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FURTHER PROMOTION AND ENCOURAGEMENT OF HUMAN RIGHTS AND  
FUNDAMENTAL FREEDOMS, INCLUDING THE QUESTION OF THE PROGRAMME AND  
METHODS OF WORK OF THE COMMISSION: HUMAN RIGHTS, MASS EXODUSES AND  
DISPLACED PERSONS

Internally displaced persons

Report of the Representative of the Secretary-General, Mr. Francis M. Deng,  
submitted pursuant to Commission on Human Rights resolution 1995/57

Compilation and analysis of legal norms\*

\* In view of its length, the present document is being issued in the original language only, the Conference Services Division of the United Nations Office at Geneva having insufficient capacity to translate documents that greatly exceed the 32-page limit recommended by the General Assembly (see Commission resolution 1993/94, para. 1).

## CONTENTS

Paragraphs

Introduction 1 - 5

I. SCOPE AND CONTENT 6 - 12

A. Structure and methodology 6 - 7

B. Definition and context 8 - 12

## II. APPLICABLE SOURCES OF LAW AND THEIR RELEVANCE TO DISPLACEMENT IN RECOGNIZED SITUATIONS 13 - 46

- A. Human rights law 13 - 20
- B. Humanitarian law 21 - 23
- C. Refugee law 24 - 26
- D. Displacement in recognized situations 27 - 46

## III. ANALYSIS OF INTERNATIONAL LAW RELEVANT TO THE PROTECTION AND ASSISTANCE NEEDS OF INTERNALLY DISPLACED PERSONS 47 - 358

- A. Equality and non-discrimination 48 - 65
- B. Life and personal security 66 - 142
- C. Personal liberty 143 - 179
- D. Subsistence needs 180 - 220
- E. Movement-related needs 221 - 257
- F. Need for personal identification, documentation and registration 258 - 268
- G. Property-related needs 269 - 284
- H. Need to maintain family and community values 285 - 322
- I. Need to build self-reliance 323 - 358

## IV. NEED FOR INTERNATIONAL PROVISION OF PROTECTION AND ASSISTANCE 359 - 409

- A. Need to receive and to provide assistance 359 - 389
- B. Needs of relief workers and organizations 390 - 409

## V. CONCLUSIONS 410 - 416

### Introduction

1. At its fifty-first session, the Commission on Human Rights, in its resolution 1995/57 of 3 March 1995 on internally displaced persons, encouraged the Representative of the Secretary-General "to

continue his review of the need for protection of and assistance to internally displaced persons, including his compilation and analysis of existing rules and norms ...". In accordance with that resolution, the following compilation and analysis of legal norms relevant to the status of internally displaced persons is submitted to the Commission for consideration.

2. The present document is based on two studies undertaken at the request of the Representative. One study was prepared by the Ludwig Boltzmann Institute of Human Rights (Austria) and was authored by Manfred Nowak and Otto Linher. Another study was undertaken jointly by the American Society of International Law and the International Human Rights Law Group (United States of America) and was written by Robert K. Goldman, Cecile E.M. Meijer and Janelle M. Diller. These studies were reviewed at a meeting of legal experts in Vienna in October 1994 and were subsequently submitted to the 1995 session of the Commission on Human Rights ((E/CN.4/1995/CRP.1), see addendum 3 to the Representative's report (E/CN.4/1995/50/Add.3)). They were further reviewed at a smaller meeting of experts which took place in Geneva in May 1995, after which they were merged and edited by Walter Kälin (Switzerland) at the request of the Representative. The merged document was reviewed and approved at a small expert meeting held in Washington, D.C. in September 1995.

3. This compilation has benefited from the work, experience and support of several Governments, institutions and individuals. The Representative is most grateful to the major contributors who are cited above, and also thanks Daniel Helle and Maria Stavropoulou of the United Nations Centre for Human Rights who contributed to the compilation and analysis. Special mention should also be made of and appreciation expressed to the many experts from international humanitarian organizations, the United Nations Centre for Human Rights, regional bodies, non-governmental organizations and the legal community who provided valuable comments. The contributions of students at the Washington College of Law of The American University and its Center for Human Rights and Humanitarian Law are also gratefully acknowledged. The generous support of the Government of Austria is acknowledged for hosting the meeting of experts in Vienna. In addition, the compilation benefited from the "Study on Internal Displacement" being conducted by the Brookings Institution and the Refugee Policy Group, which has received support from the Office of the Secretary-General, the Governments of the Netherlands, Norway and Sweden, the Ford Foundation and the McKnight Foundation. Further, the American Society of International Law and the International Human Rights Law Group received support from the Jacob Blaustein Institute for the Advancement of Human Rights and the Hauser Foundation. The Ludwig Boltzmann Institute of Human Rights gratefully acknowledges the support of the Government of Austria.

4. This compilation and analysis of legal norms relevant to internally displaced persons aims at restating obligations within the framework of existing norms as well as identifying areas where existing international law does not respond adequately to the protection and assistance needs of internally displaced persons. While this report should sharpen awareness of the legal problems faced by internally displaced persons, its conclusions will show that there is still a need to proceed further and to elaborate an appropriate international instrument: existing international law as applied to internally displaced persons consists of a highly complex web of norms originating from a variety of legal sources which makes its application in specific situations of internal displacement difficult unless it is restated in a concise form.

5. Chapter I of this report examines the guiding definitions and context of the study. Chapter II details the applicable sources of human rights, humanitarian law and refugee law used in this analysis and discusses the recognized situations in which displacement exists. It also discusses the applicability of the various sources of law in the differing situations. Chapter III analyses the legal norms that match each of the identified needs under the previously-described situations. Chapter IV discusses legal aspects of providing assistance and protection to internally displaced persons by the international community, including non-governmental organizations. Finally, chapter V sets forth basic conclusions.

## I. SCOPE AND CONTENT

### A. Structure and methodology

6. This report examines those existing international legal standards which are applicable or most relevant to internally displaced persons. The report approaches displacement from the perspective of the actual needs of internally displaced persons. A catalogue of these needs which have been derived from field reports, other relevant studies and discussions with experts is reflected in the organization of chapters III and IV of this report. For each of these needs, the report examines whether and to what extent existing norms of international law afford protection.

7. Such an analysis requires differentiation between the following situations: situations of tensions and disturbances, or disasters; non-international, i.e. internal armed conflict; and inter-State, i.e. international armed conflict. These situations may entail the simultaneous application of distinct but interrelated branches of public international law that have differing supervisory mechanisms. This report focuses in particular on three sources of international legal standards: human rights law, which is applicable in all situations; humanitarian law, which is applicable in situations of armed conflict; and refugee law which, although generally inapplicable to internally displaced persons, can serve as a model for how certain issues may be dealt with in a future international instrument applicable to internally displaced persons.

### B. Definition and context

8. In the Analytical Report of the Secretary-General on internally displaced persons of 14 February 1992 Analytical Report of the Secretary-General on internally displaced persons, United Nations document E/CN.4/1992/23, 14 February 1992 (hereinafter Analytical Report). and the Representative's Comprehensive Study of 21 January 1993, Comprehensive Study prepared by Mr. Francis M. Deng, Representative of the Secretary-General on the human rights issues related to internally displaced persons, pursuant to Commission on Human Rights resolution 1992/73, United Nations document E/CN.4/1993/35, annex, 21 January 1993 (hereinafter Comprehensive Study). the following working definition of internally displaced persons was presented. That definition is also employed in this report:

"[P]ersons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country." Analytical Report, *supra*

note 1, para. 17; Comprehensive Study, *supra* note 2, para. 34. During an international expert meeting on internally displaced persons, held in Vienna, 1-2 October 1994, it was recommended that the working definition be adapted as follows: "Persons or groups of persons who have been forced to flee their homes or places of habitual residence suddenly or unexpectedly as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters, and who have not crossed an internationally recognized State border." For a discussion of definitional issues, *see also* Internally Displaced Persons, Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolutions 1993/95 and 1994/68, United Nations document E/CN.4/1995/50, 2 February 1995, paras. 116-127 (hereinafter 1995 Report).

9. Internally displaced persons are entitled to enjoy, in full equality, the same rights and freedoms under domestic and international law as do the rest of the country's citizens. However, experience has shown that such persons, in practice, rarely enjoy such rights and freedoms because displacement, by its very nature, generally entails deprivations of multiple rights. Along with its emotional cruelty, displacement often breaks up the nuclear family, cuts off important social and cultural community ties, terminates stable employment relationships, precludes or forecloses formal educational opportunities, and deprives those in need of special protection, such as infants, expectant mothers and the sick, of vital public/private sector services.

10. Although the displaced are frequently forced to flee their homes for the same reasons as do refugees, the fact that they remain within national territory means that they cannot seek to qualify as bona fide "refugees" entitled to the special protective regime accorded to refugees under international law. Moreover, their presence within national territory means that their own Government bears primary responsibility for meeting their protection and assistance needs. However, because Governments frequently cause or tolerate internal displacement and/or are unwilling or unable to guarantee the basic rights and meet the needs of their internally displaced citizens, intergovernmental organizations, their specialized agencies and non-governmental organizations have, at times, assumed these roles on an ad hoc basis. For a discussion of the role of the United Nations High Commissioner for Refugees (UNHCR), the International Committee of the Red Cross (ICRC), the United Nations Development Programme (UNDP) and others, *see* 1995 Report, *supra* note 3, paras. 139-174.

In addition, international and regional efforts have begun to emphasize the need to address situations of internal displacement. *See e.g.*, Vienna Declaration and Programme of Action of the World Conference on Human Rights, held at Vienna, 14-25 June 1993, United Nations document A/CONF.157/23, Part I, para. 23 (calling on States to give special attention and find lasting solutions to the problems of internally displaced persons) (hereinafter Vienna Declaration); San Jose Declaration on Refugees and Displaced Persons *adopted* at San Jose, 7 December 1994 (hereinafter San Jose Declaration) *based in part on* Cartagena Declaration on Refugees, adopted at Cartagena de Indias, 22 November 1984, para. 9 (concern about the situation of displaced persons in their own countries); Towards a Genuine Partnership in a New Era: Summit Declaration of the Conference on Security and Cooperation in Europe (CSCE), *adopted* at Budapest, 1994, Part IX, para. 32; Document of the CSCE Human Dimension Seminar on Migration, including refugees and displaced persons, *adopted* at Warsaw, 20-23 April 1993; Conclusions of the Seminar on Protection of African Refugees and Internally Displaced Persons held in Harare, 16-18 February 1994

(hereinafter Harare Conclusions); Recommendations of the OAU/UNHCR Symposium on Refugees and Forced Population Displacements in Africa, EC/1994/SCP/CRP.7/Add.1, 21 September 1994 (hereinafter OAU/UNHCR Symposium). In addition, in Latin America, a Permanent Consultation on Internal Displacement in the Americas was formed in 1992 to address internal displacement on an ongoing basis.

11. This compilation and analysis of legal norms focuses on those guarantees relevant to internally displaced persons, i.e. for the situation of such persons during displacement and return. It mentions the legal norms relevant for a right not to be displaced *Infra*, paras. 222-235. See also Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95, United Nations document E/CN.4/1994/44, 25 January 1994 (hereinafter 1994 Report), para. 24; and Maria Stavropoulou, *The Right Not to Be Displaced*, 9 **The American University Journal of International Law and Policy** 689 (1994). but does not discuss the specific content and the limitations of such a right in detail. There is a need to develop these areas in order to achieve comprehensiveness in the elaboration of the legal framework that relates to displacement although it must be stressed that, conceptually, a clear distinction has to be made between legal questions related to the causes and the prevention of displacement and guarantees relevant to those who already have been displaced. Although certain chapters of this report (particularly chap. III. E) mention these issues, it has been decided to refer the detailed analysis of a right not to be displaced to a separate study.

12. Already here it should be stressed that, apart from situations of natural disasters, the strict observation and full realization of all human rights for everyone is often the best method of preventing displacement. Thus, human rights and humanitarian standards play a paramount role when addressing the root causes of displacement.

## II. APPLICABLE SOURCES OF LAW AND THEIR RELEVANCE TO DISPLACEMENT IN RECOGNIZED SITUATIONS

### A. Human rights law

13. It is well established that all individuals are endowed with basic human rights which are inherent attributes of human dignity and which are recognized by virtue of international law that both recognizes and protects them. States, in turn, are obliged to ensure respect for those universally recognized human rights which are essential to the survival, dignity and well-being of all persons subject to their jurisdiction. In this regard, all States Members of the United Nations are mandated by Articles 55 and 56 of the Charter of the United Nations United Nations Charter, 26 June 1945, 59 Stat. 1031, T.S. 993, *entered into force* 24 October 1945. to "promote ... universal respect for, and observance of, human rights and fundamental freedoms for all ...". These clauses mark the foundation of the international law of human rights. While these articles do not define or specify "human rights and fundamental freedoms", the Universal Declaration of Human Rights is widely recognized today as an authoritative interpretation of certain obligations of States Members of the United Nations under the Charter. Universal Declaration of Human Rights, General Assembly Resolution 217 A (III), United Nations document A/810 (1948) at 78 (advocating the promulgation and dissemination of the Universal Declaration by linking the document to a State's responsibility

under art. 56 of the United Nations Charter).

14. The sources of international human rights law referenced in this report include treaty and customary law. Customary international law results primarily from a general and consistent practice of States which States follow from a sense of legal obligation. In general, rules of customary international law are binding on all States. There is, however, a rarely invoked and sole exception to this rule: a State that persistently and openly objects to a practice before it crystallizes into law, will not be bound by it. In addition, there is the possibility of regional customary law, setting out more stringent standards. law. The former encompasses treaties that are open for ratification by all States as well as treaties constituting multilateral agreements among States in certain regions only. As a matter of international law, States parties to the universal and regional treaties are bound to observe the rights guaranteed in the treaty provisions, and to ensure that those rights are guaranteed under domestic law.

15. Among the referenced sources of universal law, the Universal Declaration of Human Rights, *adopted* 10 December 1948, General Assembly Resolution 217 A (III), United Nations document A/810 (1948) at 71 (hereinafter Universal Declaration). is of particular importance not only as a ground-breaking general statement of international concern for human rights but also in so far as its basic tenets have now gained widespread acceptance. Although not a treaty, the Universal Declaration may be regarded as an authoritative statement of the content of the human rights provisions (arts. 55 and 56) of the United Nations Charter, a binding treaty commitment. There is an emerging consensus among international law scholars that at least some of the principal rights proclaimed in the Declaration represent norms that have acquired the status of customary international law. *See, e.g.*, Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 *Wash. L. Rev.* 1, 9 (1988). *See also* Blaine Sloan, *General Assembly Resolutions Revisited (Forty Years Later)*, **The British Year Book of International Law** 1987, 39, 88 & n.255 (1988) (stating that "the predominant claim is that [the Universal Declaration of Human Rights] has become customary international law since its adoption by acceptance in practice" and providing sources in favour of and against this proposition, as well as sources with a more cautious approach); **Theodor Meron, Human Rights and Humanitarian Norms as Customary Law** 82-4 & n.9 (1989). For a more cautious approach, *see* Jan Martenson, *The Preamble*, in: **Asbjorn Eide et al., The Universal Declaration of Human Rights - A Commentary** 22 (1992). The International Court of Justice (I.C.J.), as early as 1949, recognized the existence of "elementary considerations of humanity" to be respected in times of peace and war. *The Corfu Channel Case, merits*, I.C.J. Reports 1949, p. 22. In 1970, the Court recognized that, in international law, there are "obligations of a State towards the international community as a whole" which may derive, *inter alia*, "from the outlawing ... of genocide, as also from the principles and rules concerning the basic rights of the human person" some of which "have entered into the body of general law." *Case concerning the Barcelona Traction, Light and Power Company Limited, second phase*, I.C.J. Reports 1979, paras. 33-34. The Human Rights Committee, established pursuant to Part IV of the International Covenant on Civil and Political Rights, recently stated that because of the customary law character of the relevant guarantees, States could not "reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or

punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women and children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy their own culture, profess their own religion, or use their own language". General Comment 24/52 of 2 November 1994, United Nations document CCPR/C/21/Rev.1/Add.6, para. 8.

16. Universal treaty law relevant for this report includes the International Covenant on Civil and Political Rights International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI) *adopted* 16 December 1966, U.N. GAOR, twenty-first session, Supp. No. 16, at 52, United Nations document A/6316 (1967), *entered into force* 23 March 1976, ratified by 129 States on 1 January 1995 (hereinafter CCPR). and its two Optional Protocols, Optional Protocol to the International Covenant on Civil and Political Rights, General Assembly Resolution 2200 A (XXI) *adopted* 16 December 1966, U.N. GAOR, twenty-first session, Supp. No. 16, at 59, United Nations document A/6316 (1966), 999 U.N.T.S. 302, *entered into force* 23 March 1976 ratified by 79 States on 1 January 1995; Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty, General Assembly Resolution 44/128 *adopted* on 15 December 1989, U.N. GAOR, forty-fourth session, Supp. No. 49, at 206, United Nations document 14668, 999 U.N.T.S. 302, *entered into force* 11 July 1991, ratified by 25 States on 1 January 1995. the International Covenant on Economic, Social and Cultural Rights, International Covenant on Economic, Social and Cultural Rights, General Assembly Resolution 2200 A (XXI), *adopted* 16 December 1966, U.N. GAOR, twenty-first session, Supp. No. 16, at 49, United Nations Document A/6316 (1967), 993 U.N.T.S. 3, *entered into force* 3 January 1976, ratified by 131 States on 1 January 1995 (hereinafter CESCR). the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Assembly Resolution 39/46, U.N. GAOR, thirty-ninth session, Supp. No. 51, at 197, United Nations document A/39/51 (1985), *entered into force* 26 June 1987, ratified by 85 States on 1 January 1995 (hereinafter CAT). the Convention on the Prevention and Punishment of the Crime of Genocide Convention on the Prevention and Punishment of the Crime of Genocide, General Assembly Resolution 260 A (III), *adopted* 9 December 1948, 78 U.N.T.S. 277, *entered into force* 12 January 1951, ratified by 116 States on 1 January 1995 (hereinafter Genocide Convention). (Genocide Convention), the International Convention on the Elimination of All Forms of Racial Discrimination, International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* at New York, 7 March 1966, 660 U.N.T.S. 195, *entered into force* 4 January 1969, ratified by 142 States on 1 January 1995 (hereinafter CERD). the Convention on the Elimination of All Forms of Discrimination against Women Convention on the Elimination of Discrimination Against Women, *adopted* by General Assembly Resolution 34/180, U.N. GAOR, thirty-fourth session, Supp. No. 46, at 193, United Nations Document A/34/46 (1980), *reprinted in* 19 I.L.M. 33 (1980), *entered into force* 3 September 1981, ratified by 138 States on 1 January 1995 (hereinafter CEDAW). and the Convention on the Rights of the Child. Convention on the Rights of the Child, *adopted* by General Assembly Resolution 44/25, U.N. GAOR, forty-fourth session, Supp. No. 49, at 166, United Nations document A/44/49 (1990), *reprinted in* 28 I.L.M. 1448 (1989), *entered into force* 2 September 1990, ratified by 168 States on 1 January 1995 (hereinafter CRC).

17. Regionally specific sources of law include the American Declaration of the Rights and Duties of Man American Declaration on the Rights and Duties of Man, *adopted* by the Ninth International Conference of American States, Bogota, Colombia, 1948, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82, doc. 6 rev. 1, at 17 (1992) (hereinafter American Declaration). For the normative value of the American Declaration, *see* I/A Court H.R., Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of article 64 of the American Convention on Human Rights, Advisory Opinion OC-10/89 of 14 July 1989, Ser. A No. 10. (American Declaration), the American Convention on Human Rights American Convention on Human Rights, *signed* at the Inter-American Specialized Conference on Human Rights, San Jose, Costa Rica, 22 November 1969, *entered into force* 18 July 1978, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82, doc. 6 rev. 1, at 25 (1992), ratified by 25 States on 1 January 1995 (hereinafter American Convention). (American Convention), the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador" Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", *signed* at San Salvador, El Salvador on 17 November 1988 at the eighteenth regular session of the General Assembly, *reprinted in Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82, doc. 6 rev. 1, at 67 (1992), *not yet in force* (hereinafter Protocol of San Salvador). (Protocol of San Salvador), the African (Banjul) Charter on Human and Peoples' Rights African (Banjul) Charter on Human and Peoples' Rights, OAU document CAB/LEG/67/3 rev. 5, *reprinted in* 21 I.L.M. 58 (1982), *entered into force* 21 October 1986, ratified by 49 States on 1 January 1995 (hereinafter African Charter). (African Charter), the European Convention for the Protection of Human Rights and Fundamental Freedoms European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, 213 U.N.T.S. 221 (1950), *entered into force* 3 September 1953, ratified by 30 States on 1 January 1995 (hereinafter European Convention). (European Convention) and its Protocols, and the European Social Charter. European Social Charter of 18 October 1961, 529 U.N.T.S. 89; entered into force 26 February 1965, ratified by 20 States on 1 January 1995.

18. In addition, this report utilizes United Nations General Assembly and Security Council resolutions. In general, General Assembly resolutions are not binding on States Members of the United Nations but, on matters concerning general norms of international law, their adoption by consensus or nearly unanimous acceptance can provide a basis for the progressive development of customary law. Many of the General Assembly resolutions referenced in this report represent non-binding but authoritative declarations. The declarations referenced in this report include, among others, the Universal Declaration on the Eradication of Hunger and Malnutrition, *endorsed* 17 December 1974, General Assembly resolution 3348 (XXIX), U.N. GAOR, twenty-ninth session, Supp. No. 31, at 75, United Nations document A/9631 (1975) (hereinafter Universal Declaration on the Eradication of Hunger and Malnutrition) and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, *proclaimed* 14 December 1974, General Assembly resolution 3318 (XXIX), U.N. GAOR, twenty-ninth session Supp. No. 31, at 146, United Nations document A/9631 (1975) (hereinafter Declaration on the Protection of Women and Children). However, United Nations Security Council resolutions, especially those issued under Chapter VII of

the Charter are legally binding on Member States.

19. The report also draws from human rights principles and standards proposed by expert non-governmental bodies, including the Siracusa Principles and the Paris Minimum Standards for Human Rights Norms in States of Emergency and the Turku/Abo Declaration of Minimum Humanitarian Standards. The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, 7 **Human Rights Quarterly** 237 (1985) (hereinafter *Siracusa Principles*); and *The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, reprinted in Richard Lillich, *Current Developments: The Paris Minimum Standards of Human Rights Norms in a State of Emergency*, 79 **American Journal of International Law** 1072 (1985) (hereinafter *Paris Minimum Standards*); *Declaration of Minimum Humanitarian Standards*, adopted by an expert meeting convened by the Institute for Human Rights, Abo Akademi University, in Turku/Abo, Finland, 30 November-2 December 1990, attached to United Nations document E/CN.4/Sub.2/1991/55, 12 August 1991 and revised at a meeting in Oslo on 29-30 September 1994, published in 89 **American Journal of International Law** 219-23 (1995) (hereinafter *Turku/Abo Declaration*). Non-governmental organizations such as the International Law Association and the International Commission of Jurists, comprised of academic scholars, practitioners, and government lawyers and judges, are largely responsible for the creation of such non-binding sets of principles. These standards gain popular authority through their acceptance and use over time, and the deference given to them by States.

20. Finally, the practice of treaty bodies such as the Human Rights Committee supervising the implementation of the International Covenant on Civil and Political Rights (ICCPR), the Committee on Economic, Social and Cultural Rights responsible for the supervision of the application of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Committee against Torture (CAT), the Committee on the Rights of the Child (CRC), the Committee on the Elimination of Discrimination against Women (CEDAW) and others are reflected in this report to the extent that they are relevant for internally displaced persons. Some of the activities of special rapporteurs, working groups and other mandates instituted by the Commission on Human Rights may also be important for internally displaced persons. Especially noteworthy are the mandates of the Special Rapporteur on extrajudicial, summary or arbitrary executions, The mandate was established by CHR Res. 1982/29, Commission on Human Rights, Report of the Thirty-Eighth Session, 1982 U.N. ESCOR, Supp. No. 2, at 147, 2-3, United Nations document E/1982/12-E/CN.4/1982/30, adopted 11 March 1982. Since 1984, the Special Rapporteur's mandate includes the authority to "respond effectively to information that comes before him". CHR Res. 1984/50, Commission on Human Rights, Report of the Fortieth Session, 1984 U.N. ESCOR, Supp. No. 4, at 85, 8-9, United Nations document E/1984/14-E/CN.4/1984/77, adopted without a vote 14 March 1984. Modifications of the mandate also incorporated the "urgent action" procedure of expressing concerns about imminent executions or death threats to Governments and urging immediate action by Governments to prevent abuse. the Special Rapporteur on torture, The mandate was established in CHR Res. 1985/33, Commission on Human Rights, Report of the Forty-First Session, 1985 U.N. ESCOR, Supp. No. 2, at 71-72, United Nations document E/1985/22-E/CN.4/1985/66, adopted 13 March 1985. Modifications in the mandate also incorporated the "urgent action" procedure of expressing concerns about imminent tortures to Governments and urging immediate action by Governments to prevent abuse. the Special Rapporteur on violence against women, Resolution 1994/45, Commission on Human Rights, Report of the Fiftieth Session, 1994 U.N. ESCOR, Supp. No. 4, at

140, 142, 143, United Nations document E/CN.4/24-E/CN.4/1994/132. The Special Rapporteur is authorized to seek and receive information on and to recommend measures to eliminate violence against women, its causes and its consequences; to work closely with other mechanisms of the Commission and its Sub-Commission and with treaty bodies to incorporate information on human rights violations affecting women; and to cooperate with the Commission on the Status of Women. the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance, CHR Res. 1993/20, Commission on Human Rights, Report of the Forty-Ninth Session, 1993 U.N. ESCOR, Supp. No. 3, at 102, 103 United Nations document E/1993/23-E/CN.4/1993/122, *adopted* 2 March 1993. The Special Rapporteur is authorized to report to the Commission and the General Assembly on incidents of racism, exchange views with relevant mechanisms and treaty bodies, including CERD, and make recommendations regarding human rights education for preventive purposes. the Working Group on Enforced or Involuntary Disappearances, CHR Res. 20 (XXXVI), Commission on Human Rights, Report of the Thirty-Sixth Session, 1980 U.N. ESCOR, Supp. No. 3, at 180, United Nations document E/1980/13-E/CN.4/1408, *adopted without a vote* 29 February 1980. Later modifications in the mandate also incorporated the "urgent action" procedure of expressing concerns about imminent disappearances to Governments and urging immediate action by Governments to prevent abuse. The Working Group's mandate was recently extended for three years by the Commission on Human Rights, Fifty-First Session, resolution 1995/38. The Group's mandate does not include disappearances which occur in international armed conflicts. However, a special process on missing persons in former Yugoslavia was instituted with Commission on Human Rights resolution 1994/72, para. 28. the Working Group on Contemporary Forms of Slavery, *See* CHR Res. 1988/42, Commission on Human Rights, Report of the Forty-Fourth Session, 1988 U.N. ESCOR, Supp. No. 2, at 102-3, United Nations document E/1988/12-E/CN.4/1988/88 (1988), *adopted without a vote* 8 March 1988. The group of five experts examines and reports annually to the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the prevention of traffic in persons and exploitation of prostitution of others. Particular concern has been placed on the protection of children and migrant women against exploitation by prostitution and other slavery-like practices, including a call to member States to establish national bodies to protect such particularly vulnerable groups. In 1990, based on the group's report, the Commission on Human Rights appointed a Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, including the adoption of children for commercial purposes. the Working Group on Indigenous Populations Established with CHR Res. 1982/19, Commission on Human Rights, Report of the Thirty-Eighth Session, 1982 U.N. ESCOR, Supp. No. 2, at 135, 1, United Nations document E/1982/12-E/CN.4/1982/30, *adopted* 10 March 1982. The Working Group is authorized to review developments concerning the human rights of indigenous populations and develop standards concerning indigenous rights. Concentrating principally on standard-setting, the group has produced a draft Universal Declaration on the Rights of Indigenous Peoples and assisted in proposing a permanent United Nations forum for indigenous peoples. The Commission on Human Rights, by virtue of resolution 1995/32, established a working group to review the draft declaration. and the Working Group on Arbitrary Detention. Established in CHR Res. 1991/42, Commission on Human Rights, Report of the Forty-Seventh Session, 1991 ESCOR, Supp. No. 2, at 105, 106, United Nations document E/1991/22-E/CN.4/1991/91. The working group, according to this resolution, has to investigate "cases of detention [which are] imposed arbitrarily or otherwise inconsistently with the relevant international standards set forth in the Universal Declaration of Human Rights or in the

relevant international legal instruments accepted by the States concerned". The Group does not handle "situations of international armed conflict in so far as they are covered by the Geneva Conventions ... and their Additional Protocols [sic], particularly when the International Committee of the Red Cross (ICRC) has competence". Report of the Working Group on Arbitrary Detention, United Nations document E/CN.4/1992/20 (21 January 1992), para. 13 (16).

## B. Humanitarian law

21. International humanitarian law (hereinafter humanitarian law) is that branch of international law that regulates the conduct of hostilities in and seeks to protect the victims of armed conflicts. Besides the customary laws of war contained, *inter alia*, in the Hague Regulations of 1907, Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907 (hereinafter Hague Regulations). the principal sources of humanitarian law are the four Geneva Conventions of 12 August 1949, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 U.N.T.S. 85; Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S. 135; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S. 287 (hereinafter Fourth Geneva Convention). These four Geneva Conventions entered into force 21 October 1950 and were ratified by 185 States on 1 January 1995 (hereinafter collectively 1949 Geneva Conventions). as well as Additional Protocol I Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), *adopted* 8 June 1977, *entered into force* 7 December 1978, 1125 U.N.T.S. 3, ratified by 135 States on 1 January 1995 (hereinafter Protocol I). (Protocol I) and II Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* 8 June 1977, *entered into force* 7 December 1978, 1125 U.N.T.S. 609, ratified by 125 States on 1 January 1995 (hereinafter Protocol II). (Protocol II) of 1977. The Geneva Conventions are the world's most widely ratified multilateral treaties.

22. There is a wide consensus that the key provisions of these treaties, which are designed to protect the victims of all armed conflicts, have acquired the status of rules of general or customary international law binding on all States. In the Report of the Secretary-General pursuant to para. 2 of Security Council Resolution 808 (1993), United Nations document S/25704, 3 May 1993, the United Nations Secretary-General states in para. 35 that "[t]he part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the protection of war victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907 ...". *See also* the United States of America v. von Leeb et al. (The High Command Case), **XI Trials of War Criminals before the Nürnberg Military Tribunals Under Control Council Law No. 10**, at 532 (1950), *quoting* from judgement of the IMT against Goehring, et al., at 253 regarding the Hague Convention (IV):

"But it is argued that the Hague Convention does not apply in this case, ... Several of the belligerents in the recent war were not parties to this Convention. In the opinion of the Tribunal it is not necessary to decide this question. The rules of land warfare expressed in the Convention undoubtedly represented an advance over existing international law at the time of their adoption. ... but by 1939 these rules laid down in the Convention were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war ..." The International Court of Justice, for example, has ruled that the guarantees laid down in common article 3 of the Geneva Conventions on non-international armed conflicts also apply, as customary law, to international armed conflicts. *Nicaragua v. the United States of America*, merits, I.C.J. Reports 1986, para. 218. As Protocol II elaborates on and authoritatively interprets common article 3, many of its provisions arguably should be regarded as customary international law too and, therefore, should be respected by the parties to all internal armed conflicts. *See Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, 1340-41 (Yves Sandoz et al. eds., 1986) (hereinafter **Commentary**). Furthermore, in the context of the establishment of the International Tribunal for the Former Yugoslavia, the guarantees protected by the prohibitions of grave breaches of the 1949 Geneva Conventions, of violations of the laws or customs of war, of genocide and of crimes against humanity were characterized as "rules of international humanitarian law which are beyond any doubt part of customary law". Report of the Secretary-General, *supra* note 42, para. 34. For the detailed list of the guarantees whose violations are punishable by the Tribunal, *see* Statute of the International Tribunal for War Crimes in former Yugoslavia (as adopted by the Security Council in resolution 841/1993, hereinafter War Crimes Tribunal): Arts. 2 (grave breaches of the Geneva Conventions), 3 (violations of the laws or customs of war), 4 (genocide) and 5 (crimes against humanity). These provisions include, *inter alia*, the following prohibitions: Genocide (art. 4 Statute); willful killing *hors de combat* and murder (art. 2, letter a and art. 5, letter a); attack or bombardment of undefended towns, villages, dwellings or buildings (art. 3, letter c); torture and inhuman treatment (art. 2, letters b and c, art. 5, letters f and i); rape (art. 5, letter g); the use of weapons calculated to cause unnecessary suffering (art. 3, letter a); unlawful confinement or deportation of civilians (art. 2, letter g); taking civilians as hostages (art. 2, letter h); willful deprivation of the right to a fair trial (art. 2, letter f); plunder of public and private property (art. 3, letter e) and wanton destruction of cities, towns and villages or devastations not justified by military necessity (art. 3, letter b).

23. Based on the Geneva Conventions and the Additional Protocols, the International Committee of the Red Cross (ICRC) monitors the application of international humanitarian law. It promotes that law and contributes to its development. In addition, the ICRC gives protection and assistance to victims of armed conflicts and other situations of violence. It has a broad right of initiative allowing it to offer its services as a specifically neutral and independent intermediary. Thus, it contributes to the protection of and assistance to internally displaced persons in several regards. For a more detailed discussion *see infra*, chap. IV.

### C. Refugee law

24. Refugee law provides rules for the legal status and treatment of refugees in host countries. It is not directly applicable to the internally displaced because, unlike refugees, internally displaced

persons have not crossed an international border. Article 1 (A) (2) of the Convention Relating to the Status of Refugees Convention Relating to the Status of Refugees, Geneva, 28 July 1951, 189 U.N.T.S. 150, *entered into force* 22 April 1954, ratified by 124 States on 17 March 1995 (hereinafter Refugee Convention). (Refugee Convention) and the subsequent Protocol Relating to the Status of Refugees Protocol Relating to the Status of Refugees, New York, 31 January 1967, 606 U.N.T.S. 267, *entered into force* 4 October 1967, ratified by 124 States on 17 March 1995 (hereinafter Refugee Protocol). (Refugee Protocol) define a refugee as anyone who has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, *is outside the country of his nationality* and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it" (emphasis added). Regional refugee law instruments such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa Organization for African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, article I.2, 1001 U.N.T.S. 45, ratified by 42 States on 1 January 1995. *See also*, **Office of the High Commissioner for Refugees, Handbook on Procedures and Criteria for Determining Refugee Status**, para. 22 (1988). and the Cartagena Declaration of 1984 Conclusions of the Declaration of Cartagena of 1984, *printed in Annual Report of the Inter-American Commission on Human Rights 1984-1985*, OEA/Ser.L/V/II.66, doc. 10 rev. 1, 1 October 1985, 177, 180, para. 3 (hereinafter Declaration of Cartagena). expand the situations under which refugee status is recognized to cases of foreign aggression, occupation, The Declaration of Cartagena does not mention occupation. foreign domination, events seriously disturbing public order and, in the case of the Cartagena Declaration, to massive violations of human rights and domestic conflict; however, both instruments are restricted to persons who have left their country of origin or nationality.

25. Despite the fact that internally displaced persons remain in their own countries, they, like refugees, have been forced to leave their homes and find themselves in refugee-like situations. Consequently, refugee law, by analogy, can be useful in proposing rules and establishing guidelines to protect the needs of the internally displaced. This is why references to refugee law are included in this report. In addition, UNHCR documents For details, *see infra*, para. 75 with notes 110 and 111. such as the Guidelines on the Protection of Refugee Women or the Guidelines on Protection and Care of Refugee Children, as well as certain UNHCR Executive Committee Conclusions which provide guidance for States parties in implementing their obligations under the Refugee Convention and Protocol might also inspire standard-setting for internally displaced persons. However, one must take into account that, by definition, refugees are not citizens of the host country whereas internally displaced persons remain in their home country; therefore, many of the norms and guidelines relating to the status of refugees in the country of refuge or asylum which guarantee them equal treatment with aliens in that country *See* arts. 13 (movable and immovable property), 15 (right of association), 17 (wage-earning employment), 18 (self-employment), 19 (liberal professions), 21 (housing), 26 (freedom of movement) of the Refugee Convention. cannot serve as a source of inspiration for analogous guarantees for internally displaced persons and have thus been excluded from this report.

26. UNHCR policy has direct application in those situations where UNHCR is directly authorized to protect and assist internally displaced persons. The agency has frequently been called upon to act on behalf of the internally displaced. Situations in which UNHCR has worked with internally displaced persons include its returnee programmes, *See, e.g.*, Security Council resolution 688 (1991) of 5 April 1991, *adopted* by 10 votes to 3 with 2 abstentions, United Nations document S/RES/688 (1991) (hereinafter S.C. resolution 688) (calling upon Secretary-General to pursue humanitarian efforts in Iraq using "all the resources at his disposal," following which UNHCR was commissioned to provide assistance to approximately 500,000 returnees and 500,000 internally displaced). special operations often undertaken at the request of the United Nations General Assembly or United Nations Secretary-General, UNHCR may engage, at the request of the General Assembly, in special operations for internally displaced persons, not related to returnee programmes, in connection with article 9 of the Statute of the Office of the United Nations High Commissioner for Refugees, *reprinted in* **Collection of International Instruments Concerning Refugees**, HCR/IP/1 (1988) at 3. It may also undertake such general humanitarian endeavours at the request of the Secretary-General under General Assembly resolution 2956 (XXVII) of 12 December 1972, United Nations document A/RES/2956 (XXVII), 18 December 1972. Examples of such UNHCR programmes involving humanitarian and other assistance to internally displaced persons are found in Sri Lanka following the resumption of conflict in June 1990 and pursuant to a letter-request by the Secretary-General to the High Commissioner for Refugees dated 5 September 1991 and in the current conflict in the former Yugoslavia following a letter-request by the Secretary-General to the High Commissioner for Refugees dated 14 November 1991. and the providing of humanitarian and development assistance to refugees and internally displaced persons in a particular region. Primary examples of UNHCR's involvement in regional arrangements for refugees and internally displaced persons are SARRED (International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa, 1988) and CIREFCA (International Conference on Central American Refugees, 1989). In 1993, the United Nations High Commissioner for Refugees formulated criteria for UNHCR's involvement with internally displaced persons and proposed that the agency take responsibility for internally displaced persons in certain situations. The High Commissioner specified primary and supplemental responsibility, respectively, in the following situations:

"(a) Situations of internal displacement where there is a direct link with UNHCR's activities under its basic mandate to protect refugees and seek solutions to refugee problems, including: (i) those where internally displaced populations are mingled with groups of returnees or are in areas to which refugees are expected to return; or (ii) those where the same causes have produced both displacement and refugee flows or there is a significant risk of cross-border movement of some or all of the internally displaced. In these situations, UNHCR will favourably consider assuming primary responsibility for the internally displaced, assessing in each case the benefits of its involvement in terms of protection and solutions as well as the need for assistance and protection.

(b) Other situations where the link with mandated UNHCR activities is not present or is less direct. In these situations, UNHCR may nevertheless consider involvement to relieve the causes of internal displacement and to contribute to conflict resolution through humanitarian action, but UNHCR

activities would normally be supplementary to the humanitarian efforts of other international organizations." Executive Committee of the High Commissioner's Programme, Note on International Protection (submitted by the High Commissioner), United Nations document A/AC.96/815, 31 August 1993, at paragraph 46.

These criteria were noted by the Executive Committee of the High Commissioner's Programme in its Report of the Forty-Fourth Session (Geneva, 4-8 October 1993), *General Conclusion on International Protection*, United Nations document A/AC.96/821, 12 October 1993, at paragraph 19 (s). In its 1994 Conclusion on Internally Displaced Persons, the Executive Committee of UNHCR encouraged the High Commissioner to proceed with the implementation of UNHCR's internal criteria and guidelines for involvement in situations of internal displacement: Executive Committee Conclusion No. 75 (XLV) Internally Displaced Persons (1994) (hereinafter EXCOM Conc. 75), *printed in* Report of the Forty-Fifth Session of the Executive Committee of the High Commissioner's Programme (Geneva, 3-7 October 1994), United Nations document A/AC.96/839, 11 October 1994 (hereinafter EXCOM 1994 Report) paragraph 20 (k) at 14. The General Assembly has reiterated its support for UNHCR's involvement with internally displaced persons. In 1994, the General Assembly called "for a more concerted response by the international community to the needs of internally displaced persons" and, in accordance with General Assembly resolution 48/116 of 1993, reaffirmed "its support for the High Commissioner's efforts, on the basis of specific requests from the Secretary-General or the competent principal organs of the United Nations and with the consent of the State concerned, and taking into account the complementarities of the mandates and expertise of other relevant organizations, to provide humanitarian assistance and protection to such persons, emphasizing that activities on behalf of internally displaced persons must not undermine the institution of asylum, including the right to seek and enjoy in other countries asylum from persecution". General Assembly resolution 49/169, *adopted without a vote* 23 December 1994, paragraph 10. The General Assembly furthermore acknowledged the continuing close cooperation between the High Commissioner for Refugees and the Secretary-General's Representative on Internally Displaced Persons and recognized the importance of such cooperation. *Id.* paragraph 13.

#### D. Displacement in recognized situations

27. International law recognizes three categories of situations, each of which is governed by a different set of norms, namely, (i) situations of tensions and disturbances, or disasters where human rights law is applicable, (ii) situations of non-international armed conflicts governed by some of the most central principles of humanitarian law and by many human rights guarantees, and (iii) situations of inter-State armed conflict where the detailed provisions of humanitarian law become primarily operative although many important human rights guarantees remain applicable. These three recognized situations cover most cases of internal displacement and thus provide an analytical framework for the present compilation and analysis of legal norms.

##### 1. Situations of tensions and disturbances, or disasters

28. Many internally displaced persons live in situations of internal tensions or disturbances, or

disasters. The terms "internal tensions and disturbances" refer to situations which fall short of armed conflict, but involve the use of force and other repressive measures by government agents to maintain or restore public order. Examples of tensions and disturbances include riots, such as demonstrations without a concerted plan from the outset, isolated sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups; and violent ethnic conflicts not amounting to hostilities. A situation of serious internal tension characteristically involves specific types of human rights violations such as large-scale arrests and other large-scale measures restricting personal freedom, administrative detention and assigned residence, large numbers of political prisoners, and the probable existence of ill-treatment or inhuman conditions of detention. *See ICRC. Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law*, 262 **International Review of the Red Cross** 9, 13 (1988) (detailing examples of tensions and disturbances).

29. Disasters have natural or human-made origins. Examples include droughts, floods, earthquakes or typhoons, nuclear disasters or famine.

30. Human rights law, rather than humanitarian law, guides governmental conduct in the treatment of persons displaced in situations of tensions and disturbances or by disaster. *See* Hans-Peter Gasser, *A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct*, 262 **International Review of the Red Cross** 38, 42 (1988) (providing an overview of existing human rights legislation and offering a new approach to better protect human values in instances of internal disturbances and tensions); Theodor Meron, *Draft Model Declaration in Internal Strife*, 262 **International Review of the Red Cross** 59 (1988) (focusing on the general characteristics of internal strife and providing a model declaration) (hereinafter *Draft Model Declaration*). Humanitarian law is inapplicable because internal tensions and disturbances do not amount to armed conflict.

31. Most human rights treaties including the ICCPR and the Convention on the Rights of the Child contain limitations clauses which permit Governments lawfully to restrict the free exercise of many rights during situations falling short of armed conflict in order to protect public safety or public health and morals, to restore order and to protect fundamental rights and freedoms of others. *See*, e.g., articles 12, 13, 18, 21 and 22, CCPR; articles 10, 14 and 15, CRC; article 11, African Charter; articles 12, 13, 15, 16 and 22, American Convention; articles 8-11, European Convention. For purposes of this report, the terms "restriction" and "restrict" are used interchangeably with the terms "limitation" and "limit", respectively. Thus, for example, a Government could impose a curfew within a riot-torn area without violating the freedom of movement. Likewise, disasters have been used to justify restrictions on otherwise guaranteed human rights. It must be stressed, however, that such limitations, according to most human rights treaties, are only permissible to the extent that they are prescribed by law and are really necessary for achieving the aforementioned purposes. The Siracusa Principles define a limitation as "necessary" if it "(a) is based on one of the grounds justifying limitations recognized by the relevant article ..., (b) responds to a pressing public or social need, (c) pursues a legitimate aim, and (d) is proportionate to that aim." Siracusa Principles, *supra* note 29, paragraph 10.

32. Article 4 of the International Covenant on Economic, Social and Cultural Rights allows for

limitations of its guarantees if they are determined by law, compatible with the nature of the rights concerned and necessary for "promoting the general welfare in a democratic society". Thus, the principle of proportionality also applies here. In this regard, the Committee on Economic, Social and Cultural Rights has stressed that "any retrogressive measures" reducing an already achieved level of realization of such rights "need to be fully justified". General Comment of the Committee on Economic, Social and Cultural Rights, No. 3, paragraph 10 (Fifth session, 1990); General Comments of the Committee on Economic, Social and Cultural Rights, Nos. 1-4, *reprinted in* Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, United Nations document No. HRI/GEN/1/Rev. 1 (29 July 1994) (hereinafter CESCR General Comments).

33. Some human rights treaties also contain derogation clauses which permit States to derogate from, i.e. suspend, certain specified rights under narrowly circumscribed situations. For purposes of this report, the terms "suspension" and "suspend" are used interchangeably with the terms "derogation" and "derogate", respectively. For example, article 4 (1) of the International Covenant on Civil and Political Rights permits a State party to suspend temporarily certain guarantees:

"In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin." Similar provisions are contained in article 27, American Convention and article 15, European Convention on Human Rights. *See also, Siracusa Principles, supra* note 29.

34. Treaties containing derogation clauses regularly list several rights which cannot be suspended, even in times of emergency. Among these non-derogable guarantees are the right to life, the prohibition of torture and cruel and inhuman or degrading treatment and punishment, the prohibition of slavery and the prohibition of retroactive application of penal law. *See* articles 4 (2), CCPR (which includes the freedom of thought, conscience and religion into the list of non-derogable rights); 27 (2), American Convention (adding the right to juridical personality, the freedom of conscience and religion, the right of family, the right to a name, the right of the child, the right to nationality and the right to participate in government); and 15 (2), European Convention.

35. Although situations of tensions and disturbances, as well as disasters, could justify restrictions on certain human rights, they rarely constitute the kind of genuine public emergency that would permit a State to derogate from guaranteed rights. Suspensions of guaranteed rights are exceptional measures which are not self-judging by national authorities. The compatibility of such measures with the State party's international obligations is ultimately subject to scrutiny and review by the appropriate supervisory bodies established to monitor States parties' respect for guaranteed human rights. *See, e.g., Manfred Nowak, United Nations Covenant on Civil and Political Rights - CCPR Commentary*, pp. 75 and 86 (1993); (hereinafter Nowak, Commentary). It should be noted

that States rarely invoke derogation clauses.

36. Certain treaties do not contain a derogation clause, such as the ICESCR, the conventions on racial discrimination, torture and the rights of the child, the African Charter and the Protocol of San Salvador. It is arguable that the customary law doctrines of necessity and force majeure could, however, be invoked in very exceptional cases to justify temporary non-application of these conventions. All but the African Charter contain savings clauses to ensure that in effect, *inter alia*, non-derogable rights recognized by virtue of other treaties or laws are respected as such. Article 5 (2), CDESCR, article 41, CRC, and article 4, Protocol of San Salvador. States parties to these instruments can invoke certain limitations specified in those treaties which would generally be "sufficient to enable a State party to respond to an emergency situation in compliance with its obligations". Philip Alston and Gerard Quinn, *The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights*, **9 Human Rights Quarterly** 156, 219 (1987) (hereinafter *Alston & Quinn*). However, certain limitations, such as those in the ICESCR requiring compatibility with the nature of the rights, prohibit interferences which result in a de facto derogation of the relevant guarantees. Thus, the Committee on Economic, Social and Cultural Rights has recognized the existence of "... a minimum core obligation to ensure the satisfaction of ... minimum essential levels of each of the rights" and concluded that "[a] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant." CDESCR General Comments, *supra* note 63, No. 3, para. 10.

## 2. Non-international armed conflict

37. Once an armed conflict exists inside a country, humanitarian law becomes applicable to those internally displaced persons who live within that situation. Human rights law remains applicable as well, although its rights and guarantees are increasingly subject to restrictions and, in extreme cases, even derogation, except for the core of non-derogable rights. Nevertheless, human rights law and humanitarian law converge to a large extent in purely internal armed conflict situations and they reinforce each other. On the interaction between human rights law and humanitarian law, *see* Report on the situation of human rights in Kuwait under Iraqi occupation, prepared by Mr. Walter Kälin, Special Rapporteur to the Commission on Human Rights, in accordance with Commission resolution 1991/67, United Nations document E/CN.4/1992/26.

38. Human rights law generally restrains the abusive practices of only one party to the conflict, namely the Government and its agents. Since only States are proper parties to human rights treaties, it is usually the Governments of States that are internationally responsible for human rights violations under those treaties. Comparable abuses committed by private actors, such as rebels or other dissident groups, are not the subject matter of admissible complaints before monitoring bodies established under existing human rights conventions unless private acts are instigated, encouraged or at least acquiesced in by the Government concerned; otherwise, they are typically labelled as infractions of a country's domestic laws. However, the notion that non-governmental actors should be internationally responsible for human rights abuses has gained ground in recent years. To the

extent that certain internationally recognized crimes are coextensive with proscriptions under human rights treaties or fall under the jurisdiction of international tribunals, private actors may incur individual penal responsibility for the commission of such crimes, including, *inter alia*, genocide or torture. *See, e.g.*, articles IV-VII, Genocide Convention, articles 4-9, CAT, and the Statute of the International Tribunal for Rwanda, *infra* note 75; *see also*, International Law Commission (ILC), Draft Code of Crimes Against the Peace and Security of Mankind, Part II, in: Report of the International Law Commission on the work of its forty-third session, 29 April-19 July 1991, United Nations document A/46/10, pp. 243-250.

39. Together with article 1 common to the four Geneva Conventions, mandating contracting parties to respect and to ensure respect for the Conventions in all circumstances, the only other provision in these instruments that directly governs all internal armed conflicts is article 3, also common to the four Conventions (hereinafter, common article 3). Common article 3 binds both parties to the conflict, i.e. Government and dissident forces. It does not apply to mere acts of banditry or unorganized and short-lived rebellions but typically to armed strife between governmental armed forces and organized, armed dissidents generally occurring within the territory of a particular State. *See* **Commentary on the Geneva Conventions of 12 August 1949: Geneva Convention Relative to the Protection of Civilian Persons in Time of War** (published under the general editorship of Jean S. Pictet, 1958) 35-36 (hereinafter **Commentary on the Fourth Geneva Convention**). It also applies to cases in which two or more armed factions within a country confront one another without the involvement of governmental forces, for example, when the established Government has dissolved or is too weak to intervene. The Statute of the International Tribunal for Rwanda granted the tribunal jurisdiction to prosecute individuals for violations of basic rules governing the conduct of internal hostilities. Specifically, under article 4 of the Statute, the Tribunal is empowered to prosecute "persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977". Under article 6 of the Statute, each person "who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime". Statute of the International Tribunal for Rwanda, annexed to Security Council resolution 955, *adopted* 8 November 1994, United Nations document S/RES/955 (1994) (hereinafter **International Tribunal for Rwanda**). The application of common article 3 is automatic as soon as a situation of armed conflict exists. It imposes legal obligations on the parties to an internal conflict for the protection of persons who do not, or who no longer, take an active part in the hostilities.

40. Common article 3 reads as follows:

"In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

"1. Persons taking no active part in the hostilities, including members of armed forces who have laid

down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

"To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

"(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

"(b) Taking of hostages;

"(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

"(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

"2. The wounded and sick shall be collected and cared for.

"An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

"The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

"The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

The obligation to apply common article 3 is absolute for every party to the conflict and independent of the obligation of the other party. Accordingly, individual civilians, including those forcibly or voluntarily displaced by virtue of the hostilities, are entitled to the absolute guarantees of common article 3 when they are captured by or subjected to the power of either government or dissident forces. In addition, common article 3, by inference, and customary law, prohibits displaced persons and other civilians living in combat zones or areas controlled by the enemy from being directly attacked. Deaths of civilians resulting from such illicit attacks are tantamount to homicide and cannot be legitimately considered to be wartime casualties.

41. Protocol II, according to its article 1 (1), applies to non-international armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol". Because of these objective requirements, the Protocol essentially applies to situations of civil war. Protocol II does not alter common article 3, but rather the two apply collectively and in conjunction with one another.

### 3. Inter-State armed conflict

42. Inter-State, i.e. international, armed conflict represents a third situation creating internal displacement that receives distinct treatment under international law. Here, human rights law remains applicable during inter-State conflict, *See, e.g.*, Report on the situation of human rights in Kuwait under Iraqi occupation, *supra* note 72. and it becomes especially important to protect internally displaced persons against their own Government where humanitarian law may not afford protection. However, because of the nature of an inter-State conflict, human rights guarantees may become subject to restrictions or even derogations. Non-derogable rights must be respected under all circumstances.

43. In such situations, humanitarian law, notably the Geneva Conventions of 12 August 1949 and Protocol I as well as the customary laws of war, becomes fully operative for States parties in inter-State hostilities which, according to article 2 common to the four Geneva Conventions, involve a declared war, or, in its absence, any conflict between two or more States leading to the intervention of armed forces, including occupation. The armed forces of States engaged in international wars must implement, enforce and comply with all the highly developed rules and protections contained in the 1949 Geneva Conventions, Additional Protocol I (where applicable) and the customary laws of armed conflict.

44. Most norms concerning the protection of civilians in international armed conflicts were designed for non-nationals of the State that effectively holds the power in the respective territory. In this regard, article 4 of the Fourth Geneva Convention, provides in relevant part:

"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.

"Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are." This report uses the term "protected persons" within the meaning of this article 4.

Most provisions of the Geneva Conventions, therefore, are not applicable to persons displaced to an area controlled by their own Government. Among the norms which only protect against the authorities of a foreign State (normally an Occupying Power) are many of those provisions which address the needs of displaced persons in the most comprehensive way: thus, Part III, Section III of the Fourth Geneva Convention is limited to persons under foreign occupation, including the particularly important and clear obligation of the Occupying Power to grant passage to humanitarian operations (art. 59).

45. Some provisions contained in Part II of the Fourth Geneva Convention and Part IV of Protocol I have, however, broader applicability. Part II of the Fourth Geneva Convention "cover[s] the whole of the populations of the countries in conflict" (art. 13), and thus also internally displaced persons in the territory controlled by their own Government. It contains provisions for hospital and safety

zones and localities (art. 14), neutralized zones (art. 15), for the protection of the wounded, sick, infirm and expectant mothers including provisions concerning hospitals and transports (arts. 16, 18-22) and the "endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and aged persons, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas" (art. 17), concerning child welfare (art. 24), the exchange of family news (art. 25) and inquiries made by members of dispersed families (art. 26).

46. Part IV of Protocol I defines a different scope of application than the Fourth Geneva Convention. Concerning the territorial aspect, "[t]he provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted" (art. 49, para 2). With respect to the personal scope of application, Protocol I refers to civilians in general and does not distinguish between nationalities but concentrates on the inoffensive character of the persons to be spared. Commentary, *supra* note 44, paragraph 1909. Therefore, while not specifically designed for this purpose, almost the whole of Part IV of Protocol I is applicable to internally displaced persons in international conflicts. In this context, the following provisions are particularly important: the prohibition of specific and indiscriminate attacks against civilians (art. 51), the prohibition of starvation of civilians (art. 54, para. 1), the protection of non-defended localities (art. 59) and demilitarized zones (art. 60), the provision of relief to the civilian population (arts. 69-71), the reunion of dispersed families (art. 74), the general fundamental guarantees applicable to everyone (art. 75) and the protection of women (art. 76) and children (arts. 77-78). It has to be noted, however, that only a limited number of States have ratified Protocol I which means that many internally displaced persons cannot benefit from these guarantees.

### III. ANALYSIS OF INTERNATIONAL LAW RELEVANT TO THE PROTECTION AND ASSISTANCE NEEDS OF INTERNALLY DISPLACED PERSONS

47. Internally displaced persons all share general protection and assistance needs, including personal safety, personal liberty, subsistence, property, and more. Women and certain vulnerable groups among the internally displaced such as children, the elderly, and the disabled, have specialized protection needs. This report will give special attention to women and children throughout the text, thus taking into account Commission on Human Rights resolution 1995/57 encouraging the Representative "to continue to pay specific attention in his review to the protection and assistance needs of women and children".

#### A. Equality and non-discrimination

##### 1. Situations of tensions and disturbances, or disasters

48. Essential to the fulfilment of other needs of the internally displaced is the need to be free from discriminatory acts or omissions of others. The concepts of equality before the law, equal protection of the law and non-discrimination form a cornerstone of international human rights law that are enshrined in Articles 1, 13, 55 and 76 of the Charter of the United Nations. Racial, ethnic, religious, gender-specific or political discrimination occurs, in one way or another, in every society. Internally displaced persons, often living in alien surroundings, deprived of their security, property and social status, are particularly exposed and vulnerable to discriminatory treatment.

49. An explicit prohibition of discrimination against internally displaced persons because of their being displaced does not exist in human rights law. However, many international and regional human rights treaties have clauses requiring States parties to respect and ensure the rights and freedoms recognized by those conventions without discrimination. In addition, provisions such as that found in article 26 of the ICCPR guarantee equality before the law and freedom from discrimination in the equal protection of the law in general; article 26 thus "governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction ...". General Comments adopted by the Human Rights Committee, No. 23, paragraph 4. General Comments adopted by the Human Rights Committee, Nos. 1-23, *reprinted in* Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, United Nations document No. HRI/GEN/1/Rev.1 (29 July 1994) (hereinafter HRC General Comments). Accord, *id.* No. 18, paragraph 12. Although not many of the treaties define "discrimination", the term is commonly understood to imply any distinction, exclusion, restriction or preference which is based on any specified ground, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. *See, e.g.,* HRC General Comments, *supra* note 80, No. 18, paragraph 7, applying this type of definition to the CCPR by reference to, *inter alia*, the definitions found in the CERD (art. 1) and the CEDAW (art. 1). Not every distinction, however, constitutes discrimination but only those that are not based on reasonable and objective criteria. States parties' obligations under these clauses generally encompass protection from discriminatory conduct, Generally, discriminatory conduct can be found where intent or "unjustifiable disparate impact upon a group ..." exists. *See, e.g.,* General Recommendations adopted by the Committee on the Elimination of Racial Discrimination, No. XIV, paragraph 2. General Recommendations adopted by the Committee on the Elimination of Racial Discrimination, *reprinted in* Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, United Nations document No. HRI/GEN/1/Rev.1 (29 July 1994) (hereinafter CERD General Recommendations). positive action to realize equality, and special measures to remedy patterns of discrimination.

50. Specific grounds upon which discrimination is prohibited in many treaties include race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or "other status". Both International Covenants contain these specified grounds. The United Nations Charter specifies that human rights and fundamental freedoms are to be respected without discrimination based on race, sex, language and religion. *See* United Nations Charter, Article 1 (3), 13 (1) (b), 55 (c) and 76 (c). Article 2 of the Universal Declaration states:

"Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status ...".

Article 7 of the Universal Declaration guarantees:

"All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration

and against any incitement to such discrimination."

51. Among the many treaty law provisions, *See also*, the non-discrimination clauses in regional instruments: article 14, European Convention; article II, American Declaration; articles 1 and 24, American Convention; article 3, Additional Protocol to the American Convention; articles 2, 3 and 18, paragraph 3, African Charter. the far-reaching guarantee of article 26 of the ICCPR is especially important:

"All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status".

Article 2 (2) of the ICESCR obliges the States parties to

"undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

52. The term "other status" in these and other instruments was intended to be interpreted broadly. *See, e.g. Marc Bossuyt, Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987) at 486. The term has been interpreted to include nationality and disability, *See* the views of the Human Rights Committee on communication No. 196/1985 (*Gueye et al. v. France*), paragraphs 9.4, 9.5 and 10. For a discussion of disability-based discrimination, *see infra*, paragraph 57; *see also infra*, paragraphs 213-220. and reasonably includes youth and old age as well. Non-discrimination clauses thus appear to ban discrimination against internally displaced persons based on their status as such. In addition, such clauses would prohibit discriminatory conduct based on grounds commonly related to situations of displacement, such as race, religion, national or social origin, and lack of property.

53. In addition, all guarantees providing protection against specific categories of discrimination such as race- and gender-specific discrimination are also applicable to internally displaced persons. Relevant instruments include the United Nations Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination, United Nations Declaration on the Elimination of All Forms of Racial Discrimination, proclaimed by General Assembly resolution 1904 (XVIII) of 20 November 1963. the Convention against Discrimination in Education, UNESCO Convention against Discrimination in Education, adopted on 14 December 1960 by the General Conference of the UNESCO, 429 U.N.T.S. 93, entered into force 22 May 1962, ratified by 84 States on 1 January 1995. the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief, proclaimed by General Assembly resolution 36/55 of 25 November 1981. the Declaration on Race and Racial

Prejudice, Declaration on Race and Racial Prejudice, adopted and proclaimed by the General Conference of the UNESCO on 27 November 1978. the Declaration on the Elimination of Discrimination against Women Declaration on the Elimination of Discrimination against Women, proclaimed by General Assembly resolution 2263 (XXII) of 7 November 1967. and the Convention on the Elimination of All Forms of Discrimination against Women.

54. The principle of non-discrimination is closely related to that of equality of treatment, which has been interpreted generally to include positive measures that will achieve equality for women and vulnerable groups such as children, the elderly *See* Principle 18 of the United Nations Principles for Older Persons (United Nations Principles for Older Persons), *adopted by and annexed* to General Assembly resolution 46/91 of 16 December 1991, stating that "[o]lder persons should be treated fairly regardless of age, gender, racial or ethnic background, disability or other status, and be valued independently of their economic contribution". Principle 17 provides that "[o]lder persons should be able to live in dignity and security and be free of exploitation and physical or mental abuse". and disabled. Article 4 (1), of the Women's Convention, for example, states that "temporary special measures aimed at accelerating de facto equality between men and women" are part of the obligations to achieve equality of men and women.

55. The fundamental right to gender equality The term "gender equality" in this report encompasses the principle of non-discrimination in its commonly recognized mandate of equal treatment as well as positive obligations to remedy inequality. Under the CEDAW, States parties agree to ensure freedom from discrimination on the basis of sex which has either the effect or the purpose of breaching recognized rights. The inclusion of equality of result as well as equality of means within the content of the principle of gender equality is emerging in scholarly debate as a viable interpretation of the relevant provisions of the CCPR and European Convention as well. *See, e.g.,* Titia Loenen, *Rethinking Sex Equality as a Human Right*, 3 **Netherlands Quarterly of Human Rights**, 253 (1994). is enshrined in Articles 1 (3), 13 (1) (b), 55 (c), and 76 (c) of the Charter and in many human rights instruments, including article 2 of the Universal Declaration, articles 2 (1), 3 and 26 of the ICCPR, and articles 2 (2) and 3 of the ICESCR. Similar rights are found in regional human rights instruments, including article 1 (1) of the American Convention, article II of the American Declaration, article 14 of the European Convention, and articles 2 and 18 (3) of the African Charter.

56. Among internally displaced persons, children are especially vulnerable. Under article 24 of the ICCPR, States parties are required to ensure "every child ... such measures of protection as are required by his status as a minor, on the part of his family, society and the State". Along with ensuring to the child all other rights of the Covenant, this obligation entails the adoption of special measures, including economic, social and cultural measures, to address a child's developmental needs in order to ensure the ability to enjoy civil and political rights. HRC General Comments, *supra* note 80, No. 17, paragraphs 1 and 3. According to the World Declaration on the Survival, Protection and Development of Children and its Plan of Action, internally displaced children, as children in "very difficult circumstances," require further attention, care and support. World Declaration on the Survival, Protection and Development of Children and Plan of Action for Implementing the World Declaration on the Survival, Protection and Development of Children in

the 1990s, adopted at New York, 30 September 1990, in Note by the Secretary-General on the Status of the Convention on the Rights of the Child, annex, United Nations document E/CN.4/1991/59, 12 December 1990 (hereinafter World Declaration and Plan of Action on Children), paras. 11 and 20 (7).

57. Besides women and children, disabled persons also need special protection in situations of displacement as there is a risk that they will suffer from discrimination. Recently, the Committee on Economic, Social and Cultural Rights elaborated on the prohibition against "disability-based discrimination" under article 2 (2) of the ICESCR. CESCR General Comment No. 5, (E/1995/22-E/C.12/1994/20, p. 99) paragraph 2 (hereinafter CESR General Comment No. 5). The Committee's General Comment defined such discrimination as including "any distinction, exclusion, restriction or preference, or denial of reasonable accommodation based on disability which has the effect of nullifying or impairing the recognition, enjoyment or exercise of economic, social or cultural rights". *Id.*, para. 15. The Committee was especially concerned with women with disabilities who often suffer from "double discrimination" *Id.*, paragraphs 19 and 31. and children with disabilities. *Id.*, para. 32.

## 2. Non-international armed conflict

58. Human rights prohibitions of discrimination and guarantees of equal protection continue to apply in situations of non-international armed conflict. However, special circumstances prevailing in such situations might allow for different treatment which would be considered discrimination in peacetime.

59. International humanitarian law provides for humane treatment without adverse distinction in situations of non-international armed conflict. Article 3 (1) common to the four Geneva Conventions reads:

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

60. Article 2 (1) of Protocol II provides that its provisions:

"shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria (hereinafter referred to as 'adverse distinction') to all persons affected by an armed conflict as defined in Article 1."

61. Finally, article 4 (1) of Protocol II reads:

"All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions

and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors."

### 3. Inter-State armed conflict

62. Prohibitions of discrimination in human rights law also apply to situations of inter-State armed conflict although there may be situations allowing for derogation. Further, the principle of humane treatment without adverse distinction is part of humanitarian law applicable in times of armed conflict between States. Thus, article 27, paragraph 3, of the Fourth Geneva Convention states:

"Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion." For the notion of "protected person" *see supra*, para. 44.

63. Article 75 of Protocol I, which contains an extensive list of fundamental guarantees, provides in paragraph 1 that all

"persons who are in the power of a Party to the conflict ... shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided in this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria ... ."

64. While article 27 of the Fourth Convention is restricted to protected persons, Protocol I affords full protection for internally displaced persons.

### 4. Conclusions

65. It can be concluded that, in situations of tensions and disturbances, or disasters, internally displaced persons are fully protected by prohibitions of discrimination and guarantees of equal protection. However, an international instrument should explicitly state that the term "other status" in non-discrimination clauses includes the status of internally displaced persons. In addition, fundamental provisions of humanitarian law apply to all civilians and, therefore, afford full protection for internally displaced persons against discriminatory violence. However, it could be useful to state this principle explicitly in a future international instrument relating to the legal status of internally displaced persons.

#### B. Life and personal security

66. Internally displaced persons frequently are at risk of various acts of violence, which may include, *inter alia*, killings, torture, rape, the use of particularly dangerous weapons and land-mines, and/or forcible disappearance. This section examines the legal norms that are most relevant to internally displaced persons experiencing such dangers during situations of tensions and disturbances, or disasters, non-international armed conflict and inter-State armed conflict.

1. Acts of violence, notably arbitrary and summary executions, genocide, terrorism, indiscriminate

attacks, and threats thereof

67. The personal safety of internally displaced persons is often at risk, particularly when they are in transit to and once they are in camps. Most acute are the dangers of individual and mass killings, including genocide and extrajudicial executions, as well as the effects of hostilities, especially from direct and indiscriminate attacks, and acts of terrorism.

(a) Situations of tensions and disturbances, or disasters

68. The right to life is the most fundamental human right. Many of the protection needs of internally displaced persons identified in this report implicate the right to life and therefore should be viewed in conjunction with this right.

69. The right to life is affirmed in article 3 of the Universal Declaration. Article 6 (1) of the ICCPR states that:

"Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life."

Similar provisions are contained in regional instruments, namely, article I of the American Declaration, article 4 (1) of the American Convention, article 2 (1) of the European Convention, and article 4 of the African Charter.

70. As to children in particular, article 6 (1) of the Convention on the Rights of the Child protects their lives while paragraph 2 of the same provision obligates States parties to "ensure to the maximum extent possible the survival and development of the child". Article 19 of the Convention requires States to

"take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment ... while in the care of parent(s), legal guardian(s) or any other person who has the care of the child".

This obligation to take positive action is especially important in situations of internal displacement because children are often separated from their parents and taken care of by other persons.

71. Most of the mentioned human rights treaties do allow for certain forms of taking of life (e.g. in the form of the death penalty or in defence of unlawful violence *See, e.g.*, articles 6 (2) of the CCPR; 2 (2) of the European Convention; 4 (2) American Convention.), but arbitrary deprivation of the right to life is never allowed. The Human Rights Committee, for example, has held that the use of force by law enforcement officials which is in excess of the principles of necessity and proportionality constitutes a violation of the right to life. Views of the Human Rights Committee on Communication No. 45/1979 (Suarez de Guerrero v. Colombia), paras. 13.2 and 13.3. The Committee also considers that, in protecting against arbitrary deprivation of life, "States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. ... Therefore, the law must strictly control and

limit the circumstances in which a person may be deprived of his life by such authorities." HRC General Comments, *supra* note 80, No. 6, para. 3. With regard to loss of life from war and other acts of mass violence, the Committee has stated that "States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life." HRC General Comments, *supra* note 80, No. 6, para. 2. In addition, according to the Committee, the protection of the right to life requires that States adopt positive measures such as steps to reduce infant mortality and eliminate malnutrition and epidemics. *Id.*, para. 5. Furthermore, CEDAW has noted that violence against women impairs or nullifies the enjoyment by women in particular of, *inter alia*, the right to life. General Recommendations adopted by the Committee for the Elimination of All Forms of Discrimination Against Women, No. 19, para. 7 (a), *reprinted in* Note by the Secretariat, Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, United Nations document No. HRI/GEN/1/Rev.1 (29 July 1994) (hereinafter CEDAW General Recommendations). For a discussion of violence against women, *see infra* paras. 124-142.

72. According to article 4 (2) of the ICCPR, article 15 (2) of the European Convention and article 27 (2) of the American Convention, derogations from the right to life are never permitted, not even in times of public emergency which threaten the life of the nation. Therefore, the prohibition of arbitrary taking of life belongs to the non-derogable rights and thus protects internally displaced persons, even in the most extreme cases. Concerning the non-derogable character of article 6 (1) ICCPR, *see* HRC General Comments, *supra* note 80, No. 6, para. 1. *See also*, OAU/UNHCR Symposium, *supra* note 4, Recommendation 13 according to which the right to life of internally displaced persons "must be respected at all times".

73. During recent years, internally displaced persons along with others have become victims of genocide in at least two situations (former Yugoslavia and Rwanda). Genocide constitutes an especially grave form of violation of the right to life. Article I of the Genocide Convention declares genocide, committed at any time, to be an international crime. In this regard, article 6 (3) of the ICCPR states that "[w]hen deprivation of life constitutes the crime of genocide, it is understood that nothing in this article shall authorize any State party to the present Covenant to derogate in any way from any obligation assumed under the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide". Article II of the Genocide Convention defines genocide as

"... any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, such as:

"(a) Killing members of the group;

"(b) Causing serious bodily or mental harm to members of the group;

"(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

"(d) Imposing measures intended to prevent births within the group;

"(e) Forcibly transferring children of the group to another group."

74. In this regard, the Vienna Declaration and Programme of Action expressed the dismay of the World Conference on Human Rights "at massive violations of human rights especially in the form of genocide, 'ethnic cleansing' and systematic rape of women in war situations, creating mass exodus of refugees and *displaced persons*" and reiterated "the call that perpetrators of such crimes be punished ... ." *Supra*, note 4, Part I, para. 28. Emphasis added.

75. Regarding refugees, the Executive Committee of UNHCR (ExCom) has expressed concerns and called for States as well as UNHCR to take measures to address the personal security needs of refugees, many of which focus on the particular needs of women and children refugees. *E.g.*, the following Conclusions of the Executive Committee of the United Nations High Commissioner for Refugees: **Executive Committee Conclusions: No. 72 (XLIV) Personal Security of Refugees** (1993) (hereinafter **EXCOM Conc. No. 72**); **No. 64 (XLI) Refugee Women and International Protection** (1990) (hereinafter **EXCOM Conc. No. 64**); **No. 60 (XL) Refugee Women** (1989) (hereinafter **EXCOM Conc. No. 60**); **No. 59 (XL) Refugee Children** (1989) (hereinafter **EXCOM Conc. No. 59**); **No. 54 (XXXIX) Refugee Women** (1988) (hereinafter **EXCOM Conc. No. 54**); **No. 47 (XXXVIII) Refugee Children** (1987) (hereinafter **EXCOM Conc. No. 47**) para. e; **No. 39 (XXXVI) Refugee Women and International Protection** (1985) (hereinafter **EXCOM Conc. No. 39**). The agency, itself, has taken strides to reform policies and programmes to improve the personal safety of refugees and, in particular, women and children. *E.g.*, UNHCR Policy on Refugee Women submitted by the High Commissioner for Refugees, United Nations document A/AC.96/754 (1990) (hereinafter Policy on Refugee Women); **Office of the United Nations High Commissioner for Refugees, UNHCR Guidelines on the Protection of Refugee Women** (1991) (hereinafter **Guidelines on the Protection of Refugee Women**); Progress Report on Implementation of the UNHCR Guidelines on the Protection of Refugee Women, United Nations document EC/SCP/74, 22 July 1992, paras. 12-17 (hereinafter 1992 Progress Report); Progress Report on Implementation of the UNHCR Guidelines on the Protection of refugee Women, United Nations document EC/1993/SC.2/CRP.37, 10 December 1993 (hereinafter 1993 Progress Report); UNHCR Policy on Refugee Children, United Nations document EC/SCP/82, 6 August 1993 (hereinafter Policy on Refugee Children); **Refugee Children: Guidelines on Protection and Care**, at 79-84 (UNHCR, 1994) (hereinafter **Guidelines on Refugee Children**). While not directly applicable to internally displaced persons, ExCom Conclusions and UNHCR guidelines may provide guidance for affording security to internally displaced persons.

(b) Non-international armed conflict

76. As discussed above, the right to life is made non-derogable in all human rights treaties, applicable to all persons at all times. Additionally, under humanitarian law, common article 3 sets forth minimum standards of treatment applicable to all persons who do not or no longer actively participate in hostilities. It prohibits the parties to internal armed conflicts from committing acts of "violence to life and person, in particular murder of all kinds," (para. (1) (a)). Paragraph (1) (d) prohibits summary executions, i.e.:

"The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

77. Common article 3 does not explicitly prohibit attacks against civilian populations in non-international armed conflicts. Common article 3's prohibition of "violence to life and person" of "persons taking no active part in the hostilities" may be broad enough to encompass attacks against civilians in territory controlled by an adverse party. Such attacks are, however, prohibited by customary law, in particular, as reflected in United Nations General Assembly resolution 2444 (XXIII), entitled "Respect for human rights in armed conflict". General Assembly resolution 2444, United Nations GAOR, twenty-third session, Supp. No. 18, at 50, United Nations document A/7218 (1969), *adopted by unanimous vote* 19 December, 1968 (hereinafter resolution 2444). Resolution 2444 (XIII) expressly recognizes the customary principle of civilian immunity and its complementary principle requiring warring parties to distinguish civilians from combatants at all times. The preamble to this resolution clearly states that these fundamental humanitarian law principles apply "in all armed conflicts," meaning both international and internal armed conflicts. Moreover, the ICRC has long regarded these principles as basic rules of the laws of war that apply in all armed conflicts. The principle of distinction was reiterated by Basic Principles for the Protection of Civilian Populations in Armed Conflict, *adopted* 9 December 1970, General Assembly resolution 2675, United Nations GAOR, twenty-fifth session, Supp. No. 28, at 76, United Nations document A/8028 (1971) (hereinafter General Assembly resolution 2675). Therefore, the customary principles of civilian immunity and of distinction between civilians and combatants must be adhered to in an internal armed conflict. Both principles are affirmed in General Rules A (1) and A (2) of the **Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts** which identifies principles and norms that are crystallized or emergent rules of international law in situations of non-international armed conflict. **Declaration on the Rules of international humanitarian law governing the conduct of hostilities in non-international armed conflicts**, adopted by the Council of the International Institute of Humanitarian Law, Taormina (Italy), 7 April 1990 (approving the conclusions and commentary of the Fourteenth Round Table of the International Institute of Humanitarian Law, San Remo (Italy), 13-14 September 1989), *reprinted in* 278 **International Review of the Red Cross** 404 (1990) (hereinafter **Declaration by the International Institute of Humanitarian Law**).

*See also*, the Declaration on the Protection of Women and Children, *supra* note 28, para. 1:

"Attacks and bombings on the civilian population, inflicting incalculable suffering, especially on women and children, who are the most vulnerable members of the population, shall be prohibited, and such acts shall be condemned."

The prohibition of "shielding", whereby, for instance, military forces "hide" behind settlements of displaced persons is discussed *infra*, at paras. 157-164.

78. Accordingly, during internal armed conflicts, civilians who are internally displaced must not - individually or collectively - be made the object of attack. However, if displaced civilians directly

participate in the hostilities, they forfeit their immunity from direct attack for as long as they assume the role of a combatant. Once they are captured, surrender or are placed *hors de combat*, they, like other civilians, are absolutely entitled to the guarantees of humane treatment without adverse distinction under common article 3.

79. In contrast, if the displaced, individually or as a group, provide only indirect support to a party to the conflict by, *inter alia*, supplying food or shelter, serving as messengers, or disseminating propaganda, they may not be subject to direct individualized attack since they pose no immediate threat to the adversary. However, if internally displaced civilians are present in or near military targets, they implicitly assume the risk of death or injury incidental to direct, proportional attacks against such military targets. Displaced persons providing indirect support to dissident forces are clearly subject to prosecution by the Government for giving aid and comfort to the enemy. The prosecution of displaced persons under such circumstances must conform to the obligatory fair trial guarantees set forth in common article 3 and, where applicable, article 6 of Protocol II.

80. Article 4 of Protocol II elaborates the fundamental guarantees of humane treatment of common article 3. Its non-derogable provisions apply to all persons, including displaced persons, who do not or no longer actively participate in the hostilities. Article 4 (2) (a) of Protocol II explicitly prohibits "violence to the life, health and physical or mental well-being of persons, in particular murder". Furthermore, acts of terrorism In humanitarian law, prohibited acts of terrorism encompass, *inter alia*, "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population" (article 51 (2) of Protocol I). are prohibited in paragraph (2) (d), and threats to commit any of the above acts are prohibited in paragraph (2) (h). Consequently, threats to kill or to commit summary executions are likewise prohibited.

81. According to article 13 (1) of Protocol II, the civilian population and individual civilians enjoy general protection against the dangers arising from military operations. While article 13 of Protocol II affords civilians general protection against attacks, it does not provide for express protection against indiscriminate or disproportionate attacks. Nevertheless, it has been stated that "the concept of general protection ... is broad enough to cover protections which flow as necessary inferences from other provisions of Protocol II". **Bothe, Partsch and Solf**, **New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949** at 677 (1982) (hereinafter **New Rules**). The more specific rules in Protocol I that protect civilians from such attacks are appropriate referents for determining the extent of similar protection for these persons under Protocol II. *See infra*, para. 86. The **Declaration by the International Institute of Humanitarian Law**, *supra* note 115, explicitly prohibits, during non-international armed conflict, indiscriminate attacks and "[a]cts of violence intended primarily to spread terror among the civilian population" (General Rules, A (1) and A (2)).

82. Article 17 (1) of Protocol II refers directly to the security of displaced persons by providing that, exceptionally, displacements may be carried out when "the security of the civilians involved or imperative military reasons so demand". In such cases there is an obligation to take "all possible measures" for a reception of the displaced under satisfactory conditions of, *inter alia*, "safety". With the word "safety", the drafters of Protocol II wanted "to preclude the location of ... camps in the

vicinity of military objectives where they would be exposed to the effects of attacks". **New Rules**, *supra* note 118, at 692, referring to CDDH/III/SR. 24, para. 45.

83. Concerning refugees, the Executive Committee of UNHCR has noted its concern regarding military and armed attacks on refugee camps and settlements. *See*, for example, **United Nations High Commissioner for Refugees, Executive Committee Conclusion No. 21 (XXXII) General** (1981), para. (h); **Conclusion No. 29 (XXXIV) General** (1983), para. (d). In 1987, this concern led to an Executive Committee Conclusion dealing specifically with the protection issue, condemning "all violations of the rights and safety of refugees and asylum-seekers and in particular military or armed attacks on refugee camps and settlements". The Conclusion also sets forth guiding considerations concerning the protection of such camps and resettlements. *See* **United Nations High Commissioner for Refugees, Executive Committee Conclusion No. 48 (XXXVIII) Military or Armed Attacks on Refugee Camps and Settlements** (1987). These recommendations may serve as a model for an international instrument for internally displaced persons as, in this regard, internally displaced persons in camps or settlements have the same needs as refugees who have crossed international frontiers.

(c) Inter-State armed conflict

84. Internally displaced civilians who fall into the hands of the adversary during an inter-State conflict will be, in most cases, protected persons. For the notion of protected persons, *see supra* para. 44. and are therefore entitled to the protections set forth in article 32 of the Fourth Geneva Convention which prohibits the parties to the conflict

"... from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents".

Furthermore, article 27 of the Fourth Convention requires that protected persons "shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof".

85. If, under the circumstances, the internally displaced are not protected persons within the meaning of article 4 of the Fourth Convention, *See supra* para. 44. they none the less must be accorded the minimum guarantees of article 75 of Protocol I, Article 75 of Protocol I applies to persons "[i]n so far as they are affected by a situation referred to in Article 1 of this Protocol, ... who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol ..." (hereinafter non-protected persons). which prohibits violence and threats of violence to the life, health, or physical or mental well-being of persons, in particular murder (art. 75 (2) (a) (i) and (e)).

86. The protection of civilians against direct and indiscriminate attacks is contained in article 51 of Protocol I. This provision reads in pertinent part:

"2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

"3. Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

"4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:

"(a) Those which are not directed at a specific military objective;

"(b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or

"(c) Those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

"5. Among others, the following types of attacks are to be considered as indiscriminate:

"(a) An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and

"(b) An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

"6. Attacks against the civilian population or civilians by way of reprisals are prohibited.

"7. The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations."

This provision, together with others which prohibit making civilians and civilian objects the target of attack, should preclude the creation of so-called "free fire zones" in which all living things are indiscriminately attacked.

87. Wilful killings of protected persons are typified as grave breaches under article 147 of the Fourth Geneva Convention, which subjects the perpetrators to prosecution under universal jurisdiction. In addition, under article 85 of Protocol I, wilful violations of the above-cited provisions of article 51, resulting in death or serious injury, constitute grave breaches.

#### (d) Conclusions

88. It can be concluded that internally displaced persons are adequately protected by international law against violations of their rights to life and security. The gaps of the Fourth Geneva Convention created by the narrow notion of "protected persons" is filled, to a large extent, by Protocol I and by non-derogable human rights law. Frequent violations of these rights of the displaced are not due to legal gaps but shortcomings in the effective implementation of existing norms. However, it would be useful to include a provision in a future international instrument that internally displaced persons must be protected against indiscriminate or disproportionate attacks and that military or armed attacks on camps and settlements of such persons are prohibited. In addition, given the extensive use of "free fire zones" and their inherently illegal character, any international instrument applicable to the internally displaced should absolutely prohibit the creation of such zones in all armed conflicts.

#### 2. Enforced disappearances

89. One of the risks facing internally displaced persons, whether they are adults or children, is enforced or involuntary disappearance caused by government, paramilitary or dissident forces or groups. Some persons reported to have disappeared have subsequently reappeared as conscripts in governmental or dissident forces. Concerning questions related to forcible recruitment, *see infra*, paras. 165-171.

#### (a) Situations of tensions and disturbances, or disasters

90. Although there is no explicit proscription of enforced disappearance in any general human rights convention, universal or regional, the practice of disappearances violates many fundamental rights recognized within those general instruments. Such rights include those relating to killings and other acts of violence and ill-treatment as well as those relating to personal liberty and the exercise of one's legal rights.

91. In recent years, a particular consensus against the practice of disappearance has been articulated by the international community. In 1992, the United Nations General Assembly adopted by consensus the Declaration on the Protection of All Persons from Enforced Disappearance. Declaration on the Protection of All Persons from Enforced Disappearance, *adopted without a vote* 18 December 1992, General Assembly resolution 133, United Nations GAOR, forty-seventh session, Supp. No. 49, at 207, United Nations document A/47/49 (Vol. I) (1993). Article 1 considers any act of enforced disappearance an offence to human dignity, and condemns it

"as a denial of the purposes of the Charter of the United Nations and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and reaffirmed and developed in international instruments in this field".

The third preambular paragraph describes forced disappearance as a situation in which

"persons are arrested, detained or abducted against their will or otherwise deprived of their liberty by officials of different branches or levels of Government, or by organized groups or private

individuals acting on behalf of, or with the support, direct or indirect, consent or acquiescence of the Government, followed by a refusal to disclose the fate or whereabouts of the persons concerned or a refusal to acknowledge the deprivation of their liberty, thereby placing such persons outside the protection of the law".

92. The Inter-American Convention on the Forced Disappearance of Persons, Inter-American Convention on Forced Disappearance of Persons (resolution adopted at the seventh plenary session, held on 9 June 1994), AG/RES. 1256 (XXIV-O/94). Article II of this Convention describes forced disappearance for the purposes of the Convention as

"the act of depriving a person or persons of his or their freedom, in whatever way, perpetrated by agents of the State or by persons or groups of persons acting with the authorization, support, or acquiescence of the State, followed by an absence of information or a refusal to acknowledge that deprivation of freedom or to give information on the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees".

Article XV of this Convention stipulates that it does not apply to international armed conflicts "governed by the 1949 Geneva Convention and its Protocol concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war". adopted in June 1994, now prohibits disappearances at any time. Article I provides, in this respect, that "States parties ... undertake ... [n]ot to practise, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees." The Convention extends liability to State actors or agents, as well as persons or groups who act "with the authorization, support, or acquiescence of the State". Under article I (b), States parties undertake to "punish within their jurisdiction those persons who commit or attempt to commit the crime of forced disappearance of persons and their accomplices and accessories". Article IV of the Convention deals with matters of jurisdiction. The defence of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance is not admitted. *Id.*, article VIII. Previously, the Organization of American States (hereinafter OAS) had declared the systematic practice of forced disappearances to be a crime against humanity. Resolution by the General Assembly of the Organization of American States, AG/RES. 666 (XIII-O/83), 18 November 1983.

93. The right to be free from disappearances is likewise reflected in section II, paragraph 62, of the Vienna Declaration and Programme of Action adopted by the 1993 World Conference on Human Rights which "reaffirms that it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators".

94. Furthermore, article 35 of the Convention on the Rights of the Child addresses the abduction of children in requiring States parties to take "all appropriate national, bilateral and multilateral measures to prevent the abduction of ... children for any purpose or in any form".

95. In the case of Manfredo Velásquez Rodríguez, the Inter-American Court of Human Rights

found Honduras responsible for the involuntary disappearance of Manfredo Velásquez Rodríguez despite the absence of an express proscription of involuntary disappearances in the American Convention. Decision of I/A Court H.R., Velásquez Rodríguez Case, Judgment of 29 July 1988, Ser. C No. 4. In a similar vein, the Human Rights Committee has condemned the practice of forced disappearance in relation to the obligation of States to guarantee the right to life recognized in article 6 (1) of the ICCPR. The Committee stated that "States parties should ... take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life." HRC General Comments, *supra* note 80, No. 6, para. 4. In the case of Rafael Mojica, the Committee reaffirmed this view and concluded that the disappearance of Mr. Mojica constituted a violation of article 6 (1) of the Covenant. HRC, Views on Communication 449/1991 (Mojica v. Dominican Republic) United Nations document CCPR/C/51/D/449/1991 (10 August 1994), paras. 5.5 and 6. The Committee also held that by failing "to ensure Rafael Mojica's right to liberty and security of person" the Government concerned also violated article 9 (1) of the Covenant. *Id.*, para. 5.4 quoting the Committee's Views on communications, Nos. 195/1985 (Delgado Paéz v. Colombia), adopted on 12 July 1990, paras. 5.5 and 5.6 (Annual Report 1990, 43); 314/1988 (Bwalya v. Zambia), adopted on 14 July 1993, para. 6.4; 468/1991 (Ol Bahamonde v. Equatorial Guinea), adopted on 20 October 1993, para. 9.2. Finally the Committee stressed that "[a]ware of the nature of enforced or involuntary disappearances in many countries, [it] feels confident to conclude that the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7" *Id.*, para. 5.7. prohibiting torture and cruel, inhuman or degrading treatment.

96. Concerning an obligation to search for disappeared persons, article 13 of the Declaration on the Protection of All Persons from Enforced Disappearance provides for an effective investigation into the fate of disappeared persons by a competent and independent State authority. According to article X (1) of the Inter-American Convention on the Forced Disappearance of Persons, even in times "of war, the threat of war, internal political instability, or any other public emergency ... the right to expeditious and effective judicial procedures and recourse shall be retained as a means of determining the whereabouts ... of a person who has been deprived of freedom ...".

(b) Non-international armed conflict

97. Neither common article 3 nor Protocol II contains an explicit prohibition of the practice of enforced disappearances. Protection against disappearances must therefore be inferred from other established and non-derogable guarantees within the aforementioned instruments. In the case of an internal armed conflict, these guarantees are the prohibitions of violence to life and person, outrages upon personal dignity, and the passing of sentences and carrying out of executions without due process (common art. 3), as well as those provisions dealing with humane treatment contained in articles 4, 5 and 6 of Protocol II.

(b) Inter-State armed conflict

98. The Fourth Geneva Convention and Protocol I contain no explicit prohibition of the practice of forced disappearances. Therefore, protection against such practices during inter-State armed conflict must, for protected persons, be inferred from the requirements of humane treatment and protection against all acts of violence and threats thereof (arts. 27 and 32 of the Fourth Convention). Further protection against forced disappearances can be derived from article 75 of Protocol I, which sets forth fundamental guarantees for the protection of "persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol". Article 147 of the Fourth Geneva Convention typifies the "unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial" as a grave breach, subjecting the perpetrator to universal jurisdiction. Article 85 of Protocol I makes such acts grave breaches of the Protocol. Article 85 of Protocol I.

(d) Conclusions

99. In accordance with the 1992 Declaration on the Protection of All Persons from Enforced Disappearance, internally displaced persons are, to the same extent as other persons, protected against this practice. Although the Declaration is not binding under international law, it is based on and reflects, to a large extent, customary law as well as the case law of the Inter-American Court of Human Rights and the United Nations Human Rights Committee. The Declaration, however, only applies to acts of enforced disappearances perpetrated by or on behalf of State agents.

100. The Inter-American Convention on the Forced Disappearance of Persons does not apply to certain situations of inter-State armed conflict. Although the United Nations Declaration does not contain a similar provision, the methods of work of the Working Group on Enforced or Involuntary Disappearances rule out any action to be taken in a situation of inter-State armed conflict. Therefore, even typical situations of enforced disappearances cannot be addressed if they are directly related to such an armed conflict. In contrast, ICRC is mandated to deal with such cases within the context of the search for missing persons. *See* article 33 (3) of Protocol I.

101. Because of the lack of explicit rules and precedents in international law regarding disappearances in situations of armed conflict, a future international instrument should stress that internally displaced persons be protected against disappearances committed by any of the parties to an armed conflict.

3. Missing and dead persons

102. In the event that displaced persons die or are missing as a result of a disaster or any kind of violence other than enforced disappearances Regarding enforced disappearances, *see supra* paras. 89-101. or hostility, the authorities should search, and, when possible, account for missing persons; and, when possible, they should dispose of the remains of the dead in a dignified manner.

(a) Situations of tensions and disturbances, or disasters

103. There is no specific human rights norm requiring State agents to search for missing persons

*See* however, *supra* para. 96 concerning the obligation to search for persons who have disappeared. or to locate and appropriately dispose of the bodies of casualties attendant to a situation of internal tensions and disturbances, or a disaster. However, in virtually all countries, domestic laws for the protection of public health require the authorities to collect and dispose of the remains of persons killed under these circumstances.

(b) Non-international armed conflict

104. Neither common article 3 nor Protocol II contains provisions imposing a duty on the contending parties to search for missing persons. However, article 8 of Protocol II imposes a duty to search for and prevent the despoiling of the dead, as well as an obligation to decently dispose of them.

(c) Inter-State armed conflict

105. Article 16 of the Fourth Geneva Convention requires each party to the conflict, as far as military considerations permit, to facilitate the steps taken to search for the dead and to protect them against pillage and ill-treatment. This article covers not just protected persons, but the entire civilian populations of the warring countries.

106. The Fourth Convention contains no provision requiring a search for missing persons. In contrast, Section III of Part II of Protocol I, which includes articles 32-34, deals exclusively with the missing and the dead, and recognizes that families have a right to know the fate of their relatives (art. 32). According to the NEW RULES, *supra* note 118, at 171, this article merely presupposes a right of families, but does not specify whether it is a legal or moral right. But, this section apparently does not apply as between a party and its own nationals. NEW RULES, *supra* note 118, at 169. Article 33 of Protocol I requires that "[a]s soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party". Furthermore, the other provisions of article 33 on the gathering and recording of information concerning missing persons do not cover internally displaced persons who are a party's own nationals.

107. Similarly, article 34 of Protocol I, requiring the burial of casualties, excludes from its application those deceased who are nationals of the country in which they have died as a result of hostilities. However, the Occupying Power is responsible for the burial of all civilian casualties, including internally displaced persons who are nationals of the occupied State and are killed during hostilities after the establishment of the occupation.

(d) Conclusions

108. To bridge these gaps, a future international instrument should explicitly provide, in all circumstances, for the search and gathering of information concerning any missing internally displaced persons, and for the search and respectful burial of those who have been killed.

4. The use of land mines and like devices

109. Land-mines pose two significant dangers, particularly to civilians (including internally displaced persons) both during and after the conclusion of hostilities. First, a party to the conflict might place land mines in an area populated by displaced civilians. Second, land-mines constitute a continuing threat to non-combatants if they are not removed or do not self-destruct but instead remain active and in place after their military purpose has ceased. Such mines are "blind" weapons and their use is indiscriminate in terms of time and victim. Experience has shown that these indiscriminate weapons present a special danger to internally displaced persons, especially while they are on the run in unfamiliar terrain, relocating to camps, leaving camps for some reason, returning to places of residence, or moving to safe havens.

(a) Situations of tensions and disturbances, or disasters

110. The use of land-mines and like devices is very unlikely during situations of tensions and disturbances, or disasters, unless the former is a sequel to or associated with ongoing hostilities. However, if State agents deployed such weapons indiscriminately during situations falling short of armed conflict resulting in death of or injury to civilians, the use of such weapons would violate the provisions of applicable human rights instruments guaranteeing, among other rights, the rights to life, physical and mental health, and freedom from cruel, inhuman and degrading treatment.

(b) Non-international armed conflict

111. The principal source of international law rules governing the use of land-mines and comparable explosive devices is the Land-Mines Protocol which is annexed to the United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons: Final Act, *opened for signature* 10 April 1981, United Nations document A/CONF.95/15 (1980), *reprinted in* 19 I.L.M. 1523 (1980) (hereinafter Weapons Convention). The Convention and its three Protocols entered into force on 2 December 1983 and have been ratified by 54 States on 22 October 1995. The Convention is an "umbrella" treaty to which are attached three optional protocol agreements, each containing specific limitations on the use of particular conventional weapons. In addition to the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (hereinafter Land-Mines Protocol), the Convention incorporates the Protocol on Non-Detectable Fragments (Protocol I) and the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III). Under this structure, the provisions of the Convention apply to all three protocols. (Weapons Convention). Article 1 of the Weapons Convention declares the Convention and its Protocols to be applicable to international armed conflict and a limited class of wars of national liberation. However, the Convention's Preamble The third paragraph of the Weapons Convention's preamble declares that a basic purpose of the Convention and its Land-Mines Protocol is to give effect to two fundamental customary principles of the laws of war, namely, that the rights of the parties to an armed conflict to adopt methods or means of warfare are not unlimited and the use of weapons, projectiles, or material calculated to cause superfluous injury or unnecessary suffering is prohibited. Another customary principle of the laws of war - the protection of the civilian population against the effects of hostilities - is recited in the Convention's second

preambular paragraph. As previously indicated, these principles of customary international law are expressly recognized in resolution 2444. *See* resolution 2444, *supra* note 113. and the de Martens clause The de Martens Clause in this Convention reads as follows:

"that in cases not covered by this Convention and its annexed Protocols or by other international agreements, the civilian population and the combatants shall at all times remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience."

This clause is named after Fyodor de Martens, the Russian jurist and diplomat who drafted the preambles to the Hague Conventions No. II of 1899 and No. IV of 1907 which codified much of the law of war. The de Martens' formulation was intended to obviate the notion that any means or methods of warfare not expressly prohibited by treaty was permissible. The clause thus affirms that customary laws of war remain in full force, except to the extent modified by treaty. Formulations similar to the original de Martens Clause appear in the four 1949 Geneva Conventions and in Protocols I and II. reaffirm the relevance of customary law principles applicable during all armed conflicts. Moreover, the Land-Mines Protocol also embodies, reaffirms, or implements these same customary law principles applicable to all armed conflicts. The War Victims Report states in this respect that "the International Conference for the Protection of War Victims should ... express its desire for future examination of the possibility of formally extending to non-international armed conflicts the applicability of international humanitarian law treaties, such as the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, which at present apply only to international conflicts". **Report on the Protection of War Victims**, prepared by the International Committee of the Red Cross, *reprinted in* 296 **International Review of the Red Cross** 391, 415 (1993). Unlike other international agreements that limit the use of specific conventional weapons for the protection of both combatants and civilians, the Land-Mines Protocol essentially seeks to protect civilians from the dangers of land-mine warfare. A review process under the auspices of the United Nations is currently under way to ban the use of land-mines.

(c) Inter-State armed conflict

112. States parties to the Land-Mines Protocol are fully bound by its provisions in the conduct of inter-State hostilities. Moreover, during warfare, non-signing States should respect those provisions in the Land-Mines Protocol which incorporate, clarify or reinforce customary rules reflected in other applicable humanitarian law instruments.

(d) Conclusions

113. A future international instrument applicable to the internally displaced should take into account the particular vulnerability of internally displaced persons regarding land-mines and should guarantee the internally displaced absolute protection against land-mines and like devices.

5. Other acts of violence and ill-treatment, including torture Rape can occur as a form of torture and cruel, inhuman or degrading treatment or punishment, and as a form of gender-specific violence. This report elaborates on this issue in para. 127.

114. Particularly during flight and while relocated in camps, internally displaced persons also run the risk of being subjected to other forms of violence or ill-treatment. Women and girls in particular may be compelled to suffer violence or ill-treatment.

(a) Situations of tensions and disturbances, or disasters

115. The prohibition of torture and cruel, inhuman or degrading treatment or punishment is absolute in all situations, ranging from situations of tensions and disturbances, or disasters to non-international and inter-State armed conflict. No restrictions or derogations are allowed under any circumstances. *See* article 4(2) of the CCPR, article 27(2) of the American Convention, and article 15(2) of the European Convention. In the *Siracusa Principles*, *supra* note 29, the freedom from torture and cruel, inhuman or degrading treatment or punishment and the freedom from medical and scientific experimentation without free consent are declared non-derogable (para. 58), and their denial is prohibited by customary international law in all circumstances (para. 69). Accord, *Paris Minimum Standards*, *supra* note 29. According to article 5 of the Universal Declaration, "(N)o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

This prohibition, which is now generally accepted as customary international law, is replicated, in substantially similar terms, in article 7 of the ICCPR, Article 7 of the CCPR adds to this right that "[i]n particular, no one shall be subjected without his free consent to medical or scientific experimentation". article 37 (a) of the Convention on the Rights of the Child, article 5 (2) of the American Convention, article 3 of the European Convention, Article 3 of the European Convention only mentions inhuman or degrading treatment or punishment, thus omitting "cruel". In an effort to focus on preventing rather than merely redressing acts of torture, the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Strasbourg, 26 November 1987, *entered into force* 1 February 1989, ratified by 29 States on 1 January 1995) established a European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which shall "by means of visits, examine the treatment of persons deprived of their liberty with a view to strengthening, if necessary, the protection of such persons from torture and from inhuman or degrading treatment or punishment". (art. 1). and article 5 of the African Charter. The protection against torture is elaborated in the Torture Convention, which makes the commission of an act of torture, defined under that treaty, effectively a universal crime subject to the jurisdiction of States parties. E.g., articles 5, 7 and 8 of the CAT. The Inter-American Convention to Prevent and Punish Torture similarly prohibits torture. Inter-American Convention to Prevent and Punish Torture, signed at Cartagena de Indias, Colombia, on 9 December 1985, at the fifteenth regular session of the General Assembly, *entered into force* 28 February 1987 and ratified by 13 States on 1 January 1995.

116. Regarding the prohibitions against torture and cruel, inhuman or degrading treatment or

punishment found in article 7 of the ICCPR, the Human Rights Committee has emphasized that the article's "aim ... is to protect both the dignity and the physical and mental integrity of the individual," and that the article "allows of no limitation." HRC General Comments, *supra* note 80, No. 20, paras. 2, 3. The Committee reaffirmed that, "even in situations of public emergency such as those referred to in article 4 of the Covenant, no derogation from the provision of article 7 is allowed and its provisions must remain in force". *Id.*, para. 3.

117. The notion of torture is defined in article 1 (1) of the Torture Convention Article 1(1) of the CAT describes torture, for the purposes of that Convention, as

"any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

For the purposes of Inter-American Convention to Prevent and Punish Torture, its article 2 defines torture as:

"any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article." as intentional acts of officials which inflict severe physical or mental pain or suffering for specific purposes (e.g. obtaining information or intimidating or punishing someone). This provision contains a definition of torture that, although not binding for article 7 of the ICCPR Nowak, Commentary, *supra* note 67, 129-130. and other instruments, can be drawn upon as an interpretational aid. Inhuman, cruel or degrading treatment and punishment is constituted by acts or omissions which cause suffering not reaching the level of severity necessary for torture See, e.g., Ireland v. United Kingdom, Judgement of the European Court on Human Rights, Series A, No. 25, para. 162. or lack the element of intentionality or of a certain purpose. Nowak, Commentary, *supra* note 67. The Human Rights Committee also stressed the duty of the State "to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity". HRC General Comments, *supra* note 80, No. 20, para. 2. Similarly, General Comments, *supra* note 80, No. 7, para. 2: "[I]t is also the duty of public authorities to ensure protection by the law against such treatment even when

committed by persons acting outside or without any official authority." Therefore, internally displaced persons might be entitled, under article 7 of the ICCPR, to request positive measures by authorities against unlawful acts by non-State actors.

118. Article 10 (1) of the ICCPR recognizes the right of those deprived of their liberty to "be treated with humanity and respect for the inherent dignity of the human person". The right to be treated with humanity and respect for one's inherent dignity during detention is closely related, and in some cases, implicated in the right to be free from torture and cruel, inhuman or degrading treatment or punishment, discussed earlier. The borderlines distinguishing violations of article 10(1) and violations of article 7 of the CCPR have yet to be clearly demarcated. *See, e.g.*, DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* (1994), sects. 9.11 - 9.25, at 367-80. The Human Rights Committee has emphasized that this guarantee "applies to anyone deprived of liberty under the laws and authority of the State who is held in prisons, hospitals ... *detention camps* or correctional institutions or elsewhere. States parties should ensure that the principle stipulated therein is observed in all institutions and establishments within their jurisdiction where persons are being held". HRC General Comments, *supra* note 80, No. 21, para. 2 (emphasis added). The Committee has declared that article 10 (1) "imposes on States parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty, and complements for them the ban on torture or other cruel, inhuman or degrading treatment or punishment contained in article 7 of the [ICCPR]". *Id.*, para. 3. In elaborating on the concept, the Committee has stated that "[t]reating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as ... property, birth or other status". *Id.*, para. 4. As discussed above, the reference to "other status", which reflects the term found in article 2 (1) of the ICCPR prohibiting distinctions of any kind, reasonably encompasses the internally displaced. These principles are of paramount importance for internally displaced persons who are detained in camps. For the detention of internally displaced persons in camps, *see infra*, paras. 150-53.

119. Under article 37 (c) of the Convention on the Rights of the Child, "[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age". In addition, under article 24 of the ICCPR, the Human Rights Committee has emphasized that "every possible ... measure should be taken to ... prevent [children] from being subjected to acts of violence and cruel and inhuman treatment." HRC General Comments, *supra* note 80, No. 17, paragraph 3.

120. On the regional level, recognition of the right of all persons deprived of their liberty to be treated with respect for the inherent dignity of the human person is found in article 5 (2) of the American Convention. Similarly, the right to have one's physical, mental and moral integrity respected is proclaimed in article 5 (1) of the American Convention, and the right to humane treatment in custody is enshrined in article XXV of the American Declaration. A more general respect for "the integrity of [the] person", not necessarily tied to deprivation of liberty, is recognized

in article 4 of the African Charter which further provides that no one may be arbitrarily deprived of that right.

(b) Non-international armed conflict

121. The human rights prohibitions of torture and cruel or inhuman treatment or punishment are non-derogable and therefore fully applicable in situations of internal armed conflict. In addition, acts of violence generally, and particularly torture, are proscribed in article 3 common to the Geneva Conventions, which prohibits "[v]iolence to life and person, in particular ... mutilation, cruel treatment and torture" as well as "[o]utrages upon personal dignity, in particular humiliating and degrading treatment" (paras. 1 (a) and (c)). In similar terms, article 4 of Protocol II prohibits "violence to the life, health and physical or mental well-being of persons, in particular ... cruel treatment such as torture, mutilation or any form of corporal punishment" (para. 2 (a)), and "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault" (para. 2 (e)). The Declaration on the Protection of Women and Children, *supra* note 28, provides in paragraph 4 that "[a]ll the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of women and children". These guarantees protect internally displaced persons whether or not they have been active participants in hostilities.

(c) Inter-State armed conflict

122. During inter-State armed conflict and in addition to human rights law, articles 27 and 32 of the Fourth Convention prohibit acts of violence against and torture of protected persons. Article 75 of Protocol I extends this prohibition to all persons who do not benefit from more favourable treatment under applicable instruments. Accordingly, internally displaced persons, irrespective of their status and the nature of the hostilities, should enjoy absolute protection against such illicit acts. Article 147 of the Fourth Geneva Convention makes the wilful torture or inhuman treatment, including biological experiments, of a protected person a grave breach and subjects the perpetrators to trial and punishment under universal jurisdiction. In addition, article 85 (2) of Protocol I provides that grave breaches of the Convention are, in certain cases, grave breaches of the Protocol. This is the case if they are "committed against persons in the power of an adverse Party protected by articles 44, 45 and 73 of this Protocol, or against the wounded, sick and shipwrecked of the adverse Party who are protected by this Protocol, or against those medical or religious personnel, medical units or medical transports which are under the control of the adverse Party and are protected by this Protocol".

(d) Conclusions

123. Internally displaced persons are fully protected against torture, cruel and inhuman treatment, and when detained, they are entitled to enjoy the same guarantees as other persons deprived of their liberty.

6. Gender-specific violence

124. Prevalent forms of gender-specific violence This report uses the term "gender-specific violence" to refer to violence against individuals of either sex; the term "gender-based violence" applies to women and girls in particular. among internally displaced persons, and in particular women, include rape and other sexual attacks and general physical attacks. Increased spousal battering and marital rape manifest the stress of displacement on the family unit. Incidences of sexual abuse of children, especially girls, reportedly occur at higher rates among those children separated from their families.

125. For purposes of this report, gender-specific violence includes any act of violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering on account of one's gender, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. The working definition of "gender-specific violence" used in this report mirrors the definition of the term "violence against women" found in the United Nations Declaration on the Elimination of Violence Against Women, General Assembly resolution 104, *adopted without a vote* 20 December 1993, United Nations GAOR, forty-eighth session, Supplement No. 49, at 217, United Nations document A/48/49 (Vol. I) (1994) (hereinafter United Nations Declaration on Violence Against Women). The term will cover violence perpetrated by the State, by others in the community, and by family members. Prevalent forms of violence against displaced women include rape and other sexual attacks, general physical attacks, domestic violence, coerced sexual acts in exchange for assistance, exploitation of prostitution and sexual harassment.

126. Although the analysis in this section applies equally to displaced men who suffer rape and other sexual attacks, gender-specific violence affects displaced women disproportionately. Violence against displaced women mirrors the pattern of gender-specific violence in general. The United Nations Declaration on Violence Against Women recognizes that "violence against women is a manifestation of historically unequal power relations between men and women which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men". *Id.*, preambular para. 6. This section identifies a set of norms applicable to certain forms of gender-specific violence most relevant to displaced persons in the contexts of tensions and disturbances, non-international armed conflict, and inter-State armed conflict. It is possible, however, to draw implications for still other types of gender-specific violence from many of the same rights.

(a) Situations of tensions and disturbances, or disasters

127. Violence against women specifically implicates the obligations of States to respect and ensure human rights and fundamental freedoms to all. As articulated by CEDAW, violence against women breaches rights guaranteed under general international law or under human rights treaties. CEDAW General Recommendations, *supra* note 106, No. 19, para. 7. In particular, the CEDAW-Committee referenced the right to equal protection according to humanitarian norms in time of international or internal armed conflict. *Id.*, para. 7(c). Gender-specific violence is rooted in gender discrimination,

which violates well-established principles of international law. *See supra*, paras. 48-55. CEDAW has interpreted the prohibition on gender discrimination, which underlies many of the obligations under the treaty, to forbid various forms of violence against women. CEDAW General Recommendations, *supra* note 106, No. 19, para. 1. The CEDAW-Committee maintains that gender-based violence is inconsistent with the basic duty under the Convention to eliminate gender discrimination (arts. 2 and 3) and with specific obligations under articles 5, 10, 11, 12, 14, and 16. *Id.*, paras. 7-23. These forms include violence directed against women on the basis of their gender and violence that affects women disproportionately. CEDAW General Recommendations, *supra* note 106, No. 19, para. 6. The former as well as the present United Nations Special Rapporteur on torture and other United Nations special rapporteurs have categorized rape by State agents as torture. *See, e.g.*, the 1986 Report of the Special Rapporteur on Torture, E/CN.4/1986/15, para. 119 and his 1995 Report, E/CN.4/1995/34, paras. 16-19; Reports of the Special Rapporteur on the Situation on Human Rights in Myanmar, United Nations document E/CN.4/1993/37 at paragraphs 136, 138 (noting "a systematic practice of torture (including rape)") and United Nations document E/CN.4/1995/65, para. 114 ("Other reported methods of torture include sexual assault and rape ..."); Report of the Special Rapporteur on the Situation of Human Rights in Occupied Kuwait, *supra* note 72 at paras. 111 (describing rape of female detainees as sexual torture) and 184 (characterizing "[r]apes committed by members of the Iraqi occupying forces during the exercise of their official functions, especially in the context of house searches or interrogations in detention" as torture and cruel, inhuman or degrading treatment); Report of the Secretary-General, Rape and abuse of women in the territory of the Former Yugoslavia, United Nations document E/CN.4/1994/5; *see, also*, several reports by the Special Rapporteur on Former Yugoslavia, especially Report on the situation of human rights in the territory of the former Yugoslavia submitted by Mr. Tadeusz Mazowiecki, Special Rapporteur of the Commission on Human Rights, pursuant to Commission resolution 1992/S-1/1 of 14 August 1992, United Nations document E/CN.4/1993/50, paras. 82-89 and Annex II, Report of the team of experts on their mission to investigate allegations of rape in the territory of the Former Yugoslavia from 12 to 23 January 1991. In interpreting the ICCPR, the Human Rights Committee has stressed that the prohibition against torture and cruel, inhuman or degrading treatment and punishment in article 7 "relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim". HRC General Comments, *supra* note 80, No. 20, para. 5. However, the Human Rights Committee did not mention rape as a form of torture in its General Comment on article 7, CCPR. A fair interpretation of the reference to both physical and mental pain could accommodate a wide range of gender-specific violence and threats thereof.

128. Under the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, "States Parties recognize that violence against women prevents and nullifies the exercise of [civil, political, economic, social and cultural] rights". Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women "Convention of Belem Do Para" (Resolution adopted at the seventh plenary session, held on 9 June 1994), AG/RES. 1257 (XXIV-O/94) (hereinafter Inter-American Convention on Violence Against Women), article 5. Failure to protect women against violence impairs or nullifies the enjoyment of the rights to liberty, security, and integrity of person, as well as, in some instances, the right to life. International and regional standards specify that violence against women impairs or nullifies the

rights to life, liberty, security and integrity of person. *E.g.*, United Nations Declaration on Violence Against Women, *supra* note 169, article 3 (a), (c) (life, liberty and security); CEDAW General Recommendation, *supra* note 106, No. 19, para. 7 (a), (d) (life, liberty and security); Inter-American Convention on Violence Against Women, *supra* note 177, article 4 (a), (b), (c), (e) (life, physical, mental and moral integrity, personal liberty and security, inherent dignity of person). Gender-specific violence of such nature also violates the rights to be free from torture or cruel, inhuman or degrading treatment. International and regional standards specify that violence against women impairs or nullifies the right to be free from torture and cruel, inhuman or degrading treatment and punishment. *E.g.*, United Nations Declaration on Violence Against Women, *supra* note 169, article 3(h); CEDAW General Recommendations, *supra* note 106, No. 19, para. 7 (b); Inter-American Convention on Violence Against Women, *supra* note 177, article 4 (d) (torture only). In addition, such forms of gender-specific violence implicate the right to the highest attainable standard of physical and mental health recognized in article 25 of the Universal Declaration, and article 12 of the ICESCR. Article XI of the American Declaration and article 11 of the European Social Charter similarly affirm a right to preservation of health. International standards specify that violence against women impairs or nullifies the right to the highest standard attainable of physical and mental health. *E.g.*, United Nations Declaration on Violence Against Women, *supra* note 169, article 3 (f); CEDAW General Recommendations, *supra* note 106, No. 19, para. 7 (g).

129. The United Nations Declaration on the Elimination of Violence Against Women affirms that violence against women both violates and impairs or nullifies the enjoyment by women of human rights and fundamental freedoms United Nations Declaration on Violence Against Women, *supra* note 169, preambular para. 5. and that States have responsibilities to eliminate violence against women which include preventing and redressing such violence: The Declaration calls on States to "adopt measures directed towards the elimination of violence against women who are especially vulnerable to violence," a category that encompasses displaced women. Article 4 (l) of the United Nations Declaration on Violence Against Women, *supra* note 169. The Declaration notes the special vulnerability of refugee women, migrant women, women living in rural or remote communities, destitute women, women in detention, and women in situations of armed conflict. *Id.*, preambular para. 7. The Inter-American Convention on Violence Against Women similarly provides that "[w]ith respect to the adoption of the measures in this Chapter, the States parties shall take special account of the vulnerability of women to violence by reason of ... their status as ... displaced persons". Inter-American Convention on Violence Against Women, *supra* note 177, article 9, first sentence. This article further states that "[s]imilar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socio-economically disadvantaged, affected by armed conflict or deprived of their freedom". Gender-based violence against women and children has also been the focus of various international and regional governmental meetings. *E.g.*, Vienna Declaration, *supra* note 4, Part II, para. 38; Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Moscow, 3 October 1991, para. 40 (including concerns about exploitation of prostitution and trafficking in women).

130. Many acts of gender-specific violence, including domestic violence, are carried out by private

individuals. Although a State is not directly liable for non-State actors' wrongs, States parties to the ICCPR, the American Convention and the European Convention have assumed an affirmative duty to ensure the treaty rights to all, without gender distinction. *See* article 2 (1) of the CCPR, article 1 (1) of the American Convention, and article 1 of the European Convention. Those treaty rights include, of course, the rights to life, liberty, security and integrity of person, and the right to freedom from torture and ill-treatment. Accordingly, acts by private actors that violate rights to personal integrity give rise to State responsibility under those treaties where the State has failed to establish adequate legal mechanisms to prevent, punish and redress such acts. In commenting on violence against women, the CEDAW-Committee has emphasized that "[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation". CEDAW General Recommendations, *supra* note 106, No. 19, para. 9. In addition, States parties to the Women's Convention assume obligations to work towards eliminating discrimination against women "by any person, organization or enterprise" Article 2 (e), CEDAW. and eliminating "prejudices and ... all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women". Article 5 (a), CEDAW.

131. Furthermore, systematic non-enforcement of gender-specific crimes, such as murder and assault in the context of domestic violence, violates the norm of equal protection of the law. *See, e.g.*, article 7 of the Universal Declaration, article 26 of the CCPR, article 24 of the American Convention, article II of the American Declaration and article 3 of the African Charter. In addition, international and regional standards specify that violence against women impairs or nullifies the right to equal protection under the law. *E.g.*, United Nations Declaration on Violence Against Women, *supra* note 169, article 3 (d); CEDAW General Recommendation, *supra* note 106, No. 19, para. 7 (e); Inter-American Convention on Violence Against Women, *supra* note 177, article 4 (f). Domestic violence, including marital rape, also impairs the ability to participate in the family fully and equally as guaranteed in article 16 (1) of the Universal Declaration, and article 23 (4) of the ICCPR, article 17 (4) of the American Convention and article 5 of the Seventh Protocol to the European Convention. States parties undertake similar obligations under article 16 (c)-(h) of the Women's Convention.

132. Displaced persons, and in particular women, have been frequently coerced into providing sexual acts in return for essential food, shelter, security, documentation or other forms of assistance. Exploitation of prostitution is also common, especially in situations where resort to prostitution presents one of the only forms of economic support. In certain situations, prostitution serves as one of the few forms of economic support for women heads of households separated from male family members either during flight or as a result of violence before displacement. At the root of this phenomenon there is often a discriminatory allocation to men of essential food, water and non-food items. Along with the resulting physical and psychological trauma, many victims have become infected with sexually transmitted diseases, including HIV/AIDS. *See, e.g.*, Preliminary Report submitted by the Special Rapporteur on Violence Against Women, its causes and consequences, United Nations document E/CN.4/1995/42 (1994) (hereinafter Preliminary Report on Violence

Against Women), paras. 210-219. These forms of gender-specific violence breach many of the human rights and humanitarian law standards discussed previously in the paragraphs on sexual attacks as well as the right to equality. CEDAW General Recommendation, *supra* note 106, No. 19, para. 24 (g) and (h). The refugee law standards discussed *supra* are also relevant by analogy. Under the Women's Convention, States parties are obligated to take measures to protect women engaged in prostitution or subject to sexual exploitation and report on their effectiveness. *Accord* Report of the Second International Workshop on National Institutions for the Promotion and Protection of Human Rights, meeting at Tunis, 13-17 December 1993, United Nations document E/CN.4/1994/45, 23 December 1993 (measures to eliminate sexual exploitation of children).

133. Applicable United Nations treaty provisions, including the Women's Convention, create the normative framework for the policies and operations of UNHCR in its efforts to combat gender-specific violence and assist refugee victims. *E.g.*, 1993 Progress Report, *supra* note 111. The note on Certain Aspects of Sexual Violence against Refugee Women sets forth provisions of human rights and humanitarian law implicated in gender-specific violence. Note on Certain Aspects of Sexual Violence against Refugee Women, United Nations document EC/1993/SCP/CRP.2 (1993) (hereinafter Note on Sexual Violence) paras. 26-30. UNHCR has defined sexual violence as "any act - or threat to commit an act - of violence which involves the sexual abuse or exploitation of its victim against her will". Forms of gender-specific violence specified include rape, sexual extortion and forced prostitution, and the application of protective measures to men and boys is explicitly provided. *Id.*, para. 6. Both the High Commissioner's Office and the Executive Committee have urged States to implement relevant national laws in compliance with international legal standards, including non-discriminatory prosecution of gender-specific crimes and application of the United Nations Code of Conduct for Law Enforcement Officials and the Standard Minimum Rules for the Treatment of Prisoners. *E.g.*, **United Nations High Commission for Refugees, Executive Committee Conclusion No. 73 (XLIV); Refugee Protection and Sexual Violence** (1993) (hereinafter **EXCOM Conc. No. 73**); **EXCOM Conc. No. 64**, *supra* note 110, para. vii; Note on Sexual Violence, *supra* note 194, paras. 33, 34, and 38 (e); Sexual Violence against Refugees: Guidelines on Prevention and Response, at 49-57 (UNHCR, 1995) (hereinafter Sexual Violence Guidelines). Acts of gender-specific violence directed against refugee girls and unaccompanied minors has been held to violate articles 19, 24, 34, 37, and 39 of the Convention on the Rights of the Child. Policy on Refugee Children, *supra* note 111, para. 12; Sexual Violence Guidelines, *supra* note 195, at 54.

(b) Non-international armed conflict

134. To the extent that gender-specific violence amounts to torture, cruel, inhuman and degrading treatment, the right to be free from gender-specific violence is itself non-derogable. Accordingly, freedom from forms of gender-specific violence that breach non-derogable rights must be guaranteed to displaced persons in all situations, including armed conflict. *See* the list of non-derogable rights *supra* para. 34.

135. In the context of non-international armed conflict, common article 3 prohibits "any adverse distinction founded on ... sex" in its guarantee of humane treatment in all circumstances of non-international armed conflict. Protocol II, article 2 (1) bears the same prohibition in the application of that Protocol. Such provisions arguably encompass all gender-specific violence because the core of

such conduct is sexual distinction.

136. Although common article 3 does not explicitly reference any particular acts of gender-specific violence, it is arguable that its general prohibitions in article 3 (1) (a) and 3 (1) (c) against "outrages upon personal dignity, in particular humiliating and degrading treatment" and "violence to life and person, in particular ... mutilation, cruel treatment and torture" encompass certain forms of gender-specific violence. In contrast, "rape, enforced prostitution and any form of indecent assault" are explicitly prohibited in article 4 (2) (e) of Protocol II. Since Protocol II elaborates on and clarifies common article 3, its explicit proscription of rape and other kinds of sexual and physical violence should be respected by the parties to all internal armed conflicts.

137. Neither common article 3 nor Protocol II contains enforcement provisions requiring the parties to the conflict to prosecute offenders. However, the Statute of the International Tribunal for Rwanda has recognized that infractions of the non-derogable rules in common article 3 and Protocol II should be regarded as offences against international law entailing the individual criminal responsibility of the perpetrator. *See* article 4 of the Statute of the International Tribunal for Rwanda, *supra* note 75. There is international precedent for prosecuting violators of humanitarian law rules that were not expressly made punishable in relevant instruments. The International Military Tribunal, in rejecting the claims of accused war criminals that they could incur no criminal liability for acts not typified as crimes under international law, stated: "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced". 1 **Trial of The Major War Criminals before The International Military Tribunal** (Nuremberg, 1947) 223. Article 3 of the Statute explicitly states:

"The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

"(g) Rape;"

138. Similarly, the Statute of the International Tribunal for the Former Yugoslavia, states in article 5 on "Crimes against humanity" that

"The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international *or internal in character*, and directed against any civilian population:

"(g) rape;". Emphasis added.

(c) Inter-State armed conflict

139. Article 27 of the Fourth Geneva Convention guarantees equal treatment to all protected persons "[w]ithout prejudice to the provisions relating to their ... sex". Article 27, para. 3 of the

Fourth Geneva Convention. Article 75 (1) of Protocol I accords to non-protected persons the enjoyment of fundamental guarantees without "any adverse distinction based upon ... sex" in its guarantee of humane treatment in all circumstances of international armed conflict subject to Protocol I. Such provisions arguably encompass all forms of gender-specific violence.

140. Rape, forced prostitution and other forms of gender-specific assault and ill-treatment are explicitly prohibited in article 27 of the Fourth Geneva Convention, which extends to protected persons only. Article 76 (1) of Protocol I, which applies to all women in the power of a Party to the conflict, including a Party's own nationals, *See New Rules, supra* note 118, at 469-70, *citing* article 72 of Protocol I (referring to "other applicable rules of international law relating to the protection of fundamental human rights during international armed conflict") and *comparing* article 27, para. 2 of the Fourth Geneva Convention. guarantees that "[w]omen shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault". Under article 77 (1) of this Protocol, children as well are to be "the object of special respect and ... protected against any form of indecent assault". Article 75 of Protocol I, on which articles 4 to 6 of Protocol II were modelled, protects those persons within its scope from "[o]utrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault". (para. 2 (b)).

141. None of the above-mentioned prohibitions list rape or other gender-specific violence among the grave breaches subject to universal jurisdiction. None the less, violations of article 27 of the Fourth Geneva Convention and, where based on racial discrimination, article 85 of Protocol I, constitute part of customary international law, thus establishing a basis for universal jurisdiction. Final Report of the Commission of Experts established pursuant to Security Council resolution 780 (1992), Annex to Letter dated 24 May 1994 from the Secretary-General to the President of the Security Council, United Nations document No. S/1994/674 (27 May 1994) (hereinafter *Final Report of the Commission of Experts*), para. 105. In addition, rape has been recognized as a war crime for which military or civilian persons may be accountable or as a grave breach subject to universal jurisdiction. In the case of a grave breach, the perpetrator must be a person linked to one of the parties to the conflict and the victim must be linked to another party to the conflict or must be a citizen of a neutral State. *Final Report of the Commission of Experts, supra* note 203, paras. 105-106. Therefore, the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda declare rape as punishable. *See supra* paras. 137-8. The International Military Tribunal in Tokyo has already prosecuted rape as a war crime. ICRC has declared the rape of protected civilians to be encompassed in the grave breach of "wilfully causing great suffering or serious injury to body or health" under article 147 of the Fourth Geneva Convention. ICRC, Aide-Memoire of 3 December 1992, quoted by *Meron, Rape as a Crime under International Humanitarian Law*, 87 *AMERICAN JOURNAL OF INTERNATIONAL LAW* 1993, at 426. Similar rationales support an interpretation that rape and similar gender-specific violence - at least in certain circumstances - are encompassed in the grave breach of "torture or inhuman treatment" under article 147. *See COMMENTARY ON THE FOURTH GENEVA CONVENTION, supra* note 74, at 598, recognizing that the grave breach of "inhuman treatment" should be interpreted in the context of article 27 of the same Fourth Geneva Convention, which also prohibits rape.

#### (d) Conclusions

142. Although it can be concluded that present international law, in principle, affords adequate protection from gender-specific violence against internally displaced persons, many of these guarantees, especially their bearing on internally displaced persons, need to be highlighted and further detailed in a future international instrument.

#### C. Personal liberty

143. The personal liberty of internally displaced persons is often at risk, both during flight and upon relocation in camps. Frequently, displaced persons are confined in judicial or administrative detention in prison or in a camp for displaced persons. In some cases, displaced persons are subject to hostage-taking, forcible recruitment, and abduction into slavery-like practices. This section examines the legal standards that are most pertinent to internally displaced persons in situations of tensions and disturbances, non-international armed conflict, and inter-State armed conflict.

##### 1. Detention and habeas corpus

144. Internally displaced persons face arrest and detention, often without judicial warrant or other legal safeguards, and sometimes as a means of collective punishment. Relocation frequently involves internment in a compound or camp with no freedom to leave. In some circumstances, alleged misconduct inside a camp can result in administrative segregation in a separate cell or building within or outside the camp, often without the accused being informed of the charges or duration of the disciplinary period, and without being given an opportunity to challenge the legality of the detention. Moreover, in some cases, internally displaced persons are considered to be part of the political opposition or counter-insurgency simply because they are on the run, have left their homes, or have been detained by warring forces in a situation of armed conflict.

##### (a) Situations of tensions and disturbances, or disasters

145. The right of everyone to be free from arbitrary arrest or detention is recognized under article 9 of the Universal Declaration and article 9 (1) of the ICCPR. The latter article provides that

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law." *Accord Paris Minimum Standards*, *supra* note 29, sect. C, article 5, stating that "[n]o one shall be deprived of his right to liberty ... except on such grounds and in accordance with such procedures as are established by law".

146. Article 37 (b) of the Convention on the Rights of the Child further provides that "[n]o child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time".

147. On a regional level, the right to liberty and security of person is guaranteed in article 7 (1) of

the American Convention, article I of the American Declaration, article 5 (1) of the European Convention, and article 6 of the African Charter.

148. The right to one's liberty may be restricted on limited grounds Article 9 (1) of the CCPR, article 37 (b) of the CRC, article 7 (2) of the American Convention, article 5 (1) of the European Convention, and article 6 of the African Charter. and is derogable under the previously cited instruments that contain derogation clauses. None the less, the term "arbitrary arrest or detention" has consistently been interpreted broadly to prohibit both arrest or detention that is not in accordance with domestic law, and arrest or detention that is incompatible with international standards respecting liberty and security of the person, even if it is in accordance with domestic law. *See, e.g.*, Report of the Working Group on Arbitrary Detention, United Nations document E/CN.4/1992/20 (21 January 1992) (hereinafter *Report of the Working Group*), para. 10. A broad interpretation of the term "arbitrary" is supported by the 1964 Commission on Human Rights Study of the right of everyone to be free from arbitrary arrest, detention and exile, United Nations document E/CN.4/826/Rev.1, at 7, para. 27 (1964). Those international standards include, *inter alia*, safeguards listed within article 9 (2) through 9 (5) of the ICCPR such as the right to be informed, at the time of the arrest, of the reasons for the arrest and to be promptly informed of the charges; the right to be brought promptly before a judge; the right to trial Provisions for a fair trial are considered part of the international standards which, if not met, will result in a finding of arbitrary detention. *E.g.*, *Report of the Working Group*, *supra* note 210, annex I, para. 6 (category III of cases considered by the Working Group). within a reasonable time or to release; the right to take proceedings before a court to have the lawfulness of the detention reviewed; and the right to compensation in the case of an unlawful arrest or detention. Rights to a fair trial and to due process in the course of criminal proceedings are also guaranteed to internally displaced persons. These guarantees are, however, not discussed in this report as this right is of little relevance for persons because they are internally displaced. Similar safeguards exist at the regional level in, *inter alia*, article 7 (4) to 7 (7) of the American Convention, article XXV of the American Declaration, article 5 of the European Convention, and article 7 of the African Charter.

149. The right to an effective remedy enables one to challenge the legality of one's detention and, as such, is considered essential. That right is guaranteed in article 8 of the Universal Declaration and article 9 (3) and 9 (4) of the ICCPR. On the regional level, the right to a remedy is recognized in article 7 of the American Convention, article 5 (4) of the European Convention, and articles 6 and 7 of the African Charter.

150. The question of whether detention in closed camps The question of whether internally displaced persons can be obligated to live in an open camp is one relating to the freedom of movement. is permissible is especially relevant for internally displaced persons. Although there are no precedents on this issue, the act of holding someone in a closed camp constitutes detention under article 9 (1) of the ICCPR. The Human Rights Committee has stressed "that paragraph 1 is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.". HCR General Comments, *supra* note 80, No. 8, para. 1. In the case of Ngalula Mpandanjila and

other former members of Parliament in Zaire, the Committee was also of the view that house arrest and certain forms of internal banishment constitute deprivation of liberty (Communication No. 138/1983, para. 10, (Annual Report of the Human Rights Committee 1986, 121). Under article 5 of the European Convention, the European Court on Human Rights considered banishment to a small island (2.5 km<sup>2</sup>) to be detention as the social contacts of the banished person were restricted to contacts with other inmates and the guards (Guzzardi Case II, Judgement of 6 November 1980, Series A, No. 39, para. 95). In contrast, banishment to a remote village in the mountains with the obligation to report to the police post in the next town were not considered to amount to detention: (Guzzardi case I, unpublished report of the European Commission on Human Rights of 5 October 1970, Application 7960/77).

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