

Overview of the Extent of International Law Prohibition of Forced Displacement of Internally Displaced Persons (IDPs) During Armed Conflict

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Abstract

While strategies for the prevention of forced displacement gain value in the humanitarian community in addressing displacement situations, Israeli actions and policies in the Occupied Palestinian Territories (OPT) continue to directly and indirectly lead to the forced displacement of Palestinians. Such policies are applied with a view to acquire land, redefine demographic boundaries and divest Palestinians of ownership. UN experts and NGOs alike have condemned repeated and recurrent Israeli actions that both directly and indirectly, have caused forced displacement in the OPT. Recent events in Rakhine State should not be viewed in isolation; the Burma security forces have a long history of discrimination and systematic human rights abuses against them. Countries to which Rohingya have fled over the years as refugees have been quick to condemn the recent spates of violence and persecution. This paper advances a position that international law instruments has provided impliedly for the right of not to be displaced however the coming into light of the Assistance of Internally Displaced Persons in Africa (the Kampala Convention) gave birth to the express provision for the right of not to be displaced.

Keywords: *Over View, International Law Prohibition, Internal Displaced Persons, Refugees, Armed Conflict*

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Background to the Study

The many existing fragments of law relating to arbitrary displacement have a common thread running through them, revealing a human right not to be displaced. The existence of such a right might seem obvious but it has not yet been recognized in any international legal instrument.¹ In 2006,² eleven African states of the Great Lakes Region adopted the Protocol on the Protection and Assistance to Internally Displaced Persons. This Protocol was the first legally binding instrument to oblige states to implement the Guiding Principles on Internal Displacement (and thus the right not to be displaced). A last, important development was the African Union's adoption in 2009 of the legally binding Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), article 4(4) of which expressly lays down the right not to be displaced.³

For the purpose of this paper a clear distinction under relevant international law branches (*lexspecialis*) must be drawn, thus Human Rights are a special sort of inalienable moral entitlement. They attach to all persons equally, by virtue of their humanity, irrespective of race, nationality, or membership of any particular social group. International Humanitarian Law on the other hand is a branch of international law limiting the use of violence in armed conflict by sparing those who do not or no longer directly participate in hostilities. Whereas Refugee law is the body of customary international law and various international, regional, and national instruments that establish standards for refugee protection. The cornerstone of refugee law is the 1951 Convention on the Status of Refugees.

Conceptual and Theoretical Perspective of Forced Displacement

At all material time unless triggered by necessity arbitrary/forced displacement is prohibited under international law. For the purposes of these Principles, internally displaced persons 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.⁴ On the other hand, According to the 1951 Convention, a refugee is someone who:

1. Has a well-founded fear of being persecuted because of his or her: Race; Religion; Nationality; Membership of a particular social group; or Political opinion.
2. Is outside his or her country of origin or habitual residence;
3. Is unable or unwilling to avail him- or herself of the protection of that country, or to return there, because of fear of persecution; and
4. Is not explicitly excluded from refugee protection or whose refugee status has not ceased because of a change of circumstances.

¹Stavropoulou, M (1994). The right not to be displaced, American university journal of international law and policy 9(3), 689-749.

²www.icgir.org/f_END/doclib.asp and also www.ise.ac.uk/collections/law/projects/greatlakes/ihl-greatlakes.htm

³Kampala Convention, 2009

⁴UN Guiding Principles on Internal Displacement, The Kampala Convention Article 1k and the IDP Protocol, Article 1(4)

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.⁵ Emphasizing the importance of compliance with international law for the prevention of forced displacement MI respect for relevant norms of international law, including human rights and humanitarian law provisions, by domestic and international actors, whether or not they are of a governmental nature, very significantly reduces the risk of internal displacement in situations of tensions and disturbances or armed conflict, Many situations of displacement could be avoided or minimized if guarantees of international human rights and humanitarian law were adequately adhered to⁶.

Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence. The prohibition of arbitrary displacement includes displacement: (a) When it is based on policies of apartheid, “ethnic cleansing” or similar practices aimed at or resulting in alteration of the ethnic, religious or racial composition of the affected population; (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand; (c) In cases of large-scale development projects that are not justified by compelling and over-riding public interests; (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and (e) When it is used as a collective punishment.⁷

Human Rights Perspective

In human rights law, by contrast, this prohibition is only implicit in certain provisions, in particular those pertaining to freedom of movement and choice of residence, freedom from arbitrary interference with one's home, and the right to housing. These rights, however, fail to provide adequate and comprehensive coverage of all instances of arbitrary displacement since they do not spell out the circumstances under which displacement is permissible and, furthermore, are subject to restrictions and derogation.⁸ They do, nonetheless, jointly point to a general rule according to which forced displacement may be undertaken only exceptionally and, even then, may not be effected in a discriminatory manner nor arbitrarily imposed”.⁹ The guarantees mentioned in this statement include Article 12 UDHR, Articles 12(1) and 17 CCPR, Articles II and 22(t) ACHR, Article 8 ECHR and Article 2(1) of Protocol No. 4 to the ECHR, Articles 49 and 147 Geneva Convention IV, Articles 5 1(7), 78(1) and 85(4) of Protocol I, Articles 4(3)(e) and 17 of Protocol II, and Article 16 of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, as well as Article 10 of the Declaration on the Rights of Indigenous Peoples. The ICRC Study found that prohibitions of displacement applicable in situations of armed conflict are part of customary international humanitarian law (Rules 129 and 130).

⁵(Article 2(4)) Kampala Convention

⁶(see, supra, Principle 2)

⁷Principle 6 (1)

⁸Studies in Transnational Legal Policy No. 38 The American Society of International Law Washington, DC

⁹(EICN.4/1998/53, para. 10).

Together, these rights and guarantees constitute a sound legal basis for restating, in general terms, a general prohibition against arbitrary displacement. The limitation of the prohibition to those displacements that are arbitrary reflects the fact that most human rights and humanitarian law provisions provide for restrictions on the relevant rights or declare displacement to be permissible in certain situations.

In international human rights law, it is the key norm as It guarantees not only the right to liberty of movement but also freedom to choose one's residence which includes the right to remain there (paragraph 1).¹⁰ This right “shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant” (paragraph 3). The guarantees regarding freedom from arbitrary interference with one's home contain similar limitation clauses.¹¹

Humanitarian Perspective

In international humanitarian law, with respect to occupied territories, states that forced movements of persons are allowed, on an exceptional basis only, if the security of the population or imperative military reasons so demand.¹² However, civilians may not be evacuated across the borders into the territory of the occupying power or any other country, and evacuated persons “shall be transferred back to their homes as soon as hostilities in the area in question have ceased.” These rules have become part of international customary law which are enshrined in the customary Rules of International Law.¹³ For situations of international armed conflicts, no party shall arrange for evacuation of children to a foreign country “except for a temporary evacuation where compelling reasons of health or medical treatment of children or, except in occupied territory, their safety, so require.”¹⁴

As regards internal armed conflict, *Article 17* Additional Protocol II prohibits forced movement of civilians for reasons related to the armed conflict unless “the security of the civilians involved or imperative military reasons so demand.” This prohibition has acquired international customary law status (*Rule 129(B)*). It however allows evacuations of children during non-international conflicts to safe areas with the consent of a parent or guardian, provided such removal takes place within the country and only temporarily.¹⁵

Deportation of the civilian population in an occupied territory and forced movement of civilians for reasons related to the armed conflict in internal armed conflicts, will unless the security of the civilians involved or imperative military reasons so demand, amounts to war crimes.¹⁶

¹⁰ Article 12 ICCPR.

¹¹ Article 17 Ibid

¹² Article 49 Geneva Convention IV

¹³ Rules 129(A), 130 and 132)

¹⁴ Article 78(1) Additional Protocol)

¹⁵ Article 4(3(e) Additional) Protocol II

¹⁶ (Article 8(2)(b)(viii) and (e)(viii) Rome Statute)

Finally, Article 16 of ILO Convention No. 169 concerning Indigenous and Tribal Peoples and Article 10 of the Declaration on the Rights of Indigenous Peoples contain a prohibition against forcibly removing indigenous peoples from their lands.

Forced displacement of persons may, as this paper shows, be allowed in certain circumstances. but exceptions from protection against displacement are restricted to cases of an ultimate ratio which shall be resorted to only if there are no other alternatives. In this regard, the term “*arbitrary*” implies that the acts in question contain “elements of injustice, unpredictability and unreasonableness” (Nowak, ICCPR Commentary, Article 17, para. 12), particularly because they are not in conformity with domestic law, pursue purposes that are not legitimate in light of the requirements of international human rights and humanitarian law, are not based on objective and serious reasons, or are not necessary to achieve legitimate goals, i.e., lacks proportionality. The Guiding Principles are not a UN declaration on the rights of internally displaced persons, nor do they constitute, as such, a binding instrument. However, they reflect and are consistent with international human rights law and international humanitarian law.

Paragraph 2,¹⁷ gives an illustrative on list of situations in which displacement would be arbitrary. Subparagraph (a): Displacement is arbitrary if it is based on policies of apartheid, “ethnic cleansing” or similar practices, and is aimed at or results in the altering of the ethnic, religious or racial composition of the population. Whereas an explicit prohibition of “ethnic cleansing” has not yet been adopted, “crime of apartheid” among the crimes against humanity¹⁸ and explains in paragraph 2 that “the crime of apartheid’ means inhumane acts [...], committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime.”“Ethnic cleansing” may fulfil these criteria. This practice may also amount to genocide. Genocide means, inter alia, inflicting deliberately on a group conditions of life calculated to bring about its physical destruction in whole or in part with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group.¹⁹

By stating that displacement of civilians would be arbitrary in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand, reflects the already cited articles of Geneva Convention IV and the Protocols that have acquired the status of customary international humanitarian law, as well as the corresponding war crimes (see above, paragraph 1).²⁰

With regard to these two exceptional circumstances in which forced displacement might be permissible, the ICRC Commentary to **Article 17 AP II** explains that “[it is self-evident that a displacement designed to prevent the population from being exposed to grave danger cannot be expressly prohibited. [...] Military necessity as a ground for derogation from a rule always requires the most meticulous assessment of the circumstances. [...] The situation should be

¹⁷Principle 6 of the UN guiding principles

¹⁸Article 7(1)ICC

¹⁹Article 2 of the Genocide Convention 20

²⁰Ibid 16

scrutinized most carefully as the adjective 'imperative' reduces to minimum cases in which displacement may be ordered. Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group”.

Large scale development projects such as the construction or establishment of dams, ports, mines, large industrial plants, railways, highways, airports and irrigation canals can contribute significantly to the realization of economic and social human rights in particular. Such projects might, however, lead to involuntary displacement and relocation or resettlement. Sub-paragraph (c) does not prohibit such displacement, which is often an accepted part of a country's development. Rather, it ensures that development cannot be used as an argument to disguise discrimination or any other human rights violation, by stressing that development related displacement is permissible only when compelling and overriding public interests justify such projects, that is, when the requirements of necessity and proportionality are met. As this corresponds to the limitations on the right to freedom of movement and of residence set forth by the human rights provisions, subparagraph (c) fully reflects international human rights law.

Furthermore, international organizations such as the World Bank and the Organization for Economic Co-operation and Development (OECD) have addressed the issue of involuntary displacement caused by development projects and issued corresponding operational directives or guidelines. Thus, the World Bank Operational Policy 4.12 of 2001 (replacing former Directive 4.30) emphasizes that “*involuntary resettlement should be avoided or minimized where feasible, exploring all viable alternative project designs.*”

Similarly, the OECD's 1992 Guidelines for Aid Agencies on Involuntary Displacement and Resettlement in Development Projects explains that “[involuntary population displacement should be avoided or minimized whenever feasible by exploring all viable alternative project designs. In every case, the alternative to refrain from carrying out the project (the 'non- action 'alternative) should seriously be considered, and people 's needs and environmental protection must be given due weight in the decision-making process.” The Basic Principles and Guidelines on Development-Based Evictions and Displacement stress that any eviction in the context of the implementation of a development project “must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation” (A/HRC/4/18, para. 21).

Forced displacement in situations of natural or human-made disaster is arbitrary if it is undertaken for reasons other than the safety and health of the affected persons. This is consistent with human rights provisions guaranteeing liberty of movement and freedom to choose one's residence, which allow limitations on rights only where necessary and where objective reasons exist. Other reasons are hardly imaginable in situations of natural or human-made disasters. Under certain circumstances the duty to protect as a state obligation inherent in the right to life may require authorities to order and implement evacuations in order to avert

imminent and serious dangers. States parties are to ensure the accountability of non-state actors involved in the exploration and exploitation of economic and natural resources leading to displacement.²¹

Protecting human rights As far as the human rights-centred approach is concerned, the consequences of environmental damage on life, health or property impose an obligation on national governments to adopt preventive measures in order to avoid as far as possible populations being displaced and to respect their fundamental rights.²² The European Court of Human Rights stated, in the case of *Oneryidiz v. Thrice*,²³ that prevention is the primary duty of the state and is derived from its positive obligation to safeguard the right to life. The same obligation appeared in the case of *Budayeva v. Russia*,²⁴ when the Court reiterated that the state has a positive obligation to establish a legislative and administrative framework for the purpose of protecting human rights from the consequences of a disaster.²⁵ The African Commission also recognized, in the case of *Federal Republic of Nigeria v. Ogoni Community*, that failing to implement preventive measures designed both to protect the community from pollution stemming from a particular source and to avoid displacement is a violation of rights under the African Charter.

Finally, forced displacement is arbitrary if it is used as a collective punishment.²⁵ The prohibition of collective punishment is firmly rooted in humanitarian law. Thus, *Article 33 (1)* Geneva Convention IV, *Article 75 (2)(d)* Protocol I and *Article 4(2)(b)* Protocol II expressly state the prohibition of collective punishments and such prohibition is also part of customary international humanitarian law applicable in international as well as non-international armed conflict (Rule 103). Concerning *Article 33 (1)* Geneva Convention IV, the ICRC Commentary explains that the prohibition refers to “penalties of any kind inflicted on persons or entire groups of persons, in defiance of the most elementary principles of humanity, for acts that these persons have not committed” Nowak Commentary to *Article 4 (2)(b)* Protocol II emphasizes that “[t]he concept of collective punishment [...] should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property)” in human rights law, a promotion of collective punishment is not explicitly mentioned.

Never the less, such punishment, depending on what form it takes, may violate multiple human rights, including the punishment of innocence, the right to security and prohibitions of arbitrary detention and cruel or inhuman punishment.

If displacement occurs,²⁶ it should last no longer than required by the circumstances. This requirement is an expression of the general principles of proportionality that is to be respected

²¹ (Articles 3(h) and (I)). Kampala Convention

²² 3(4) and 3(5) of the non-binding Model Legislation attached to the IDP Protocol

²³ Application 48939/99 (2004), para. 89.

²⁴ ECtI-IR, *Budayeva and Others v Russia*, Judgment of 20 March 2008. See Walter Kahn and Claudine Haenni Dale 'Disaster risk mitigation — why human rights matter', FMR 31 www.frnreview.org/JFMRpdfs/FMR31/38-30.pdf

²⁵ Article 5(2) Kampala Convention

²⁶ Paragraph 3: UN Guiding Principles

whenever the rights of human beings are limited. It is expressly provided for in article 16(3) of the ILO Convention No. 169 indigenous and tribal peoples in independent countries, stating that “[whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.”

Furthermore, Article 49(2) Geneva Convention IV stipulates that [persons [...]] evacuated shall be transferred back to their homes as soon as hostilities in the question have ceased.” According to customary international humanitarian law applicable in both international and non- international armed conflict, internally “[displaced persons have a right to voluntary return in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist.”²⁷

Human rights norms guaranteeing liberty of movement and freedom to choose one's residence allow for restrictions only if the measures meet the criteria of necessity and proportionality. Prolonged displacement in situations where the circumstances no longer required restrictions on these rights would clearly be in contradiction of these criteria. Furthermore, it would inhibit the finding of “lasting solutions to questions related to internally displaced persons including their voluntary and safe return and rehabilitation”.²⁸

Conclusion

The paper sought to make a case for respecting the basic human rights of not to be displaced by juxtaposing the relevant branches of international law i. human rights law, refugee law and humanitarian law and purposively interpret the principles embedded thereof in favour of the victims of arbitrary displacement. The paper affirms that the said right exists, the paper as well used the lenses of Human Rights to analyse the scope (temporal, geographical and personal) of the right not to be displaced.

The paper concludes that states per the concept of state responsibility is the primary entity that both shoulders and prevents arbitrary displacement which starts with addressing root causes of forced displacement by strengthening the rule of law and providing citizens with security, justice, and equal opportunities are crucial to breaking the cycles of violence, abuse and discrimination that can lead to forced displacement.

²⁷(Rule 132) of customary rules of international humanitarian law.

²⁸Called for by the 1993 Vienna World Conference on human rights in its declaration and programme of Action (A/CONF.48/157/23,12 July 1993,part,para. 23).