchange of information on security matters in order to reduce the risks, including risks for our staff and volunteers.

3. We seek to prevent displacement while recognizing people’s right to leave of their own accord.

Displacement is usually caused by imminent threats to the physical safety or survival of individuals or whole communities. Our first choice is to help people stay in their homes, but only as long as their safety, physical integrity and dignity are not jeopardized and staying is in accordance with their wishes.

We must therefore:

- promote our respective mandates, international humanitarian law and the auxiliary role of the National Society⁸ in relation to its country’s government in order to obtain special access to the communities and to all authorities in

⁸ See Resolution 2, *The specific nature of the International Red Cross and Red Crescent Movement in action and partnerships and the role of National Societies as auxiliaries to the public authorities in the humanitarian field*, 30th International Conference, Geneva, 2007.

place – an important advantage to be used in support of both practical action and dialogue with the parties concerned;

- enhance disaster-preparedness and risk-reduction programmes, with the backing of the International Federation and the ICRC.
- 4. We support the safe, voluntary and dignified return, relocation or local integration of IDPs, on the basis of our independent assessment of their situation.**

The authorities are responsible for restoring essential conditions including security guarantees. Before engaging in any activities aimed at durable solutions, National Societies, the ICRC and the International Federation, each in accordance with their respective mandates and with the expertise and resources available to them, must:

- verify by means of an independent assessment that those initiatives will guarantee the safety and protect the dignity of the IDPs;
- verify that IDPs' decision to participate in such solutions is truly voluntary.

- 5. We seek to empower individuals and communities. We do this by ensuring their participation in the design and implementation of our programmes, by helping them to exercise their rights and by providing access to available services.**

The individuals and communities affected by displacement are often in the best position to express their needs and to evaluate the local, national, regional and international response. Understanding their specific needs is the first step towards ensuring that those are addressed.

We must therefore:

- take into account the needs as expressed by the communities themselves;
- seek, where necessary and feasible, to overcome any abuses, pressure or shortcomings, including cases where these are on the part of public services;
- take proactive measures to avoid doing harm to those for whose benefit we work;
- inform people affected by displacement about their rights and refer them to appropriate public services or specialized organizations.

In addition, host National Societies should, to the extent possible, offer people in affected communities the opportunity to join the Movement as volunteers and to serve within their own environment.

- 6. We coordinate with the authorities and all others concerned. Whenever necessary, we remind them of their obligations, as set out in the applicable normative framework.**

In the event of forced displacement, national legislation is the primary source of relevant law and should contain guarantees of assistance and protection for

the affected populations. IDPs are part of the civilian population and entitled to protection as such. However, national legislation does not always contain provisions to deal with displacement, nor does it always even envisage the extraordinary circumstances in which internal displacement occurs.

It is the responsibility of the relevant authorities to put in place the conditions needed to ensure that Movement personnel can undertake their work safely and to uphold the protective nature of the red cross and red crescent emblem.

In armed conflicts, the ICRC has the special role of working for the faithful application of international humanitarian law and performing the tasks devolved upon it by the Geneva Conventions. The ICRC also supports the other components of the Movement in this respect.

We must therefore:

- promote knowledge of the relevant rules of national, international humanitarian law and international human rights law, as applicable, for the benefit of people affected, during all phases of displacement;
- whenever necessary, make the authorities aware of the need to comply with these rules;
- support the ICRC in the fulfillment of its mandates.

7. We, the National Societies, as auxiliaries to our authorities, support those authorities in meeting their responsibilities in the humanitarian field as far as our resources and capacities allow and provided we can do so in full compliance with the Fundamental Principles and in keeping with the mission and Statutes of the Movement.

By their very nature, programmes for IDPs are carried out on a large scale, and may last a long time. These programmes serve people often forced to leave their homes under threat to their lives, health and dignity. Inter-communal and political tensions in such contexts may be high, and it is therefore necessary for National Societies to have a clear and constructive dialogue with their authorities.

We must therefore ensure that:

- our dialogue with the authorities stresses the need for National Societies to respect the Fundamental Principles and the Movement's Statutes;
- the authorities are aware of the limits to the National Society's ability to carry out activities for which the State is responsible and activities which may exceed the Society's capabilities;
- from the outset we discuss with the authorities proper guarantees regarding handover strategies.

8. We seek to limit the extent to which we substitute for the authorities in discharging their responsibility to meet the needs and ensure the well-being of the population within the territory under their control.

The authorities have primary responsibility for ensuring the well-being of any population affected by internal displacement and for providing the services needed. The Movement's work is undertaken in such a way as to avoid discouraging the authorities, as those primarily responsible, from meeting their obligations to respect, protect and safeguard the rights of individuals.

Therefore, when the authorities will not or cannot shoulder their responsibilities, we must ensure that any substitutive activity we engage in is regularly discussed with those authorities with a view to their taking action to meet their obligations towards their population.

9. We give priority to operational partnerships within the Movement and seek to play our complementary roles, shoulder our responsibilities and marshal our expertise, all to the full.

By definition, emergencies call for a rapid response. National Societies, which have their roots in communities and a structure that ideally covers the entire national territory, are often well positioned to alleviate the suffering of affected individuals and communities rapidly and effectively. However, emergencies caused by large-scale displacement often exceed the capacities of the various components of the Movement, even where they have a specific mandate in the area concerned. The fact that we share the same identity through the emblems we use and the principles we apply and the policies and guidelines to which we have agreed means that we should give priority to partnerships and effective coordination within the Movement.

We must therefore:

- ensure that the collective action taken by different components of the Movement is as consistent as possible, eliminate gaps and overlaps, adopt common positions and send common messages, and maximize the impact that can be achieved with the available resources;
- do as much as we can in situations where a link exists between internal displacement and flight across international borders to ensure a humanitarian response that is coordinated by a cross-border strategy.

10. We coordinate with other entities on the basis of their presence and abilities on the ground, the needs to be met, the capacities available, and the possibilities for access, while ensuring that we remain (and are perceived as remaining) true to our Fundamental Principles.

The growing number and increasing diversity of agencies responding to internal displacement creates both opportunities and risks that the Movement addresses

through an analysis of the specific situation, the agencies present and their respective roles.

We must therefore:

- welcome cooperation and coordination with all other humanitarian entities and call for tasks to be assigned according to the expertise, abilities and effective resources of each organization.
- resist any attempt, whether military,⁹ political, ideological or economic, to make us depart from the course of action dictated by the requirements of humanity, independence, impartiality and neutrality or to persuade us to act in ways that would harm the image of the Movement.

Annex 1

Commentary on the Policy principles and guidance

1. **We in the International Red Cross and Red Crescent Movement serve all those affected by internal displacement – the people actually displaced, host communities and others – and make decisions according to the most pressing needs for humanitarian services.**

IDPs make up a large proportion of the people that we assist. People forced to flee their homes are most likely to be in dire need since they have often been brutally pushed out of their usual environment. This directly threatens their ability to meet their most basic needs,¹⁰ especially when communities or individual families are torn apart or when relatives are injured, killed¹¹ or go missing. In keeping with the principle of impartiality, the Movement must give priority to the most urgent cases of distress. The purpose of the principle of humanity is to protect life and health and to ensure respect for human dignity. The Movement does not dissociate

9 See Guidance Document on Relations Between the Components of the Movement and Military Bodies, 2005 Council of Delegates, Resolution 7.

10 Common threats to the safety of IDPs are:

- direct attacks and ill-treatment
- increased risk that families will be torn apart and that children in particular, will be separated from their parents or other relatives
- increased risk of gender violence, e.g. rape or sexual violence against women and girls
- increased exposure to health hazards
- deprivation of property
- restricted access to essential goods and services, including health care
- exposure to collateral risks in attempting to meet essential needs
- risk of tension between host communities and displaced people
- presence of weapon-bearers in camps
- forced recruitment
- movement through unsafe areas and settlement in unsafe or unfit locations,
- forced return to unsafe areas

11 See in particular the Movement Strategy on landmines and on explosive remnants of war, to be updated by the 2009 Council of Delegates.

assistance from protection. Protection-related activities are a major asset for the Movement, which is viewed as a legitimate actor in this field. It should therefore identify, in addition to the assistance priorities, those linked to protection issues. “Protection” and “assistance” are intrinsically linked and are inseparable elements of the ICRC’s mandate. The ICRC defines protection as all activities aimed at ensuring 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 and refugee law. Of course, national laws are also relevant bodies of laws.

There are four groups of relevant rights:

1. rights relating to physical safety and integrity (e.g. the right to life and the right to be free of torture, assault and rape);
2. basic rights relating to the basic necessities of life (e.g. the right to food, potable water, essential health care and shelter);
3. Other economic, social and cultural rights (e.g. the right to work, to receive restitution or compensation for lost property, and the right to education);
4. Other civil and political rights (e.g. the right to obtain personal documentation, political participation, access to courts, freedom from discrimination).

The Movement is more familiar with the two first groups of rights through its emergency activities, but National Societies could also consider discussions with relevant authorities, when feasible, on the two other groups of rights for the benefit of displaced persons.

The Movement must also consider the needs and vulnerabilities of groups trapped, for whatever reasons, in their place of origin, and cannot overlook the fact that resident populations are very often the first providers of support for IDPs. Individual families and local communities often share their own resources with displaced groups. They are therefore also affected by displacement and should receive support to help them play their key role in mitigating the effects of displacement.

The Movement must therefore strive to support host families and communities in their efforts to assist IDPs. In the event of armed conflict, IHL allows internment or assigned residence of civilians only if imperative security reasons justify it.¹² In other cases, when camps are set up to facilitate the delivery of humanitarian aid, they frequently act as a magnet because of the services and comparative safety they provide. This creates new problems, which are complex to address and may compound the vulnerabilities and risks to which IDPs are exposed.

12 Principle 12 of the Guiding Principles states that “every human being has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. To give effect to this right for internally displaced persons, they shall not be interned in or confined to a camp. If in exceptional circumstances such internment or confinement is absolutely necessary, it shall not last longer than required by the circumstances”. See E/CN.4/1998/53/Add.2.

When conducting humanitarian programmes with a special focus on people affected by displacement, special care should be taken to integrate these specific operations into overall strategies based on needs and vulnerabilities.

Long-term displacement may have different types of consequences for those affected. In addition to the lasting effects of emotional trauma, IDPs may suffer new types of vulnerability arising from the disruption of their social and economic lives, separation from family members,¹³ dependency on humanitarian aid, discrimination and marginalization. Often IDPs are crowded around urban centres. In such cases, like slum dwellers, they frequently need national authorities to provide poverty relief, health care, vocational training and employment. At other times, they become long-term residents of camps, which effectively turn into makeshift villages.

2. We make full use of our privileged access to both communities at risk and decision makers.

With our network of Red Cross and Red Crescent staff and volunteers, we are anchored in the community and often have privileged access to decision-makers. National Societies, with their roots in the community, are well placed to identify all the needs and to cover those needs where a response from the Movement has an added value. We should also work to identify gaps (e.g. in education and social services) and refer unmet needs to other specialized actors. National Societies should therefore act as a humanitarian referral system for their governments and for other humanitarian actors.

Our roots within the communities may become a weakness if any of the components of the Movement is not perceived as impartial. Political constraints and security considerations may compel components of the Movement temporarily to suspend their operations in certain areas. The Movement needs to establish a dialogue with the authorities and any other parties involved. It must gain their trust through strict compliance with the Fundamental Principles, in particular impartiality, neutrality and independence, in order to secure unimpeded and safe access to the populations it wishes to protect and assist¹⁴ and to remind the authorities and the various parties of their obligations. National Societies also gain the trust of their authorities when they are perceived as reliable partners while playing their auxiliary role.

13 See the current *Restoring Family Links Strategy (and implementation plan) for the International Red Cross and Red Crescent Movement* (2008–2018), and its Annex, 2007 Council of Delegates, Resolution 4.

14 See our policy *Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organizations (NGOs) in Disaster Relief*, adopted by the 1993 Council of Delegates, Resolution 6. See also *Principles and action in international humanitarian assistance and protection*, 26th International Conference, 1995, Resolution 4, E.

3. We seek to prevent displacement while recognizing people's right to leave their homes of their own accord.

A basic tenet of our approach to displacement is that it is best to avoid it in the first place and that we should support people *in situ*. The Movement's ability to take a multidisciplinary approach is a major asset in this endeavour. If displacement nevertheless does occur, steps should be taken to move towards a durable solution as quickly as circumstances allow.

Groups of people can be deliberately forced to move by the parties to an armed conflict.¹⁵ They can also feel obliged to flee their homes in order to avoid violations of human rights or humanitarian law, the effects of armed conflict and other situations of violence – for example shortages of food or water and the collapse of health-care services. Prevention of forced displacement or refugee flows is therefore part of the wider protection of the civilian population required by international humanitarian and human rights law.¹⁶

Groups of people may also be forced to flee in the face of natural or man-made disaster. Displacement may be understood as a coping mechanism resorted to when basic needs can no longer be met.

Some sudden-onset crises such as natural disasters are recurrent and to some extent predictable. Others are not. The Movement's components have developed different means of mitigating the consequences of disaster, for example through risk reduction. It is therefore important to consider the context-specific factors that prompt displacement and to identify groups of people who would be particularly at risk should displacement occur. The Movement's ability to gain access both to communities at risk and to decision-makers must be harnessed to prevent displacement where appropriate and to respond to those most in need when displacement is unavoidable.

4. We support the safe, voluntary and dignified return, relocation or local integration of IDPs, on the basis of our independent assessment of their situation.

The Guiding Principles on Internal Displacement stress that the national authorities are responsible for establishing the conditions for safe and voluntary measures, as well as providing the means to help IDPs pursue voluntarily durable solutions in safety and with dignity. It remains the prerogative of IDPs to independently seek sustainable means of improving their situation. The authorities are nevertheless responsible for facilitating the return, local integration or relocation

15 IHL contains a specific prohibition on displacement unless it is justified for the safety of the population or for imperative reasons of security (see annex on legal framework).

16 The Movement has adopted several resolutions on the dissemination and implementation of international humanitarian law. See in particular Resolution 7 of the 1993 Council of Delegates, Resolution 16 of the 23rd International Conference, 1977, and Resolution 14 of the 24th International Conference, 1981.

of IDPs seeking a long-term solution, and with helping recover property and possessions and arranging compensation for their loss if that recovery is not possible. In principle, potential durable solutions to displacement include:

- return and reintegration: the person returns to where he or she lived before the crisis;
- local integration: the person integrates into the local community in which he found himself following displacement;
- relocation: the person relocates to a yet another location within the country and integrates into the community there.

We must support the ability of people and communities affected by displacement to make informed decisions on the basis of the options available. We must also encourage opportunities for them to participate fully in the planning and implementation of the solutions they select. They should be subjected to no coercion – such as physical force, harassment, intimidation or denial of basic services. We must not support the closure of IDP camps or facilities as a means either to induce or to prevent return, local integration or relocation elsewhere without acceptable alternatives.

We must promote durable solutions based on voluntary, safe and dignified choices for the people affected.

Before taking part in any return or relocation programme, we must first make sure that the IDPs concerned are informed of the details of the programme, in particular the living conditions and risks. Components of the Movement must also seek to obtain adequate knowledge of the situation in the place of return or relocation so as to avoid supporting any steps that might harm the persons concerned during and after their return.

National Societies should ask their authorities and public services about arrangements made and see if there is any way in which they might assist the groups concerned.

Depending on local conditions in the place of return, permanent local integration or relocation, a variety of programmes may be organized and means used, always focusing on the most vulnerable groups first. They may include:

- activities to strengthen the ability of the local branch of the National Society to provide adequate services;
- return kits containing food and hygiene items;
- help in resuming a livelihood (tools, seeds) and generating income;
- shelter materials;
- means to rebuild social networks;
- strategies to clear explosive remnants of war;
- restoring family links;
- activities aimed at enhancing community development;
- protection work aimed at ensuring full respect for the letter and spirit of the relevant law and the rights of the individual.

- 5. We seek to empower individuals and communities. We do this by ensuring their participation in the design and implementation of our programmes, by helping them to exercise their rights and by providing access to available services.**

IDPs can provide valuable information on their displacement, its cause and scope as well as the protection problems they face. In any case, programmes for the benefit of people affected by a displacement have a better chance of sustainability if those people's own views are taken into account.

In our effort to protect people's dignity, we proactively seek the input, analysis and recommendations of those affected, on their lives and circumstances. However, respect for the individual implies that each person is regarded as autonomous (i.e. entitled to make his or her own choices).

Respect for people who provide humanitarian organizations with information requires that, as far as possible, they be given the opportunity to make an informed decision about whether or not to provide personal or sensitive data. The person concerned should be informed about the circumstances in which the data provided can be transmitted to the authorities or another party.

We take measures to ensure that people have access to accurate information and have opportunities to participate in and influence decisions made on their behalf, as well as to ensure that meaningful choices are offered them in what are often dire circumstances.

We see ourselves as accountable first to those at risk and we will, to the extent possible, put in place systems to ensure that our accountability is transparent and can be monitored. We take proactive measures to avoid doing harm to those for whose benefit we work. We are guided by the desire to do, at all times, what is in the best interests of those at risk. We therefore attach importance to direct dialogue with them.

Programmes for people affected by displacement must be designed in such a way as to empower the beneficiaries, to promote self-reliance and to strengthen resilience. When drawing up emergency plans, components of the Movement must bear in mind their possible long-term consequences and work out with the affected groups mechanisms to help ensure self-reliance.

- 6. We coordinate with the authorities and all others concerned. Whenever necessary, we remind them of their obligations as set out in the applicable normative framework.**

Unlike refugees, IDPs are not covered by a specific international convention. This sometimes gives rise to an assumption that there is a gap in the legal framework for the protection and assistance of IDPs. However, although the relevant law may contain no specific references to IDPs, a legal framework can always be referred to for the protection of people who have been displaced, people who have been left behind, and other groups affected by the events concerned. The authorities and, in the event of conflict, the warring parties must be reminded of their obligations

towards people affected by displacement, and those affected should be aware of the rights that can protect them.

The Movement needs to establish a dialogue with the authorities and any other parties involved. It must gain their trust through strict compliance with the Fundamental Principles, in particular impartiality, neutrality and independence, in order to secure unimpeded and safe access to the populations it wishes to protect and assist and to remind the authorities of their obligations. National Societies also gain the trust of their authorities when they are perceived as reliable partners while acting in their auxiliary role.

The Movement must know the rules of international law governing all phases of displacement, in particular international humanitarian law and international human rights law, for the benefit of people affected. In addition, national law must be taken into account and be interpreted in such a way as to comply with the international law binding on the State. At no time should the Movement's activities fall short of the standards set by international law. International law applicable to displacement can be found in many treaties. They include the universal and regional human rights treaties, the Geneva Conventions of 1949 and their Additional Protocols of 1977, as well as customary international law. There are also newer developments specific to the problem of displacement, such as the Great Lakes Protocol on Internally Displaced Persons. These and other potential normative developments can complement and strengthen the existing international legal framework.

All components of the Movement should be aware of the applicable legal framework when engaging in displacement-related activities because the protection provided by international law (and national law where applicable) must constitute the minimum benchmark for all our work (see annex 2 on the legal framework).

The ICRC plays a particular role in upholding international humanitarian law and should provide support for the other components of the Movement in this respect.

7. We, the National Societies, as auxiliaries to our authorities, support those authorities in meeting their responsibilities in the humanitarian field as far as our resources allow and provided we can do so in full compliance with the Fundamental Principles and in keeping with the mission and Statutes of the Movement.

In any emergency that overstretches their resources, the authorities will look for reliable partners. The more they trust their National Societies, the more readily they will entrust them with matters that are the responsibility of the State. At times a government's trust may be based more on the National Society's reliability as a provider of services than on its respect for the Fundamental Principles of the Movement. The auxiliary role often confers an operational advantage but it is essential that the National Society uphold the Fundamental Principles, and preserve its independence in decision-making and action, particularly when the State authority is a party to a conflict in the country of operation.

In their role as auxiliaries to their respective public authorities, National Societies must strive for a balanced relationship with clear and reciprocal responsibilities and work to maintain and enhance a constant dialogue at all levels within the agreed framework for humanitarian action.¹⁷

8. We seek to limit the extent to which we substitute for the authorities in discharging their responsibility to meet the needs and ensure the well-being of the populations within the territory under their control.

Resident populations and local communities are very often the first to help IDPs. Local, regional and national authorities nevertheless have primary responsibility for providing affected people and communities with coordinated and sustainable support.

The Movement should avoid substituting its activities for work that should be carried out by the authorities in cases where doing so might discourage the authorities from fully meeting their obligations and responsibilities. In countries where State structures are weak, there may be a tendency to ask National Societies to take over a wide range of undischarged responsibilities. It may be useful to distinguish between cases where a State is labouring under a shortage of capacity from those where it lacks political will. Where the State lacks the political will to shoulder its responsibilities, National Societies should resist pressure to become substitutes and should assess the support available to them in the light of their own capacities. National Societies should be extremely wary of agreeing to substitute for the authorities without first advocating alternatives that are in accordance with the Fundamental Principles and the Movement's Statutes.

The Movement's components should support affected communities in their desire to fall back on their usual coping mechanisms and should develop programmes that focus on restoring self-reliance.

9. We give priority to operational partnerships within the Movement and seek to play our complementary roles, shoulder our responsibilities and marshal our expertise, all to the full.

The Movement has long been active in meeting the needs and diminishing the vulnerabilities of IDPs, refugees, asylum-seekers and other migrants, and has developed a number of policies¹⁸ in this field.

17 See Resolution 2 of the 2007 International Conference.

18 In recent decades, the Movement has established a number of policies and regulations governing its emergency operations and its activities in protracted conflicts and disasters. In 2001, the Council of Delegates adopted a major resolution on the Movement's work to aid refugees and IDPs. The resolution called for a strategy to guide that work. In 2003, the Council of Delegates adopted a document entitled *Minimum elements to be included in operational agreements between Movement components and their operational partners*, which aims to strengthen the Movement's image and credibility. The Movement has also developed an important body of policies, regulations and guidelines on coordination and cooperation within the Movement (endorsed through resolutions adopted by the International Conference, the Council of Delegates and the Federation General Assembly) based primarily on the Geneva Conventions, the Fundamental Principles and the Movement's Statutes.

Thanks to the different but complementary mandates of the Movement's various components, their combined efforts provide a comprehensive response to displacement. In armed conflict and other situations of violence, two distinct components of the Movement, the host National Society and the ICRC, have concomitant mandates.¹⁹ In any other case, the host National Society is well placed to play a crucial role, especially in the early-warning phase and the first stages of a crisis, as well as in the later phase during which most other agencies withdraw. Through the bulk of the crisis, the variety of expertise within the Movement's components is combined to provide a substantial response. The Movement has know-how in the use of contingency-planning mechanisms that play a significant role in an effective humanitarian response. In addition, it has developed an effective system for the rapid deployment of humanitarian staff.

In the interests of optimal use of resources, the National Societies and, in case of international relief operations, the ICRC and the International Federation, must strive to establish and adopt a coordination framework for the Movement and share it with all their partners. Where it is able to do so on the basis of a realistic assessment of its capacities, the host National Society coordinates the Movement's response on its territory. Otherwise, that Society is the primary partner of the agency on which this coordination responsibility devolves. In order to strengthen their common identity and respect for the Fundamental Principles, the components should assign priority to (operational) partnerships within the Movement. Careful consideration must be given to maintaining or strengthening the capacity of the National Society of the country concerned. Its overall capacity and role should not be sapped by large-scale operations for displaced groups.

The International Federation has the lead in ensuring that the National Society concerned receives adequate capacity-building support from other components of the Movement. The ICRC contributes to the development and preparedness of National Societies in areas related to its mandate and core expertise. It will in particular support the endeavours of National Societies to strengthen their operating capacity in the fields of tracing and restoring family links, including the management of human remains and forensic identification, spreading knowledge of the Movement's Fundamental Principles, and activities to reduce the impact of weapon contamination. To this end, the ICRC will do its utmost to provide possible technical advice and resources.

In order to ensure that those providing resources and support can do so as part of a well-organized response, the different components of the Movement must coordinate their resource-mobilizing strategies and appeals, in particular in the initial phase of an emergency.

In accordance with existing policy, National Societies must channel their international appeals primarily through the ICRC or the International Federation, as appropriate.

¹⁹ According to Articles 4 and 5 of the Movement's Statutes, National Societies in their own countries and the ICRC have complementary and concomitant mandates in international and other armed conflicts or internal strife.

10. We coordinate with other entities on the basis of their presence and abilities on the ground, the needs to be met, the capacities available, and the possibilities for access, while ensuring that we remain (and are perceived as remaining) true to our Fundamental Principles.

Given the magnitude of internal displacement, a comprehensive response is generally beyond the powers of any single humanitarian organization.

In many places where there is a need for large-scale humanitarian operations, the number of agencies involved has grown. As a result, all the organizations involved need to systematically coordinate their efforts as far as possible and find ways of making the best possible use of their resources, capacities and expertise in order to maximize their overall impact.

IDPs are increasingly viewed as a specific vulnerable group in need of specific protection and a specific status. The issue is high on the agenda of United Nations agencies and many non-governmental organizations working in the field.

There are many advantages to cooperating with UN agencies, especially if we seek areas of complementarity in which they can provide specific expertise (e.g. WHO, UNFPA, FAO) and aid (e.g. WFP, UNICEF, UNCHR) for IDPs and in which, for example, National Societies can make available their own extensive national network and their direct access to the authorities.

Our relations with the UN agencies must be guided by the same general principles that inspire all components of the Movement in their relations with any other humanitarian entities. This is particularly true in armed conflict and other situations of violence where it is of fundamental importance for all components of the Movement to maintain, and be perceived by others as maintaining, a strictly neutral and independent humanitarian approach vis-à-vis all actors, even if National Societies can simultaneously act as auxiliaries to their authorities.

In armed conflicts and other situations of violence, a clear distinction must be drawn between the UN as a whole (peace-keeping, peace-making and political bodies) and its specialized agencies. While cooperating with specialized agencies, particular attention must be paid to preserving the Movement's identity and ensuring respect for the Fundamental Principles.

Cooperation agreements with local and international non-governmental organizations are possible, provided that their work is understood, that they subscribe to values similar to our own and that cooperation with them does not distort the perception that communities and authorities have of the Movement's work.

When negotiating or reviewing operational agreements between Movement components and external organizations, the components must refer to existing guidance on relations with organizations outside the Movement.²⁰

20 See *Minimum elements to be included in operational agreements between Movement components and their operational partners*, 2003 Council of Delegates, annex to Resolution 10 and Guidance Document on Relations between the Components of the Movement and Military Bodies, (Council of Delegates, 2005, Resolution 7).

Annex 2

Legal framework

All components of the Movement should be aware of the applicable legal framework when engaging in activities concerning displacement because the protection provided by international law (and national law if applicable) must provide the minimum benchmark for all activities. The ICRC plays a particular role in upholding international humanitarian law and should support the other components in this respect.

Broadly speaking, the international legal framework applicable to displacement includes the following main bodies of law and principles:

- a) **National law:** National law provides the legal framework for each specific situation. As the majority of IDPs are nationals of the State in which they find themselves, they are entitled to the full protection of national law and the rights it grants to the State's citizens, without adverse distinction resulting from displacement. Some displaced persons, however, are not nationals. They are nonetheless protected under international human rights law, and most rights must be granted to them without discrimination. National law must be in accordance with the minimum standards provided by international human rights and humanitarian law. Where this is not the case, work to promote knowledge of the law can help bring national legislation and policies in line with international law and principles.
- b) **International humanitarian law:** During armed conflicts, IDPs are civilians and are entitled to the same protection from the effects of hostilities and to the same relief as the rest of the civilian population.

Respect for basic rules of IHL would prevent most displacement since it occurs mostly as a result of violations of those rules, such as the obligation to distinguish at all times between civilians and combatants and between civilian objects and military objectives, the prohibition on making civilians or civilian objects the target of attacks, the prohibition on indiscriminate attacks, the obligation to take precautions in attacks to spare the civilian population, the prohibition on acts or threats of violence to spread terror among the civilian population, the prohibition on starvation as a method of warfare, the prohibition on the destruction of objects indispensable for the survival of the civilian population, the prohibition on reprisals against the civilian population and civilian property, fundamental guarantees such as the prohibition on ill-treatment, and the prohibition on collective punishments.

In addition, IHL contains a specific prohibition on displacement unless it is justified for the safety of the population or for imperative reasons of security. It also stipulates that, if they are displaced, civilians must be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and members of the same family unit must not be separated. It further states that displaced persons have a right to safe and voluntary return and that their

property must be respected. Finally, IHL stipulates that the parties to a conflict must allow and facilitate the rapid and unimpeded passage of humanitarian relief (for civilians in need), which is impartial in character and conducted without adverse distinction, subject to their right of control.

- c) **International human rights law:** The rights enshrined in international human rights law must be granted to everyone without discrimination, including people, such as IDPs, who have to leave their ordinary places of residence. Human rights are universal and inalienable and States must respect and guarantee the civil, political, economic, social and cultural rights of all persons at all times. International human rights law is, in particular, reflected in the Universal Declaration of Human Rights of 1948 and in the universal and regional human rights treaties. These can be supplemented by other human rights instruments, such as declarations of human rights principles or other declarations, the most relevant one being the Guiding Principles on Internal Displacement mentioned below (paragraph d). International humanitarian law in particular guarantees respect for the right to life, freedom from torture and other forms of ill-treatment, respect for private and family life, respect for property, freedom of expression, belief, conscience and religion, and the right to a standard of living adequate for the health and well-being of oneself and one's family, including food, clothing, housing and medical care. An important right is that of everyone living lawfully within the territory of a country to freedom of movement and to choose his or her place of residence.

Respect for these fundamental human rights would prevent displacement in the first place. But this law also protects people once they are displaced. For instance, their family life and their property must continue to be respected.

While these human rights are, of course, not without limitation, the authorities may not restrict them unless this is necessary for legitimate reasons and the limitation is not excessive as compared to the aim that they seek to achieve.

- d) **The Guiding Principles on Internal Displacement:** The Guiding Principles provide guidance for States and international organizations. They are a compilation of recommendations, drawn from public international law, international humanitarian law, human rights law and refugee law, which aim to restate the fundamental protection to which IDPs are entitled. The Guiding Principles are not binding in themselves but provide a useful tool. They bring together applicable norms that already exist but that might be 'forgotten' as they are found in different bodies of law. They spell out in detail rules that may be unclear in binding instruments, such as rules governing return.

Reports and Documents

Sixty years of the Geneva Conventions: learning from the past to better face the future

Ceremony to celebrate the 60th anniversary of the Geneva Conventions, Geneva, 12 August 2009.

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Address by Jakob Kellenberger, President of the International Committee of the Red Cross

We gather here to mark a significant coming of age. Sixty years ago today, the Geneva Conventions were adopted. This defining event played a central role in expanding the protection provided to victims of armed conflicts. It also expanded the ICRC's humanitarian mandate, and facilitated our access as well as our dialogue with States.

It would be natural, on this date, to reflect with a certain pride and satisfaction on the achievements and successes over the decades, and to allow at least a modest degree of self-congratulation. It cannot be denied that much more attention is paid to situations where the rules are violated than to the many situations where their respect is ensured.

At the same time, this anniversary is an opportunity to anticipate the next decade and beyond, ensuring that the Geneva Conventions are well-prepared for the increasing challenges and risks that still lie ahead.

Without a doubt, the journey so far has not always been plain sailing. The extent to which armed conflict has evolved over the past 60 years cannot be underestimated. It almost goes without saying that contemporary warfare rarely consists of two well-structured armies facing each other on a geographically defined battlefield. As lines have become increasingly blurred between various armed groups and between combatants and civilians, it is civilian men, women and children who have increasingly become the main victims. International humanitarian

law, IHL, has necessarily adapted to this changing reality. The adoption of the first two Additional Protocols to the Geneva Conventions in 1977, with the rules they established on the conduct of hostilities and on the protection of persons affected by non-international armed conflict, is just one example. Specific rules prohibiting or regulating weapons such as anti-personnel mines and, more recently, cluster munitions are another example of the adaptability of IHL to the realities on the ground.

The traumatic events of 9/11 and its aftermath set a new test for IHL. The polarisation of international relations and the humanitarian consequences of what has been referred to as the “global war on terror” have posed a huge challenge. The proliferation and fragmentation of non-state armed groups, and the fact that some of them reject the premises of IHL, have posed another. These challenges effectively exposed IHL to some rigorous cross-examination by a wide range of actors, including the ICRC, to see if it really does still stand as an adequate legal framework for the protection of victims of armed conflict.

In short, the result of this sometimes arduous process was a resounding reaffirmation of the relevance and adequacy of IHL in preserving human life and dignity in armed conflict. However, as I made clear at the outset, this is no time to rest on our laurels. The nature of armed conflict, and of the causes and consequences of such conflict, is continuing to evolve. IHL must evolve too.

The priority for the ICRC now is to anticipate and prepare for the main challenges to IHL in the years ahead. While these challenges have a legal and often a political dimension, I must stress that our ultimate concern is purely humanitarian; our only motivation is to contribute to achieving better protection for the victims of armed conflict.

I shall refer to some of these challenges and consider some ways in which they might be addressed, including what and how the ICRC, for its part, stands ready to contribute in terms of guidance and advice. It almost goes without saying, however, that the effort required to address these challenges is the responsibility – be it legal or moral – not just of the ICRC, but of a wide range of actors including States and non-state actors, military forces and legislators.

I shall focus firstly on certain challenges related to armed conflict in general and secondly on those related specifically to non-international armed conflicts.

So what are some of the ongoing challenges to IHL? The first relates to the conduct of hostilities. I referred earlier to the changing nature of armed conflict and the increasingly blurred lines between combatants and civilians. Civilians have progressively become more involved in activities closely related to actual combat. At the same time, combatants do not always clearly distinguish themselves from civilians, neither wearing uniforms nor openly carrying arms. They mingle with the civilian population. Civilians are also used as human shields. To add to the confusion, in some conflicts, traditional military functions have been outsourced to private contractors or other civilians working for State armed forces or for organised armed groups. These trends are, if anything, likely to increase in the years ahead.

The result of this, in a nutshell, is that civilians are more likely to be targeted – either mistakenly or arbitrarily. Military personnel are also at increased

risk: since they cannot properly identify their adversary, they are vulnerable to attack by individuals who to all appearances are civilians.

IHL stipulates that those involved in fighting must make a basic distinction between combatants on the one hand, who may lawfully be attacked, and civilians on the other hand, who are protected against attack unless and for such time as they directly participate in hostilities. The problem is that neither the Geneva Conventions nor their Additional Protocols spell out what precisely constitutes “direct participation in hostilities”.

To put it bluntly, this lack of clarity has been costing lives. This is simply unjustifiable. In an effort to help remedy this situation, the ICRC worked for six years with a group of more than 50 international legal experts from military, academic, governmental and non-governmental backgrounds. The end result of this long and intense process, published just two months ago, was a substantial guidance document. This document serves to shed light firstly on who is considered a civilian for the purpose of conducting hostilities, what conduct amounts to direct participation in hostilities, and which particular rules and principles govern the loss of civilian protection against direct attack.

Without changing existing law, the ICRC’s Interpretative Guidance document provides our recommendations on how IHL relating to the notion of direct participation in hostilities should be interpreted in contemporary armed conflict. It constitutes much more than an academic exercise. The aim is that these recommendations will enjoy practical application where it matters, in the midst of armed conflict, and better protect the victims of those conflicts.

Direct participation in hostilities is not the only concept relating to the conduct of hostilities that could benefit from further clarification. Differences exist over the interpretation of other key notions such as “military objective”, the “principle of proportionality” and “precaution”.

The debate has been prompted in part by the growing number of military operations conducted in densely populated urban areas, often using heavy or highly explosive weapons, which have devastating humanitarian consequences for civilian populations. The media images of death, injury and destruction – of terrible suffering – in such situations of conflict in different parts of the world are surely all too familiar to everyone here today.

Another key issue here is the increasingly asymmetric nature of modern armed conflicts. Differences between belligerents, especially in terms of technological and military capacities have become ever more pronounced. Compliance with the rules of IHL may be perceived as beneficial to one side of the conflict only, while detrimental to the other. At worst, a militarily weak party – faced with a much more powerful opponent – will contravene fundamental rules of IHL in an attempt to even out the imbalance. If one side repeatedly breaks the rules, there is a risk that the situation quickly deteriorates into a free-for-all. Such a downward spiral would defy the fundamental purpose of IHL – to alleviate suffering in times of war. We must explore every avenue to prevent this from happening.

I would also like to briefly address the humanitarian and legal challenges related to the protection of internally displaced people. In terms of numbers, this

is perhaps one of the most daunting humanitarian challenges arising in armed conflicts around the world today, from Colombia to Sri Lanka and from Pakistan to Sudan. This problem not only affects the many millions of internally displaced persons, IDPs, but also countless host families and resident communities.

Violations of IHL are the most common causes of internal displacement in armed conflict. Preventing violations is therefore, logically, the best means of preventing displacement from occurring in the first place.

On the other hand, people are sometimes forcibly prevented from fleeing when they wish to do so. During displacement, IDPs are often exposed to further abuses and have wide-ranging subsistence needs. Even when IDPs want to return to their place of origin, or settle elsewhere, they are often faced with obstacles. Their property may have been destroyed or taken by others, the land might be occupied or unusable after the hostilities, or returnees may fear reprisals if they return.

As part of the civilian population, IDPs are protected as civilians in armed conflicts. If parties to conflicts respected the basic rules of IHL, much of the displacement and suffering caused to IDPs could be prevented. Nevertheless, there are some aspects of IHL concerning displacement that could be clarified or improved. These include in particular questions of freedom of movement, the need to preserve family unity, the prohibition of forced return or forced resettlement, and the right to voluntary return.

These various humanitarian and legal challenges exist in all types of armed conflict, whether international or non-international. However, I would now like to highlight some specific challenges concerning the law regulating non-international armed conflicts.

Non-international armed conflicts are by far the most prevalent type of armed conflict today, causing the greatest suffering. Yet there is no clear, universally-accepted legal definition of what such a conflict actually is. Both Article 3 common to the four Geneva Conventions and the second Additional Protocol give rise to certain questions on this. How can a non-international armed conflict be more precisely distinguished from other forms of violence, in particular organized crime and terrorist activities? And what if a non-international armed conflict spills over a State border, for example?

The lack of clear answers to such questions may effectively allow parties to circumvent their legal obligations. The existence of an armed conflict may be refuted so as to evade the application of IHL altogether. Conversely, other situations may inaccurately or prematurely be described as an armed conflict, precisely to trigger the applicability of IHL and its more permissive standards regarding the use of force, for example.

Even where the applicability of IHL in a non-international armed conflict is not in dispute, the fact that treaty-based law applying to these situations is at best limited has led to further uncertainties.

Let us remember, however, that non-international armed conflicts are not only governed by treaty law. The substantial number of rules identified in the ICRC's 2005 Study on Customary International Humanitarian Law provides additional legally binding norms in these situations.

But while customary IHL can fill some gaps, there are still humanitarian problems arising in these types of conflicts that are not fully addressed under the current applicable legal regime.

IHL applicable in non-international armed conflict contains general principles but remains insufficiently elaborate as regards material conditions of detention and detainees' right of contact with the outside world, for example. Lack of precise rules on various aspects of treatment and conditions of detention and the lack of clarity surrounding detention centres may have immediate and grave humanitarian consequences on the health and well-being of detainees. Therefore, even if the primary humanitarian challenge lies in the lack of resources by detaining authorities and in the lack of implementation of existing general principles, more precise regulation of conditions of detention in non-international armed conflict could usefully complement some of IHL's fundamental requirements.

Other areas that suffer from a lack of legal clarity include procedural safeguards for people interned for security reasons. In an effort to clarify minimum procedural rights, in 2005 the ICRC issued a set of procedural principles and safeguards applicable to any situation of internment, based on law and policy. The ICRC has been relying on this position in its operational dialogue with detaining authorities in a number of contexts around the world. Adequate protection could nevertheless be better ensured if procedural safeguards were put on a more solid legal footing by States.

Humanitarian issues arise in other areas as well, in part because of a lack of rules, or because the rules are too broad or vague, leaving much to subjective interpretation. These areas include access to populations in need of humanitarian assistance, the fate of missing persons and protection of the natural environment. And this list is not exhaustive.

To address these humanitarian and legal challenges, the ICRC has been intensively engaged for the past two years in a comprehensive internal research study. The study aims firstly to explain in simple terms the scope of application of the law to the whole range of aforementioned humanitarian concerns arising in non-international armed conflicts, including the challenge of improving compliance with the law by all parties to such conflicts. On the basis of this, its second aim is to evaluate the legal responses provided in existing law to these humanitarian concerns. Based on a comprehensive assessment of the conclusions of this research, which is still underway, a case will be made for the clarification or further development of specific aspects of the law. The research will be followed by proposals on how to move forward, both substantively and procedurally.

Within the scope of this study, the ICRC is also looking at aspects of Article 3 common to the Geneva Conventions that need to be further clarified. Article 3 is widely regarded as a mini-Convention in itself, binding States and non state armed groups; a baseline from which no departure, under any circumstances, is allowed. It applies minimum legal standards to the treatment of all persons in enemy hands, regardless of how they may be legally or politically classified or in whose custody they may be. We are preparing a consolidated reading of the

protective legal and policy framework applicable in non-international armed conflicts that meet the threshold of common Article 3.

The ICRC has a responsibility in ensuring that the Conventions will continue to stand the test of time. Of course it is the political and legal responsibility primarily of States, which have universally ratified the Conventions, to ensure that they are implemented and enforced.

Ideally of course, all parties to an armed conflict, whatever they call themselves or each other, would appreciate that it is in their own best interest to apply the legal restraints provided by IHL. After all, combatants on both sides have obligations as well as rights. On the other hand, failure to prevent abuse against others ultimately removes the safeguard against similar abuse in return. The result, simply put, is spiralling human suffering.

However, the lack of respect for existing rules remains, as ever, the main challenge. I hardly need to remind you of the catalogue of flagrant violations of IHL frequently witnessed in armed conflicts around the world today. This situation – sadly – is compounded by a prevailing culture of impunity. True, there have been significant positive developments towards strengthening accountability for war crimes through various international tribunals and the International Criminal Court. National legislators and courts are also finally starting to live up to their respective responsibilities of ensuring that domestic legislation recognises the criminal responsibility of those who violate IHL, and of actually enforcing such legislation.

Public pressure and international scrutiny of conduct in an armed conflict are also significant factors in improving compliance with IHL. This presupposes adequate knowledge and training in IHL not just by lawyers and military commanders, but by wider sectors of the public at large. After all it was public pressure – and the collective shame of governments in failing to stop the atrocities in the former Yugoslavia and Rwanda – that led to the establishment of the ad hoc tribunals for those countries in the mid-1990s.

Ignorance of the law is no excuse. At least the guidance, clarification and proposals coming out of the various ICRC initiatives I mentioned will make recourse to this excuse by parties to a conflict even less credible.

The ICRC can only contribute one part of what must be a concerted international effort to improve compliance with IHL. On the 60th anniversary of the Geneva Conventions, I make a heartfelt plea to States and non-state armed groups, who are also bound by their provisions, to show the requisite political will to turn legal provisions into a meaningful reality. I urge them to show good faith in protecting the victims of armed conflicts – conflicts that in view of the challenges I have mentioned today are likely to become ever more pernicious in the years to come.

Sixty years ago, the Geneva Conventions were born out of the horrors experienced by millions of people during the Second World War and its aftermath. The essential spirit of the Geneva Conventions – to uphold human life and dignity even in the midst of armed conflict – is as important now as it was 60 years ago. Thank you for doing all you can to keep that spirit alive.

REPORTS AND DOCUMENTS

The Geneva Conventions and Public International Law

British Foreign and Commonwealth Office

Conference commemorating the 60th Anniversary of the 1949 Geneva Conventions, London, 9 July 2009

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Address by Theodor Meron, Judge and former President of the International Criminal Tribunal for the former Yugoslavia, Professor of International Law and holder of the Charles L. Denison Chair at New York University Law School

With sixty years of hindsight, it seems particularly appropriate to reflect on the trajectory of international humanitarian law (IHL) as shaped by the 1949 Geneva Conventions. The near universal acceptance of the Conventions and their secure integration into the international system can sometimes lead us to underestimate the significance of their impact. It is this transformative impact on public international law which will be the focus of this note.

To start, I will briefly review the historical context from which the 1949 Conventions materialized. Calamitous events and atrocities have always driven the development of IHL. In 1863, the American Civil War gave rise to the Lieber Code. This ultimately gave birth to the branch of IHL commonly known as the Hague Law, which governs the conduct of hostilities. One hundred and fifty years ago, the battle of Solferino – immortalized in Henry Dunant’s moving memoir of suffering and bloodshed – inspired the Red Cross Movement. Thence began the other branch of IHL, the Geneva Law, which – starting with the first Geneva Convention in 1864 – has provided for the protection of victims of war, the sick, the wounded, prisoners and civilians.

In the twentieth century, Nazi atrocities led to Nuremberg, the Genocide Convention, the adoption of the Universal Declaration of Human Rights and the

human rights clauses in the UN Charter. At around the same time, the 1949 Geneva Conventions were adopted. While the First, Second and Third Geneva Conventions followed earlier, more rudimentary models of IHL, the common clauses of the Conventions and the Fourth Geneva Convention were entirely new conceptions. Not surprisingly, the committee that drafted the common clauses was chaired by one of the eminent international lawyers of the time, Maurice Bourquin. The most famous of these common clauses is of course common Article 3, which for the first time in the history of international law introduced regulation of non-international armed conflicts into multilateral treaties. Through international criminal courts, this article has evolved into a mini-code of criminal proscriptions.

The 1949 Geneva Conventions were the flagship of the post-World War II legal changes that shifted the paradigm of many aspects of IHL from an inter-State archetype to a homocentric system, which included rules on individual criminal responsibility. The Geneva Conventions also introduced the system of grave breaches and the obligation of all states parties to prosecute or to extradite violations listed as such, *aut dedere aut judicare*. The conventions thus make an important contribution to the principle of universal jurisdiction over crimes *jure gentium*. Although the Conventions contemplated exercising jurisdiction by the detaining powers, it is now accepted that international criminal courts may also exercise jurisdiction over grave breaches.

From Hague IV to Geneva IV

To understand how significant the 1949 Geneva Conventions were, it is useful to consider the legal protections that preceded them. The most significant of the latter were included in the Fourth Hague Convention, which contains important but inadequate rules governing the protection of civilians in occupied territory, including the duty to maintain law and order and the prohibition of collective punishment. Of the fifteen articles of the Hague Regulations on ‘Military Authority over the Territory of the Hostile State’, only three relate to the physical integrity of civilians. The other provisions deal essentially with the protection of property. The sufferings of populations in Nazi-occupied Europe demonstrated very well the gaps in the Fourth Hague Convention, and the need for a more protective regime.

The ICRC had prepared a draft civilians’ convention (the ‘Tokyo draft’) that would have supplemented the Hague Convention, but the onset of World War II suspended any progress. Of course, it would take a true optimist to believe that the existence of a civilians’ convention during World War II would have prevented the worse Nazi atrocities (such as the Holocaust), as well as those committed by Japan, from occurring, but it would at least have given the ICRC more of a standing to intervene.

Informed by the carnage of World War II, the Fourth Geneva Convention created a new balance between the rights of occupiers and the rights of occupied populations. The Fourth Hague Convention established important limitations on the occupier’s permissible activities; by contrast, the Fourth Geneva Convention

obligated the occupier, as Sir Hersch Lauterpacht memorably wrote, ‘to assume active responsibility for the welfare of the population under his control.’¹ These obligations included ensuring the population’s basic needs in terms of food, health, and administration of justice; and more broadly, protection of the individual’s human dignity. In further contrast to Fourth Hague Convention, the Fourth Geneva Convention contains detailed provisions on the protections afforded to civilians – aliens, the general population, vulnerable groups such as children and women, and internees – not only in occupied territories, but also in all territories of the parties to the conflict. It may be worthwhile recalling the ancient pedigree of the rules on humane treatment of the civilian population of occupied countries. In the context of theft of a church object during the Hundred Years War, and the hanging ordered for the offender, Shakespeare’s Henry V declared: ‘we would all have all such offenders so cut off, and we here give express charge that in our marches through the country there be nothing compelled from the villages, nothing taken but paid for, none of the French upbraided or abused in disdainful language.’ The Fourth Geneva Convention constitutes a great leap in what has been a very long march towards a more proactive approach to safeguarding civilian welfare.

From reciprocity to individual responsibility and rights

How much humanitarian law has already departed from its previous foci can be seen by revisiting the now largely obsolete *si omnes* clause of the Fourth Hague Convention, as well as the question of belligerent reprisals.

The *si omnes* clause found in early law of war treaties provided that if one party to a conflict was not a party to the instrument, no parties were bound by the instrument. The Fourth Hague Convention’s *si omnes* clause was invoked as a defence and threatened the integrity of Nuremberg prosecutions. It was only by considering the Hague Regulations – made inapplicable by the *si omnes* clause – as a mirror of customary law that the argument of the Nuremberg defendants could be answered. While Hague IV is still in force, the fact that most of its provisions are now regarded as customary law, means that the Convention’s general participation clause can now be regarded as having fallen in desuetude.

And what about the Geneva Conventions? The general participation clause was explicitly reversed in the 1929 Prisoner of War (POW) Convention and in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field. Article 82 of the POW Convention provided that ‘[i]n time of war if one of the belligerents is not a party to the Convention, its provisions shall, nevertheless, remain binding as between the belligerents who are parties thereto’.

1 Hersch Lauterpacht, ‘The Law of War’, in Elihu Lauterpacht (ed), *International Law: Collected Papers – Disputes, War and Neutrality*, Cambridge University Press, Cambridge, 2004, p. 604.

Common Article 2(3) of the 1949 Geneva Conventions goes even further. It provides that even if one belligerent is not a Party to the Convention, but accepts it for the specific conflict only, the parties shall be bound by the Convention in relation to it. This idea of broadening the potential contractual reach of a convention had been broached in 1929 but was rejected at that time.

The Geneva Conventions also broadened their applicability by excluding the principle of reciprocity. Common Article 1 of the 1949 Geneva Conventions, which provides that ‘The High Contracting Parties undertake to respect and ensure respect for the present Convention *in all circumstances*’, epitomizes this denial of reciprocity. The ICRC Commentary to the First Geneva Convention further emphasizes the unconditional and non-reciprocal character of the obligations: ‘[a] State does not proclaim the principle of the protection due to wounded and sick combatants in the hope of saving a certain number of its own nationals. It does so out of respect for the human person as such’.²

Another aspect of Common Article 1, the charge that parties ‘ensure respect’, also derives from the rejection of reciprocity and goes to the heart of accountability for violations of international humanitarian law. The International Court of Justice held this article to be declaratory of customary law in its 1986 judgment in *Nicaragua v. United States*, concluding that the Geneva Conventions were merely specific expressions of general principles of IHL, which obligated the United States to respect their provisions.

Although the initial purpose of Common Article 1 may have been to specify the obligation of a party to ensure that its entire civilian and military apparatus respect the Conventions, it has subsequently been interpreted as providing standing for States parties to the Convention *vis-à-vis* violating States. Parties can therefore endeavour to bring a violating party back into compliance, thus promoting universal application. To a large extent, this later interpretation was triggered by the ICRC’s commentaries to the Geneva Conventions and the supportive literature generated by them. The exact scope of the rights of third parties under Common Article 1, however, is still unclear. Nevertheless, Common Article 1 can already be seen as the humanitarian law’s analogue to the human rights principle of *erga omnes*.

We can further observe the departure from the principle of reciprocity in the treatment of reprisals, at least in treaties, though less in state practice. From the 1929 Convention relative to the Treatment of Prisoners of War to the 1977 Additional Protocol I to the Geneva Conventions, the domain of legitimate reprisals has shrunk dramatically. The 1929 POW Convention prohibited reprisals against prisoners of war. The 1949 Geneva Conventions dramatically expanded the prohibition on reprisals to include persons, installations, or property protected by their provisions, as well as prohibiting collective punishment and terrorization of the civilian population, and the taking of hostages. Additional Protocol I prohibits

2 Jean Pictet, *Commentary I: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 1952, pp. 28–29.

reprisals against the entire civilian population, civilian objects, and cultural objects (reprisals against the latter are also prohibited by the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict). The Protocol also prohibits reprisals against objects indispensable to the survival of the civilian population, the natural environment, and works or installations containing so-called ‘dangerous forces’, such as nuclear or toxic materials. Finally, Protocol II to the Convention on Conventional Weapons prohibits reprisals through the use of mines, booby-traps and other devices.

Modern treaties have thus reduced legitimate reprisals to those against the armed forces; but since attacks against the military are, in any event, lawful under *jus in bello*, these treaties in effect have nearly eliminated reprisals against non-military targets. Practice of states lags, however, behind such enlightened normative texts.

The principle of reciprocity, still prominent in the law of war, has thus undergone important changes. Although reciprocity still applies to the creation of obligations under the Geneva Conventions, its reach is limited. It does not enable the termination of obligations on grounds of breach. For example, the denunciation clause of the Geneva Conventions provides that a denunciation cannot take effect until peace has been concluded and the release and repatriation of the persons protected by the Conventions have been completed. Article 60(5) of the Vienna Convention on the Law of Treaties resonates with these provisions of the Geneva Conventions. Under this article, the party victim to a breach of treaty cannot invoke the breach as a ground for terminating or suspending the treaty provisions of a humanitarian character relating to the protection of the human person. A breach, and consequently the principle of reciprocity, may therefore not be invoked to justify derogations from humanitarian law with regard to protected persons, especially civilians. As the ICRC Commentary notes, ‘the Conventions are coming to be regarded less and less as contracts on a basis of reciprocity concluded in the national interest of each of the parties, and more and more as solemn affirmations of principles [and] unconditional engagements’.³

Inalienability of individual rights

The transition from contractual principles governing interstate relations to universal ones is also evidenced in the proposals for a preamble to the 1949 Geneva Conventions. While no preamble was included in the four Conventions because of disagreements on its content, concern for human rights was nonetheless very present among the delegates. A French proposal, which was to become the preamble to the draft Convention, amply demonstrates this concern, stating that: ‘The High Contracting Parties, conscious of their obligation to come to an agreement in

3 Pictet, above note 2, p. 28.

order to protect civilian populations from the horrors of War, undertake to respect the principles of human rights which constitute the safeguard of civilization.’

Although the French proposal was not accepted, much of its language can be found in Common Article 3. The International Court of Justice has already paid Common Article 3 the highest tribute in the *Nicaragua* decision, by describing it as a reflection of ‘elementary considerations of humanity’. The establishment of mechanisms for the repression of grave breaches and the evolution of international criminal jurisdiction also demonstrate the intent to reach individuals as the ultimate subjects of humanitarian rights and obligations.

While even the early Geneva Conventions conferred protections on individuals as well as States, whether those protections belonged to the contracting States or to the individuals themselves was unclear. The 1929 Geneva Prisoners of War Convention first paved the way for recognition of individual rights by using the term ‘right’ in several provisions. It was not until the 1949 Geneva Conventions, however, that ‘the existence of rights conferred on protected persons was affirmed’ through several key provisions.⁴ These provisions clarified that rights are granted to the protected persons themselves. They also introduced into international humanitarian law an analogue to *jus cogens*, which is so central to human rights law. In IHL, this analogue preceded by two decades the recognition of *jus cogens* in the Vienna Convention on the Law of Treaties. According to Common Article 6/6/6/7, agreements by which either States or the individuals themselves purport to restrict the rights of protected persons under the Conventions will have no effect. These invalidating provisions are conceptually different from the concept of *jus cogens* of Article 53 of the Vienna Conventions on the Law of Treaties. The resolution of conflicts between this Common Article and later agreements may thus be difficult; however, given the widespread recognition of the Geneva Conventions as customary law – and in some cases, as peremptory law – the invalidating provisions will probably prevail.

Common Article 6/6/6/7 was adopted in reaction to agreements during World War II between belligerents, such as those between Germany and the Vichy government which, under pressure by the Nazi authorities, deprived French prisoners of war of certain protections under the 1929 POW Convention. Another Common Article (7/7/7/8) further provides that: ‘[Protected persons] may in no circumstances renounce in part or in entirety the rights secured to them by the present Convention, and by the special agreements referred to in the foregoing Article, if such there be’.

Several provisions of the Geneva Conventions similarly use the language of ‘rights’, ‘privileges’, ‘entitlements’ or ‘claims’. States may not waive such rights. The ICRC Commentary specifies that the prohibition upon renunciation of rights is absolute. This prohibition was adopted in light of experience showing that persons

4 Jean Pictet, *Commentary II: Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, ICRC, Geneva, 1960, p. 58.

may be pressured into making waivers, but that proving duress or pressure is difficult.

The significance of the rights conferred by the Geneva Conventions is reinforced by the recognition of the broad applicability and customary nature of the Conventions. The International Court of Justice and the international criminal tribunals have repeatedly affirmed the universal applicability of the Geneva Conventions. In the *Case Concerning the Armed Activities on the Territory of the Congo* (New Application: 2002, *Democratic Republic of the Congo v. Rwanda*), in which the Court explicitly acknowledged for the first time the existence of peremptory norms in international law, it confirmed that in the Nicaragua decision, it had upheld the four Geneva Conventions as ‘concrete expressions’ of general principles of humanitarian law. The Court also affirmed the expansive applicability of the Geneva Conventions in its 1996 *Advisory Opinion regarding the Legality of the Threat or Use of Nuclear Weapons*. In its opinion, the Court determined that the Convention ‘constitutes intransgressible principles of international customary law’. Moreover, in its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* in 2004, where it recognized Israel had violated certain obligations *erga omnes*, the Court reaffirmed that Article 1 of the Fourth Geneva Convention requires every State party to the Convention to ensure compliance with its provisions, regardless of whether the state is a party to a specific conflict.

In conclusion, it should be underscored that the Geneva Conventions of 1949 – important as they were even at the time of their adoption – have gained even more authority with the passage of time, and their impact on public international law is difficult to overestimate. Firstly, they achieved universality as the most highly ratified treaties in the world, apart perhaps from the Charter of the United Nations and the Convention on the Rights of the Child. Secondly, most of their provisions are recognized as customary law, and often as *jus cogens* or peremptory norms. Thirdly, they have shown unusual adaptability to changed circumstances. For example, the strict interstate obligations pertaining to repatriation of POWs to the country of origin have been attenuated by the principle of individual autonomy of the POW. Another sign of the Conventions’ versatility is the change in the requirement of different captor/detainee nationalities for the status of protected persons. This requirement, so difficult to apply to wars involving fragmentation of states, has been superseded in the jurisprudence of international criminal tribunals by the more flexible concept of belonging to adversary groups. This vitality of the Conventions is in a great degree due to another unique aspect: the role of the ICRC and its outstanding reputation as the institutional guardian of the Conventions.

Confronted by crises and atrocities which sadly continue unabated, it is easy to forget how much worse the fate of all humans would be in the absence of the Geneva Conventions and the International Committee of the Red Cross. In the midst of the atrocities that persist today, they hold us to a higher standard of human dignity that cannot be contracted away.

REPORTS AND DOCUMENTS

National implementation of international humanitarian law

Biannual update on national legislation and case law January–July 2009

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A. Legislation

Australia

Defence Legislation (Miscellaneous Amendments) Act 2009

The *Defence Legislation (Miscellaneous Amendments) Act 2009* (No. 18, 2009) was published on 3 April 2009. The Amendment inserts into the Geneva Conventions Act 1957 (mainly into *Part IV – Abuse of the Red Cross and other emblems, signs, signals, identity cards, insignia and uniforms*, paragraph 15) the appropriate reference required to add the emblem of a red frame in the shape of a square on edge on a white ground (also known as the red crystal) as an additional distinctive emblem granting protection under international humanitarian law. The law was adopted as a means of implementing the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), adopted by the Diplomatic Conference of States Parties to the Geneva Conventions on 8 December 2005. The 2009 amendments, currently attached to the Geneva Conventions Act as a note, shall enter into force one month after Australia ratifies Additional Protocol III.

Democratic Republic of Congo

Law No. 09/001, 10 January 2009, on the protection of the child (Loi No. 09/001 du 10 Janvier 2009 portant sur le protection de l'enfant)

The Law No. 09/001 on the protection of the child was adopted on 10 January 2009, and published in the Official Journal on 12 January 2009. Among provisions for the general protection and well-being of children, the law defines ‘child in an exceptional situation’ as any person below 18 years of age that is found in a situation of armed conflict, tensions or civil troubles, natural catastrophes or a situation of appreciable and prolonged degradation of socio-economic conditions.¹ Similarly, it provides for ‘exceptional protection’, by which it prohibits the enlisting or using of children in the armed forces or armed groups. It also places a duty on the State to assure that children enlisted or used by forces or armed groups are reintegrated into their family or community.² The State should also guarantee the protection and education of children affected by armed conflict, as well as their re-adaptation.³ In terms of penal repression, Article 187 specifies that the enlistment or use of children below 18 years of age in the armed forces or armed groups shall be punishable by imprisonment for 10–20 years.

East Timor

New Penal Code of East Timor, Law No. 19/2009, 8 April 2009

On 30 March 2009, a new penal code was adopted by East Timor, which was published on 8 April 2009 and entered into force 60 days later. It incorporates the crimes of genocide, crimes against humanity and war crimes into domestic legislation,⁴ in some cases following the definitions found in international instruments such as the Rome Statute of the International Criminal Court. In the case of genocide, Article 123 includes, *inter alia*, murder and serious bodily or mental harm as underlying offences, followed also by ‘prohibition of certain commercial, industrial or professional activities to members of the group’.⁵ With regard to crimes against humanity, the definition adopted the underlying offences found in the ICC Statute, although without mentioning the need for the act to have been committed ‘in knowledge of the attack’, as stated in the international text. Sentencing for both offences is set at 15–30 years imprisonment.

As for war crimes, Article 125 expressly provides for several of these in the context of either an international or non-international armed conflict (such

1 Article 2(5).

2 Article 71.

3 Article 73.

4 Book II (Special Part), Title I, Chapter I.

5 Article 123 (1)(h).

as the following acts committed against a 'person protected by international humanitarian law': murder, torture, rape, taking of hostages, unjustified destruction of high-value patrimonial goods). Other acts, on the other hand, are only criminalized in the case of an international conflict (e.g. an occupying power's direct or indirect transfer of part of its own population into occupied territory; forcing prisoners of war to fight for the armed forces of an enemy power; unjustified delay in the repatriation of prisoners of war). Additionally, Article 126 prohibits certain methods of warfare in all types of conflict, such as perfidy, or launching an indiscriminate attack against a civilian population in the knowledge that such an attack would cause excessive civilian casualties. Article 127 explicitly prohibits means of warfare such as the use of poisonous or toxic gases, anti-personnel mines, chemical weapons and others defined by international law. Article 128 provides for war crimes committed against goods protected by distinctive emblems, while Article 129 refers to war crimes against property. Sentences attached to each war crime range from 5 to 30 years imprisonment.

In terms of jurisdiction, Article 8 establishes that the provisions on international crimes shall be applicable to acts committed outside the territory of East Timor if the suspect is found in East Timor and cannot be extradited, or if a decision is made against his/her surrender. The law shall also be applicable when the crime is committed against East Timor nationals, or in cases where the State is under a duty to prosecute under conventional or customary international law.

El Salvador

Law on the Protection of the Emblem and the Name of the Red Cross and Red Crescent, Amendment, Decree No. 808, 13 February 2009

A decree to amend the *Law on the Protection of the Emblem* was adopted on 11 February 2009, and entered into force ten days later, with the objectives of delimiting the use of the emblem and name of the Red Cross and Red Crescent domestically, and determining the conditions under which they may be employed, the persons and institutions authorized to use it and the authorities in charge of its regulation.

Article 1 as amended includes the red cross, red crescent and red crystal as emblems, and specifies that they may only be used as determined in the 1949 Geneva Conventions and the Additional Protocols, i.e. to mark personnel, transport units, material and establishments belonging to the medical or religious services of the armed forces, the El Salvador National Society, the ICRC and the International Federation of the Red Cross and Red Crescent.

A new chapter was included in the law to deal exclusively with the third Additional Protocol to the Geneva Conventions. It states that the armed forces may temporarily use the red crystal emblem where its employment strengthens protection. The National Society may also use it under State authorization.

The new Article 15 of the law recalls that the misuse of the emblem shall be punished according to the penal laws in force. Use of the signs for commercial purposes also remains prohibited.

Guatemala

Law on weapons and munitions, Decree No. 15-2009, 21 April 2009

The law regulates ownership, import and export, holding, storage, trafficking and all other services related to arms and munitions. It prohibits the use, by individuals or by the armed forces, of those arms and munitions specified as prohibited in international treaties to which Guatemala is a party. The decree regulates all types of firearms, arms using compressed gases, light arms, explosives, chemical and biological weapons, atomic weapons, missiles, traps, experimental weapons and any other arms. It also creates a General Office for the Control of Arms and Munitions, whose functions shall include registration and authorization of all arms and munitions in the territory of Guatemala, inspection of warehouses, denunciation of violations to the competent authorities, and collaboration in halting arms smuggling and trafficking.

Article 82 prohibits the fabrication, import, export, holding and use of any chemical or biological weapons, atomic weapons and any experimental arms by individuals, as defined in the law. Article 98 prohibits all transfer, import or export of all types of weapons, pieces or components to countries which systematically violate human rights, or in cases where there is reason to believe that the weapons or pieces shall be used for acts of genocide, crimes against humanity, violations of international law, or support of irregular armed groups.

With regard to penal repression, unlawful import or export of chemical or biological weapons (amongst others) shall be punished with 6–12 years imprisonment. Ownership, holding or transport of these weapons may be punished with 10–15 years imprisonment.

Ghana

Geneva Conventions Act 2009, 708th Act of Parliament, 6 January 2009

The *Geneva Conventions Act 2009* was adopted and published on 6 January 2009. The Act provides for the repression of grave breaches found in the four 1949 Geneva Conventions and Additional Protocol I, by making a general reference to Articles 50, 51, 130 and 147 of the four Geneva Conventions respectively, as well as Articles 11 and 85 of Additional Protocol I, with sentencing ranging from 14 years imprisonment to the death penalty.

The Act also provides that any offence ‘other than that specified’ under the provisions on grave breaches, but which otherwise contravenes any of the Conventions or Protocol, is punishable by a sentence of up to 14 years in prison.

In terms of jurisdiction, indictments may be issued against any person ‘of whatever nationality’ who commits an offence ‘whether within or outside this country’ (Article 1). The Act also establishes the provision of judicial guarantees for indicted persons, including specifically those applicable to the trial of a prisoner of war or protected internee. Legal representation is compulsory for a trial to proceed, although no mention is made of whether such representation should be of the accused’s own choosing. The Act also protects the red cross and red crescent emblems, as well as the heraldic emblem of the Swiss Confederation, the red lion and sun, and other distinctive signs. Misuse of the emblems may be punished by a fine or imprisonment of no more than 3 months.

Jordan

Amended Law of the Jordan Red Crescent Society for the Year 2009, No. 3/2009, 4 January 2009

The *Amended Law of the Jordan Red Crescent Society for the Year 2009*, internally known as the Emblem Law, was published in the official gazette No. 4945 on 4 January 2009, under law No. 3/2009. The amendment, which modifies Law No. 3 of 1969 (referred to as the Original Law), broadens the definition of ‘emblem’ to mean the red crescent or red cross, ‘as well as any other emblem that may be adopted based on an international convention effective in the Kingdom’.⁶ It also penalizes the deliberate or ‘unrightful’ use or naming of the emblem, or deliberately placing the emblem on the boards of shops, stickers, publicity or commercials, with a penalty of a minimum of 3 months and a maximum of 3 years imprisonment.⁷ In addition, anyone who uses or orders the use of the emblem with ‘deceptive intentions in times of war and armed conflict’ in a manner that leads to serious damage to the physical integrity of people, may be sentenced to hard labour for up to 10 years.⁸ If the act leads to death, the penalty may rise to hard labour for life.

Kenya

Act No. 16 of 2008, International Crimes Act 2008, 1 January 2009

The *International Crimes Act 2008* came into operation on 29 May 2009, by notice published in the official gazette. Its commencement date, as found in the legislation, is set at 1 January 2009.

The Act gives the force of law to almost the entirety of the Rome Statute in Kenya, including the parts dealing with the relevant crimes, jurisdiction and

6 Article 2, Clause B.

7 Article 2, Clause C.

8 Article 2, Clause D.

admissibility (Part 2) and with international co-operation and judicial assistance (Part 9). With regard to the penalization of conduct, the Act makes reference to the definitions of genocide, crimes against humanity and war crimes found in the relevant articles of the Rome Statute, and provides for sentences of imprisonment for life for all offences involving intentional killing, and lesser terms (to be determined in court) in any other case. In terms of jurisdiction to prosecute, the Act establishes that a person may be tried if the act or omission is committed in Kenya or, at the time of the offence, the suspected offender was a Kenyan citizen, employed by the Government of Kenya, a citizen of a State engaged in armed conflict against Kenya, or employed by such State. The offence may also be prosecuted if the victim was a Kenyan citizen, or if the suspected offender is present in Kenya after commission of the offence.

The Act also provides for co-operation with the International Criminal Court: if a request for arrest and surrender is received from the ICC, and the Executive is satisfied that the request is supported by the information and documents required by Article 91 of the Rome Statute, the Executive shall notify a judge of the High Court in order for an arrest warrant to be issued. The arrest warrant may be issued if the judge is satisfied that, *inter alia*, the person is present in Kenya, suspected of being in Kenya, or may go to Kenya.

Kiribati

Anti-Personnel Mines (Prohibition) Act 2008, 23 December 2008

The Anti-Personnel Mines (Prohibition) Act 2008 was adopted on 23 December 2008, with the stated purpose of implementing Kiribati's obligations under the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. In this regard, the Act prohibits the use, acquisition, development, possession or transfer of anti-personnel mines with a fine and/or imprisonment not exceeding 10 years, in the case of individuals, and a fine not exceeding 500,000 Australian dollars (approximately 250,000 US\$) when dealing with bodies corporate.

With regard to jurisdiction, the offence must have been committed in the territory of Kiribati, or if abroad, by a Kiribati national or a body corporate incorporated under the laws of Kiribati. The Act also allows for members of fact-finding missions, acting under Article 8 of the Convention, to enter the country and 'collect information relevant to an alleged compliance issue',⁹ and to enter any premises and inspect, examine or conduct any tests concerning anything on the premises that relates to an anti-personnel mine.

⁹ Article 14(1).

United States

Executive Order 'Ensuring Lawful Interrogations', 22 January 2009

This executive order was issued by the President of the United States of America on 22 January 2009, with the force of law, revoking past Executive Order No. 13440 and all other orders or regulations issued to or by the Central Intelligence Agency. Its purpose is to improve 'the effectiveness of human intelligence gathering, to promote the safe, lawful, and humane treatment of individuals in United States custody and of United States personnel who are detained in armed conflicts, to ensure compliance with the treaty obligations of the United States, including the Geneva Conventions [...]'.

The Order establishes that Article 3 Common to the 1949 Geneva Conventions shall provide the minimum standards of treatment for any person detained in connection with an armed conflict, namely that they should 'in all circumstances be treated humanely and shall not be subjected to violence to life and person (including murder of all kinds, mutilation, cruel treatment, and torture), nor to outrages upon personal dignity'. It also states that persons shall not be subjected to any interrogation technique or approach, or any treatment related to interrogation, which is not authorized by and listed in Army Field Manual 2 22.3. In the conduct of interrogations, it is prohibited to rely on any interpretation of laws dealing with interrogation (including the Convention Against Torture and Article 3 Common) issued by the Department of Justice between 11 September 2001 and 20 January 2009.

In addition, the Order demands the CIA to close 'as expeditiously as possible' all detention facilities under its control, and requires all departments and agencies of the Federal Government to provide the International Committee of the Red Cross with notification of, and timely access to, any individual detained in any armed conflict in the custody or under the effective control of an officer, employee, or other agent of the United States Government.

Executive Order 'Review And Disposition Of Individuals Detained At The Guantánamo Bay Naval Base And Closure Of Detention Facilities', 22 January 2009

The Executive Order, passed on 22 January 2009, was signed by the President of the United States of America with the objective to 'effect the appropriate disposition of individuals currently detained by the Department of Defense at the Guantánamo Bay Naval Base (Guantánamo) and promptly to close detention facilities at Guantánamo'.

Acknowledging that some 300 detainees remained detained at the Naval Base, and that most have been held for more than 4 years, the Order establishes that in the interests of the United States, the executive branch take 'prompt and thorough review of the factual and legal bases for the continued detention of all individuals currently held at Guantánamo, and of whether their continued

detention is in the national security and foreign policy interests of the United States and in the interests of justice'. Particular mention is made of those who have been charged with offences before military commissions pursuant to the Military Commissions Act of 2006, Public Law 109-366, and the military commission process in general.

The Order states that the detention review should determine whether it is possible to transfer or release the individuals in a manner consistent with the national security and foreign policy interests of the United States. In addition, it underscores that no individual currently detained at Guantánamo should be held in detention except in conformity with all applicable laws governing the conditions of such confinement, including Common Article 3 of the Geneva Conventions. The text requires the Secretary of Defense to immediately undertake a review of the conditions of detention at Guantánamo to ensure full compliance.

Finally, the order states that such reviews should commence immediately, while establishing that the base be closed 'as soon as practicable', but no later than 22 January 2010.

B. Case Law

Bosnia and Herzegovina

Prosecutor v. Novak Dukic, Court of Bosnia and Herzegovina, Section I, Case X-KR-07/394, 12 June 2009

Mr Novak Dukic, commander of the Ozren Tactical Group of the Army Republika Srpska, was sentenced to 25 years imprisonment by the Court of Bosnia and Herzegovina (Section I) after being found guilty of war crimes against civilians (as defined in Article 173(1) of the Bosnian Criminal Code). According to the Court, on 25 May 1995 Mr Dukic – in his capacity as Commander – ordered his unit to fire an artillery projectile at a location in the immediate centre of Tuzla, known as Kapija. Seventy-one people were killed and approximately 130 injured as a result of the operation, in a zone that had been declared a safe area by Resolution 824 of the United Nations Security Council. The panel concluded that his actions constituted a direct and indiscriminate attack on civilians, in violation of international humanitarian law.

Mr Dukic had also been accused of ordering the artillery platoon to shell Tuzla with nine artillery projectiles, but was acquitted on this second charge owing to a lack of evidence.

Prosecutor v. Ferid Hodzic, Court of Bosnia and Herzegovina, Section I, Case X-KR-07/430, 29 June 2009

On 29 June 2009, the Court of Bosnia and Herzegovina (Section I) acquitted Mr Ferid Hodzic on charges of war crimes against civilians and prisoners of war in

the hamlet of Rovasi (near Cerska) in the municipality of Vlasenica, in violation of the criminal code of Bosnia and the 1949 Geneva Conventions. The acts in question were committed between May 1992 and January 1993.

Mr Hodzic was charged with ordering ethnic Serb civilians and prisoners of war to be unlawfully detained and treated inhumanely for months – particularly through very harsh conditions of detention, little food and water, no electricity or access to restrooms, no differentiation between male and female detainees, and constant beatings by Bosnian soldiers. Mr Hodzic was also accused of the death of a civilian held in custody, apparently from the injuries resulting from these beatings. He was charged under command responsibility, specifically for failing to prevent the murder or punish the perpetrators.

In its judgement, the Court found that the prisoners had indeed suffered frequent beatings and insults, and were held in detention conditions amounting to cruel treatment under the 1949 Geneva Conventions and inhuman treatment under the Criminal Code of Bosnia. However, the Court heard no evidence to hold that Mr Hodzic had ordered the commission of such acts. Further, the Court found it impossible to assert who or what authority was responsible for the detention of the prisoners and civilians, as much of the information was either incomplete or contradictory. In effect, no finding was made of a military command or chain of command for the area, leaving the Court with no choice but to acquit the suspect of all charges in the indictment.

Canada

Her Majesty the Queen v. Désiré Munyaneza, Superior Court, Criminal Division, No. 500-73-002500-052, 22 May 2009

On 22 May 2009, the Superior Court of the Province of Quebec, District of Montreal, found Mr Désiré Munyaneza – a Rwandan citizen arrested in Canada – guilty of seven counts of genocide, crimes against humanity and war crimes. These crimes were committed against members of the Tutsi ethnic group in the Prefecture of Butare, Rwanda, in April 1994. Based mostly on witnesses' and victims' testimonies, the judge found that through his social status and his determination, the accused participated actively in the plan of what was to become genocide. The Court also found Mr Munyaneza to have intentionally murdered many Tutsi, knowing that his acts were part of a widespread and systematic attack encouraged and supported by the government, making him guilty of crimes against humanity. As for the classification of certain acts as war crimes, the Court first accepted as proven and uncontested the International Criminal Tribunal for Rwanda (ICTR)'s finding in *Prosecutor v. Akayesu* that a non-international armed conflict occurred in Rwanda between 1 April and 31 July 1994. It then established that 'while [such] an armed national conflict raged in Rwanda between the RAF (Rwandan Armed Forces) and the RPF (Rwandan Patriotic Front), Désiré Munyaneza intentionally killed dozens of people in Butare and the surrounding communes who were not participating directly in the conflict, sexually assaulted

dozens of people and looted the homes and businesses of individuals who had nothing to do with the armed conflict' (par. 2087).

The case against Mr Munyaneza is the first to have successfully indicted and prosecuted a suspect based on the conditions for jurisdiction and definitions of international crimes found in the *Crimes Against Humanity and War Crimes Act 2000*, which came into force on 23 October 2000. The Act allows for the prosecution of genocide, crimes against humanity and war crimes as defined by international law (in particular, the Statute of the International Criminal Court and customary law). It also allows for the prosecution of crimes committed outside Canada, regardless of the nationality of the perpetrator or the victims, provided that the Attorney-General consents and conducts the proceedings. As for the requirement that the accused be present in the territory of the forum State, Section 9(2) of the Act provides that 'the provisions of the Criminal Code relating to requirements that an accused appear at and be present during proceedings (and any exceptions to those requirements) [shall] apply.'¹⁰

Chile

Prosecutor v. Augusto Pinochet, Ariosto Lapostol Orrego, Fernando Polanco Gallardo, Luis Fernandez Monjes, Hector Vallejos Birtolo. Plaintiff: Ernesto Lejderman Avalos. Supreme Court of Chile, 696-2008, 25 May 2009

On 25 May 2009, the Second Chamber of the Supreme Court of Chile revoked previous decisions on the murder of Bernardo Lejderman and his wife by three members of the Chilean military in December 1973. The military officers were sentenced to 5 years and 1 day in prison, without benefits. The civil claim, however, was dismissed by the Court.

Although the Court sentenced the former military officers for murder, it also established that at the time of the relevant events, the country was immersed in a non-international armed conflict as defined in Article 3 common to the 1949 Geneva Conventions. Thus, certain treaty provisions became 'exceptionally applicable'. Citing Article 146 of the third Geneva Convention, the Court underscored Chile's obligations to guarantee the safety of persons deprived of their liberty in times of armed conflict within its territory, and to ensure that there is no impunity for those committing offences against such persons. In this vein, it confirmed the inapplicability of amnesty laws or statutes of limitations to offences committed during the period in question, giving primacy to conventional and customary international law over the domestic law of Chile. Further, it confirmed statements made in previous Supreme Court cases that the non-applicability of statutes of limitations was a universal principle already considered to be customary law at the time of the crimes.

¹⁰ Part XX, Section 650 of the Criminal Code.

Israel

Physicians for Human Rights et al. v. Prime Minister of Israel et al., Supreme Court acting as High Court of Justice 201/09, 19 January 2009; Gisha Legal Centre for Freedom of Movement et al. v. Minister of Defence, HCJ 248/09, 19 January 2009

The Supreme Court of Justice of Israel, acting as High Court, denied in a joint decision the granting of relief to the organizations Physicians for Human Rights and the Gisha Legal Centre for Freedom of Movement, in respect of claims filed during a large-scale military operation conducted by Israel in December 2008–January 2009 in the Gaza Strip. The first organization claimed that the Israeli Defence Forces (IDF) were attacking ambulances and medical personnel, and causing delays in the evacuation of the wounded to hospitals in the Gaza Strip. The latter claimed the shortage of electricity in Gaza was preventing hospitals, clinics, the water system and the sewage system from functioning properly – a situation which, according to the claim, was directly caused by the IDF.

In its judgement, the Court re-stated that the IDF's combat operations are governed by international humanitarian law, and thus protected civilians must be treated humanely and protected against acts of violence. Similarly, medical facilities and personnel may not be attacked unless they are being exploited for military purposes. Evacuation and treatment of the wounded, as well as access for humanitarian relief convoys, should be allowed.

The respondents, representing the State, did not dispute their responsibility under humanitarian law. They accepted that the army has the duty to respect the humanitarian needs of the civilian population even during hostilities, and that preparations for this should be made in advance. With regard to the provision of humanitarian assistance, the respondents explained that various mechanisms had been adopted before the initiation of hostilities in order to respond as adequately as possible to the needs of the population, such as increased human and material resources destined for humanitarian assistance work, both at co-ordination centres and at ground level. They also argued that the general rule was to refrain from attacking medical personnel and ambulances, except in cases where it became clear that they were being exploited for the purpose of fighting the IDF. With regard to the electricity cuts, the State argued that given the ongoing combat operations, it was not possible to ensure there would be no damage to the electricity network, but that efforts were continuously being made to repair any damages to the lines.

In its legal reasoning, the Court first determined that applicable legal norms in customary international law, treaties to which Israel is a party, as well as domestic law, provide rules and principles that apply in times of war. This demands that steps be taken to implement them during the course of hostilities, including performing judicial review of military operations. The court then resolved to classify the conflict between Israel and Hamas, stating that the normative arrangements 'revolve around the international laws relating to an international armed conflict', and that in addition, the laws of belligerent occupation could also

apply. On this issue, as well as the question of which specific provisions of IHL were applicable to the case, the Court found no disagreement between the parties.

As for the circumstances of the specific claims at hand, the Court evaluated the measures taken by the respondents, as well as the difficulties encountered in the battlefield. It found that, in light of the establishment and enhancement of the humanitarian mechanisms (including the setting up of a clinic and statements made towards doubling humanitarian assistance efforts), the Court saw no further reason to grant relief. A similar conclusion was reached regarding the electricity network; thus, both claims were rejected.

The Netherlands

Prosecutor v. Joseph Mpambara, The Hague District Court, LJN: BI2444, 09/750009-06 and 09/750007-07, 23 March 2009

On 23 March 2009, the Dutch District Court sitting in The Hague sentenced Joseph Mpambara, a Rwandan citizen, to 20 years imprisonment for the fatal torture of two women and at least four of their children in Rwanda in 1994. The Court acquitted Mr Mpambara of war crimes, however, as no nexus could be established between his acts and the armed conflict going on at the time between the Rwandan government and Tutsi rebel groups. Key to this decision was the fact that he was not a public official or part of the military.

Mr Mpambara was arrested in the Netherlands after applying for asylum there. Under the International Crimes Act, courts in the Netherlands may only seize themselves of cases without a traditional link to the country (i.e. when the crime was not committed in Dutch territory, or by or against Dutch nationals) in cases of genocide, war crimes, crimes against humanity or torture, and if the suspect is present in the country.

Prosecutor v. Frans van Anraat, Dutch Supreme Court, LJN: BG4822, 07/10742, 30 June 2009

On 30 June 2009, the Dutch Supreme Court upheld a war crimes conviction against Mr Frans van Anraat, a Dutch businessman who had been accused of selling chemicals for the production of poison gas to Saddam Hussein's government during the Iran–Iraq war.

Mr van Anraat was found guilty of complicity in violations of the laws and customs of war by the District Court of The Hague on 23 December 2005, and sentenced to 15 years imprisonment (but acquitted of complicity to commit genocide). The ruling was confirmed in May 2007 by the Court of Appeals at The Hague, which increased the sentence to 17 years.

The District Court found that Mr van Anraat, as the sole supplier of a gas called TDG, knew that the chemical was being used for the production of mustard gas, which would be used in the Iran–Iraq war. As such, the decision confirmed the District Court's opinion that Mr van Anraat '... consciously and solely acting in

pursuit of gain, has made an essential contribution to the chemical warfare programme of Iraq during the 1980s. His contribution has enabled, or at least facilitated, a great number of attacks with mustard gas on defenseless civilians. These attacks represent very serious war crimes ...'.¹¹

Although the civil claims brought by 16 victims were dismissed for requiring extensive analysis of Iraqi and Iranian law, the judgement left open the possibility of pursuing compensation through the Dutch civil courts. As for sentencing, the Supreme Court reduced Mr van Anraat's time in prison by 6 months, in consideration of the lengthy proceedings endured.

United States

Ra'ed Ibrahim Mohamad Matar et al. v. Avraham Dichter,
United States Court of Appeals for the Second Circuit,
Docket No. 07-2579-cv, 16 April 2009

The United States Court of Appeals for the Second Circuit dismissed an appeal filed against Avraham Dichter, former Director of Israel's general Security Service, by survivors of an Israeli military attack on a residential apartment building in Gaza City. The appellants sought damages for alleged war crimes and violations of international humanitarian law. The claim was based on the *Alien Tort Claims Act* and the *Torture Victim Protection Act*, which provide US courts with extra-territorial jurisdiction over international crimes.

The claim had already been dismissed in first instance by the US District Court for the Southern District of New York, which held that Mr Dichter was immune from suit under the *Foreign Sovereign Immunities Act of 1976* (FSIA); in the alternative, the suit presented a non-justiciable political question. In the Court of Appeals, the appellants claimed Mr Dichter should not enjoy immunities, as he was no longer a public official at the time the suit was filed, and that 'the agency status of an individual, like the instrumentality status of a corporation, should be determined at the time suit is filed'.¹² They further argued that FSIA is silent with regard to former foreign government officials, indicating the legislature's intention to strip former officials of the immunity enjoyed under the common law.

The Court rejected this argument, holding that it was common law practice for courts to decline jurisdiction over a suit involving foreign officials when the Executive Branch so requested, acting under a 'traditional rule of deference to such Executive determinations'. Also, the Court held that even if it was agreed that the FSIA did not apply to former foreign officials (something which was not decided upon by the Court), it did not follow that these officials would lack immunity, as 'the FSIA is a statute that "invaded the common law" and accordingly must be

11 *Public Prosecutor v. van Anraat*, Judgement, District Court of The Hague, LJN: AX6406, 09/751003-04, Section 17.

12 Judgement, p. 9.

“read with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident”¹³. Claiming that common law does indeed recognize the immunity of former officials, and that the Executive had indeed urged the Court to decline jurisdiction, it upheld Mr Dichter’s immunity from suit.

Having dismissed the claim on jurisdictional grounds, the Court found it unnecessary to discuss further issues.

Jamal Kiyemba, Next Friend et al. v. Barack Obama et al., United States Court of Appeals for the District of Columbia Circuit, No. 08-5424, 18 February 2009

On 18 February 2009, the US Court of Appeals for the District of Columbia Circuit quashed a District Court decision to release seventeen Chinese citizens – members of the Uighur community who were being held in Guantánamo Bay Naval Base – into US territory. After granting their writs of *habeas corpus*,¹⁴ the lower court had ruled that the government no longer had any authority to hold them in detention, and that, given the ‘exceptional circumstances of this case and the need to safeguard “an individual’s liberty from unbridled executive fiat”, [it was] justified [to] grant the petitioners’ motion’¹⁵ to be released into the US.

On rejecting the District Court’s decision, the Court of Appeals argued that ‘for more than a century, the Supreme Court has recognized the power to exclude aliens as “inherent in sovereignty, necessary for maintaining normal international relations and defending the country against foreign encroachments and dangers – a power to be exercised exclusively by the political branches of government”’.¹⁶ As a result, it would not be within the province of any court to review the determination of the political branch of the Government to exclude a given alien. Although an argument had been posed by the petitioners along the lines of deserving to be released into the US after all they had endured, the Court insisted that ‘such sentiments, however high-minded, do not represent a legal basis for upsetting settled law and overriding the prerogatives of the political branches ... Nor does their detention at Guantánamo for many years entitle them to enter the United States. Whatever the scope of *habeas corpus*, the writ has never been compensatory in nature’.¹⁷ The Court concluded by accepting the Government’s assertion that it is continuing diplomatic attempts to find an appropriate country willing to admit the petitioners.

13 Judgement, p. 12.

14 See United States Court of Appeals for the District of Columbia Circuit, *Huzaifa Parhat v. Robert M. Gates, Secretary of Defense et al.*, Docket No. 06-1397, argued on 4 April 2008, decided on 20 June 2008.

15 Judgement, p. 5.

16 *Idem.*, p. 6.

17 *Idem.*, p. 13.

Fadi Al Maqaleh et al. v. Robert Gates et al.; Haji Wazir et al. v. Robert Gates et al.; Amin Bakri et al. v. Barack Obama et al.; Redha Al-Najar et al. v. Robert Gates et al.; joint decision, United States District Court for the District of Columbia, Civil Actions No. 06-1669, No. 06-1697, No. 08-1307, No. 08-2142, respectively, 2 April 2009

The petitioners in this case were internees who were held for more than six years in the Bagram Theater Internment Facility at Bagram Airfield, Afghanistan. The US District Court for the District of Columbia decided on 2 April 2009 to recognize the right of three of the petitioners to submit writs of *habeas corpus*. The Court reached its decision based almost exclusively on the grounds previously established by the Supreme Court in the case *Boumediene v. Bush*,¹⁸ arguing that ‘the detainees themselves as well as the rationale for detention are essentially the same’. A similar claim filed by a fourth petitioner of Afghan nationality, was rejected.

With regard to the first three, five elements were considered by the Court when comparing the petitioners’ case with that of *Boumediene*. First, the Court noted that the petitioners were non-US citizens, who were apprehended outside the US and later brought to a third country (Afghanistan) for detention. Secondly, as in *Boumediene*, the petitioners were also determined by US authorities to be ‘enemy combatants’, a status the petitioners contested. Further, the Court found that the process by which the petitioners were qualified as enemy combatants was inadequate, and significantly more so than in the Guantánamo detainees’ case (thus making the *Boumediene* decision even more justly applicable to the case before the Court). Fourthly, although the two contexts are not identical, the Court argued that the objective degree of control asserted by the United States at Bagram is not appreciably different than that at Guantánamo. Finally, the Court acknowledged that although the practical obstacles to determining a Bagram detainee’s entitlement to *habeas corpus* were greater than in the case of Guantánamo (the former being located within an active theatre of war), such obstacles were ‘not as great as the respondents claim, and certainly are not insurmountable’.¹⁹ Furthermore, the fact that the petitioners were held in Bagram and not elsewhere was an option largely of the Government’s choosing.

As for the fourth petitioner, the Court argued that ‘When a Bagram detainee has either been apprehended in Afghanistan or is a citizen of that country, the balance of factors may change. Although it may seem odd that different conclusions can be reached for different detainees at Bagram, in this Court’s view that is the predictable outcome of the functional, multi-factor, detainee-by-detainee test the Supreme Court has mandated in *Boumediene*’.²⁰ In that sense, the Court rejected the claim based on ‘practical obstacles in the form of friction with the “host” country’.

18 See United States District Court for the District of Columbia, *Lakhdar Boumediene et al. v. George W. Bush, et al.*, Civil Case No. 04-116 (RJL), Memorandum Order of 20 November 2008.

19 Judgement, p. 4

20 Judgement, p. 5.

Hedi Hammamy v. Barack Obama et al., United States District Court for the District of Columbia, Civil Case No. 05-429, 2 April 2009

On 2 April 2009, the United States District Court for the District of Columbia rejected petitioner Hedi Hammamy's writ of *habeas corpus*, by which he sought release from detention at the US Naval Base at Guantánamo Bay, Cuba. Basing itself on the parameters set by the Supreme Court in *Boumediene v. Bush*, the Court found that Hammamy's qualification as enemy combatant was justified, and thus his detention lawful.

The Court established that the question posed was whether the Government could show, by a preponderance of the evidence, that petitioner Hammamy was an enemy combatant, i.e. 'an individual who was part of or supporting Taliban or Al Qaeda forces that are engaged in hostilities against the United States or its coalition partners... includ[ing] any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.'²¹

To satisfy its burden of proof, the Government contended that Mr Hammamy fought with Taliban or Al Qaeda forces against US forces during the battle of Tora Bora, and was a member of a terrorist cell based in Italy that provided support to various Islamic terrorist groups. The Government based such contention on intelligence reports from various government law enforcement and intelligence services. Key in the Government's case was also the finding of the petitioner's identity papers in an Al Qaeda cave complex after the battle of Tora Bora.

Although the petitioner denied all involvement with the terrorist cell in Italy and argued he had not participated in the battle of Tora Bora and had never attended military training camps in Afghanistan, the Court found that 'based on the evidence presented by the Government described above and all reasonable inferences drawn therefrom, ... petitioner Hammamy is being lawfully detained as an enemy combatant because it is more probable than not that he was part of or supporting Taliban or Al Qaeda forces both prior to and after the initiation of US hostilities in October 2001.'²²

21 *Boumediene v. Bush*, as cited by the Court, p. 5.

22 Judgment, p. 9.

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