When Housing Rights Violations Constitute International Crime: Applicable Human Rights and Humanitarian Law

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Human rights law and international humanitarian law (IHL) are complementary, sharing a mutually reinforcing relationship during armed conflict. A proper legal analysis requires reference to both bodies of law.[1] Certain human rights may be defined more specifically in their quotidian context. The *lex specialis* of IHL provides specific rules and prohibitions that may be relevant for the purposes of interpreting the human rights and corresponding domestic and extraterritorial State obligations in cases of armed conflict.[2] For organizational purposes, the present discussion of housing and land rights standards in both regimes will proceed from the more-general human rights norms to their more-specific application in the context in which IHL also applies.

With the adoption of the Universal Declaration of Human Rights (UDHR) in 1948, the right to adequate housing is recognized internationally as an indispensable component of right to an adequate standard of living.[3] Ever since, the right to adequate housing has achieved worldwide recognition and needed legal precision derived from implementation of international legal instruments as a basic right of all human beings. This legality, like all human rights, is grounded in the moral argument and popular struggles asserting the intrinsic value and dignity of the human person that is affirmed and realized in a state of well-being, a common objective and an objective indicator of civilization.

Human rights treaties and customary norms oblige States, including those party to the relevant covenants and conventions, to conduct themselves so as to respect, protect and fulfill the human right to adequate housing (HRAH) in ways that ensure the progressive attainment and sustainability of human well-being.

All States in the UN Organization have ratified international treaties committing them to respect, protect and fulfill the human right to adequate housing. In addition to ratification of those instruments, most States also have assumed specific legal obligations at the domestic level in the form of constitutional provisions, legislation, national policies and/or

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1 *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), I.C.J. Reports 2005*, paras. 216-20, 345(3); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, I.C.J. Reports 2004*, para. 106; and *Legality of the Threat or Use of Nuclear Weapons, I.C.J. Reports 1996,* para. 25. Although the Court concluded in the Nuclear Weapons Advisory Opinion that "[t]he test of what constitutes an arbitrary deprivation of life ,,, falls to determined by the applicable *lex specialis,* namely, the law applicable in armed conflict", more recently, in *Congo v. Uganda*, it found independent violations of human rights law during armed conflict without applying the *lex specialis* principle (paras. 216-219).

2 See Human Rights Committee, general comment No. 31 (2004) on the nature of the general legal obligation imposed on States parties to the Covenant (art. 2).

3 *UDHR Article 25 states*

domestic jurisprudence. Israel is a ratifying party to the major human rights treaties relevant to the current situation.[4]

The most fundamental provision for the legal right to adequate housing, including security of tenure and freedom from dispossession and destruction, is embodied in Article 11(1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions.

Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) obliges States parties to:

> prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:…
>
> (d)(v) The right to own property alone as well as in association with others…
>
> (e)(iii) the right to housing.

Article 14(2)(h) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) obliges States parties to ensure that women:

> enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Article 27(3) of the International Convention on the Rights of the Child (CRC) calls upon States parties to:

> provide material assistance and support programs with regard to nutrition, clothing and housing.

As a ratifying party to these legal instruments, a State is bound to ensure and demonstrate its progress toward ensuring that the rights enshrined in each of them is respected, protected,

SECURE TENURE

INTERNATIONAL LEGAL BASIS: UDHR 17, ICESCR 11; ICCPR 1; CESCR 4; ICCPR 1; DSPD I, 6; CHR 1993/77

The legal right to secure tenure, whether freehold, leasehold, or other form of individual and collective possession of housing, involves protection from forced eviction, harassment and other threats. It also effectively guarantees access to, use of and control over land, property and housing resources. Governments should "confer security of tenure to all persons currently threatened with forced eviction and…adopt all necessary measures, giving full protection against forced eviction, based upon effective participation, consultation and negotiation with affected persons or groups" (CHR 1993/77).

[4] These include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social, and Cultural Rights (ICESCR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CaT), the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), and the Convention on the Rights of the Child (CRC). In addition, Israel has ratified the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC-OP-AC).

promoted and fulfilled in accordance with the common overriding principles (discussed below).

A State party's human rights obligations are generally understood to derive from a formula of three aspects: to respect protect and fulfill the right. In practical terms, these concepts mean, respectively, that a State and its agents must (1) govern their own behavior so as not to violate the human right, (2) ensure that third parties do not violate the right of others and (3) take practical and effective steps actively "to the maximum of its available resources" to ensure the realization of the right.[5]

While this nonhierarchical formula of these aspects of implementation provides some clarity as to "what" a State is obliged to do in implementing a human rights treaty, other provisions—known as the over-riding principles of implementation—clarify "how" that implementation is to be carried out. The first three articles ICESCR set forth the six over-riding principles that address the required behavior of States as essential conditions in their respect, protection and fulfillment of rights:

- Self-determination[6]
- Nondiscrimination[7]
- Gender equality
- Rule of law[8]
- International cooperation[9]
- Progressive realization/nonretrogression[10]

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[5] "Maastricht Guidelines on Violations of Economic, Social and Cultural Rights," Maastricht, 22–26 January 1997, para. 6. The quote derives from Article 2.1 of ICESR.

[6] Article 1: 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence. 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

[7] Article 2: 2. The States Parties to the present Covenant 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. 3. Developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals. Article 4: The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

[8] Article 2: 1. Each State Party to the present Covenant undertakes to take steps…achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

[9] Article 2: 1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical…

[10] Article 2: 1. Each State Party to the present Covenant undertakes to take steps…with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means...

The last of these over-riding principles, "progressive realization," is found uniquely in ICESCR. Therefore, it is understood to reflect the special character of economic, social and cultural rights, such as HRAH, which may require serial efforts to become fully realized. However, the other five over-riding principles reflect the immediacy of State obligations. That means that it is inadmissible that a State delay its implementation of economic, social and cultural right by, for example, continuing to discriminate on the basis of gender or any other arbitrary criterion.[11]

Extraterritorial applicability of human rights obligations

ICESCR and the Convention on the Elimination of All Forms of Discrimination against Women (CEDaW) contain no provision limiting their application to the internal territory of States parties. Articles 2 (1) and 16 (1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) refer to each State party's obligation to prevent acts of torture "in any territory under its jurisdiction." The International Court of Justice has concluded that ICCPR "is applicable in respect of acts done by a State [also] in the exercise of its jurisdiction outside its own territory."[12]

For purposes of this report, the human rights application principle of international cooperation is particularly significant as the principle that sets forth the extraterritorial dimension of the State's human rights obligations. ICESCR provides in Article 2(1) that:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant…

In the context of ICESCR Article 11, guaranteeing HRAH, the Covenant reinforces the extraterritorial dimension of State parties' human rights obligations. It provides that:

> The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

The concept of international cooperation, as initiated as a formal obligation in the UN Charter, extends far beyond the constitutional borders of a State and follows the State in its bilateral or multilateral relations, including in technical assistance cooperation. International cooperation is an essential subject of modern statecraft and a legal

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[11] General comment No. 3: "The nature of States parties' obligations" (art. 2, para. 1, of the Covenant), fifth session (1990), E/1991/23, para. 1.

[12] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion,* para. 111. The Court reached the same conclusion with regard to the applicability of CRC. *Ibid*., para. 113. In *Congo v. Uganda*, para. 220, the Court concluded that Uganda was internationally responsible for its violations of international human rights law committed in both occupied and unoccupied sections of the Congo. The Human Rights Committee has clarified that "a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party." General comment No. 31 (2004), para. 10. See also Human Rights Committee, *Lopez v. Uruguay*, communication No. 52/1979 (CCPR/C/OP/1), paras. 12.1-12.3 (1984).

obligation of all States members of the United Nations. The contours and content of such cooperation is defined in the Charter as one of the principal purposes of the United Nations:

> …in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.[13]

International cooperation, according to Article 55 of the Charter, involves:

> …the creation of conditions of stability and well-being[,] which are necessary for peace and friendly relations among nations based on respect for the principles of equal rights and self-determination of peoples, [hence] the United Nations shall promote universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.

In 1970, the General Assembly further specified the obligations of States to engage in international cooperation in fulfillment of their chartered responsibilities:

> *Considering* […] the progressive development and codification of the following principles:…
> (d) the duty of States to cooperate with one another in accordance with the Charter;…
> (g) the principle that States shall fulfill in good faith the obligations assumed by them in accordance with the Charter, so as to secure their more-effective application within the international community[,] would promote the realization of the purposes of the United Nations;…
>
> *The duty of States to cooperate with one another in accordance with the Charter*
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> The duty of States to cooperate with one another, irrespective of the differences in their political, economic and social systems, in the various spheres of international relations, in order to maintain international peace and security and to promote international economic stability and progress, the general welfare of nations and international cooperation free from discrimination based on such differences….

Like human rights, in general, the over-riding principles of human rights implementation also have an indivisible quality. For example, the subsequent elaborations of the Charter's principles also have established the relationship among international cooperation, self-determination and human rights:

> *The principle of equal rights and self-determination of peoples*…
>
> Every State has the duty to promote[—]through joint and separate action[—]universal respect for, and observance of human rights and fundamental freedoms in accordance with the Charter….[14]

Human Rights applicability in armed conflict

In considering the full complementarity of human rights and IHL, one of the first dilemmas arises from the question of the potential limits of human rights law in particular situations. The relevance of this question extends well beyond the exceptional situation of armed conflict, and embraces the very regular issues of regulating extraterritorial State behavior in trade, investment and finance for development.

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[13] Articles 1, para. 3.

[14] Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations (GA 2625, adopted without a vote, 24 October 1970, annex).

ICCPR and other international human rights instruments allow for the possibility to derogate from obligations to respect, protect and fulfill certain rights in particular circumstances that threaten the nation's existence, provided that the measures are strictly necessary and are rescinded as soon as the public emergency or armed conflict ceases to exist.[15] It is notable, for the present inquiry, that Israel remains in a state of public emergency proclaimed on 19 May 1948, four days after its Declaration of Establishment.[16] Israel issued a declaration upon ratification of ICCPR that reaffirmed that state of emergency and issued a reservation to Article 9 (liberty and security of person).[17]

ICCPR specifies the nonderogable rights, which (theoretically) prevail without limitation in any situation, including states of emergency and armed conflict.[18] ICESCR does not provide explicitly for derogations in time of public emergency. However, in times of armed conflict, the guarantees of the Covenant may be limited in accordance with its Article 4 and/or in the possible case of scarcity of available resources in the sense of Article 2.1.[19]

Legal experts and international human rights bodies have established that human rights law and its corresponding State obligations do not disappear with the outbreak of conflict.[20] In support of that legal fact, international case law and the findings of UN human rights treaty bodies provide ample support for the contention that a State's human rights obligations extend to areas beyond its national borders to areas within its "effective control."[21]

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15 ICCPR, art. 4, para. 1; Human Rights Committee, General Comment No. 29 (2001), para. 3.

16 CCPR/C/ISR/2001/2, para. 71.

17 A/58/40, vol. I, p. 64,, para. 12. The Human Rights Committee has expressed concern that the article 9 reservation is broader than is permissible under article 4 of ICCPR, and that Israeli policies related to the state of emergency appear to have unofficially derogated from additional provisions of ICCPR (ibid).

18 International Covenant on Civil and Political Rights, General Assembly resolution 2200A (XXI), 16 December 1966, entered into force 23 March 1976. Article 4.2 provides that "No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made... These seven nonderogable rights are: right to life, freedom from torture or to cruel, inhuman or degrading treatment or punishment, freedom from slavery and servitude, imprisoned merely on the ground of inability to fulfil a contractual obligation, freedom from prosecution in the absence of applicable law, right to recognition everywhere as a person before the law, and freedom of thought, conscience and religion.

19 See Committee on Economic, Social and Cultural Rights (CESCR), general comment No. 14 (2000), paras. 28-29.

20 For a discussion of extraterritorial applicability of human rights law and corresponding State obligations, see Ibrahim Salama and Francoise Hampton, "Working paper on the relationship between human rights law and international humanitarian law," UN Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2005/14, 21 June 2005, paras. 78–92. See also the examination of case law in the High Court of Justice, Queen's Bench Division, Divisional Court, *R. al-Skeini and others* v. *Secretary of State for Defence*, 14 December 2004.

21 Examples included International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, advisory opinion of 8 July 1996, *I.C.J. Reports 1996 (I),* p. 226, at p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, *I.C.J. Reports 2004*, para. 106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *I.C.J. Reports 2005*, para. 219. European Court of Human Rights, *Loizidou v. Turkey* (40/1993/435/514), 18 December 1996; and *al-Skeini* op cit., and, in the case of Israel's human rights obligations in the post-1967 occupied territories, see the Concluding Observations of the Human Rights Committee, monitoring the Covenant on Civil and Political Rights, CCPR/C/79/Add.93, CCPR/C/ISR/2001/2; the Committee on Economic, Social and Cultural Rights, E/C.12/1/Add.27 (1998) and E/C.12/1/Add.90 (2003); the Committee against Torture CAT/C/XXVII/Concl.5 (2001); the Committee on the Elimination of Racial Discrimination (CERD) CERD/C/304/Add.45 (1998) A/52/18, para. 19(3), and CERD Prevention of Racial Discrimination, including Early Warning and Urgent procedures A/49/18 (1994). The Human Rights Committee interprets States' human rights

Extending legal obligations to respect, protect and fulfill human rights law as a rule to govern a State's extraterritorial actions may be essential to sustaining and advancing human well-being and civilization. However, that does not rule out the consideration that, while our current stage of human civilization legally permits the conduct of war through the provisions of IHL, the content of human rights may require interpretation in the light of applicable IHL rules. The obvious contradiction between permissible killing under IHL and the "nonderogable" right to life may be too obvious an example to mention.[22]

However, to the extent that essential housing and land values are concerned, applying the specificity of human rights law to States' extraterritorially conduct in armed conflict poses potential challenges and sets legal limits to States' classic warring conduct. Among these norms are the test of "effective control" and "within the power" of the State required to implement human rights criteria in areas outside its "national" territory. Legal debates continue with intent to limit human rights duties of States at war by seeking to limit definitions of "control." This follows the logic asserting that the conduct of war by airborne assaults, perforce, eludes the attacking State's responsibility for the human rights consequences.[23]

That legally dismissive posture of belligerent States compares with actions involving the deployment of ground troops, where "effective control of territory" is presumably greater.[24] A war-enabling IHL theory also asserts that extraterritorial battlefield conduct enjoys exemption from human rights application unless and until individual combatants are subsequently removed to a detention facility that the duty-bearing State operates.[25] More positive is the interpretation by some military quarters in some States, recognizing that customary international law, including human rights obligations, may extend to all international operations.[26]

Important as it is to the prospects of remedies, the human rights perspective sees the legalistic and academic debate as limiting a State's extraterritorial human rights obligations in wartime as an unacceptable form of malign dalliance, adding insult to the injury that the gravely violated civilians have incurred.

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obligations to extend to protecting "anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party." See General Comment 31, "Nature of the General Legal Obligation on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (2004), para. 10.

22 For authoritative discussion, see ICJ, *Legality of the the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, *ICJ Reports 1996*, para. 25.

23 *Supra*, note 75.

24 European Court of Human Rights, *Bankovic and others v. Belgium and 16 Other Contracting States*, Case No. 52207/99, 12 December 2001, http://www.echr.coe.int/eng/Press/2001/Dec/Bankovicadmissibilitydecisionepress.htm.

25 David Kretzmer, "The law of armed conflict: Problems and prospects," Chatham House, 18–19 April 2005, *at:* http://www.riia.org/pdf/research/il/ILParmedconflict.pdf; also Noam Lubell, "Challenges in applying human rights law to armed conflict," *International Review of the Red Cross* Vol. 87, No. 860 (December 2005), at 741.

26 Berger, Grimes and Jensen, eds., *The US Operational Law Handbook 2004*, Chapter 3, Section III.

However, there is little dissent from the position that human rights and their corresponding State obligations apply in times of war.[27] What endures, however, are legal questions as to the extent of their application in certain circumstances.

Gross Violations Housing Rights: Forced Eviction and Population Transfer

Long-standing international human rights treaty obligations form one basis for the legal authority upon which rest affected persons' human rights claims against Israel for its arbitrary damage, destruction and forcible acquisition of civilian private and public property, including homes and other shelters, infrastructure and public service facilities, and all manner of natural resources. Coercive measures to remove human inhabitants from, or dispossess them of their dwellings are violations of the minimum international standards of State behavior under human rights law. This specific prohibition is borne out in the CESCR General Comment No. 7 (GC 7) on "the right to adequate housing: forced eviction" (1997). Ample support for that prohibition is found in the jurisprudence of ICESCR, as well as the UN Commission on Human Rights, which has resolved that "forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing."[28] The UN Sub-Commission on the Promotion and Protection of Human Rights also has characterized the all-too-common practice as a violation of "the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment."[29]

The type of displacement that often takes place in the context of armed conflict constitutes a particularly egregious form of forced eviction, owing to its scale and the severity of the resulting deprivation. As citizens of their respective countries, IDPs are entitled to enjoy the protection of all international human rights and humanitarian law guaranteed by their State's adherence to the relevant instruments of public international law, including customary law norms.

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27 "Mission to Lebanon and Israel," op cit., paras. 14–15. More generally, see note 21 above.

28 Commission on Human Rights resolution 1993/77, "Forced evictions". See also Sub-Commission on the Promotion and Protection of Human Rights resolution 1998/9, "Forced evictions," "Reaffirming that every woman, man and child has the right to a secure place to live in peace and dignity, which includes the right not to be evicted arbitrarily or on a discriminatory basis from one's home, land or community…1. Reaffirms that the practice of forced eviction constitutes a gross violation of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment." The Sub-Commission on the Promotion and Protection of Human Rights resolution 1997/6, "Forced Eviction," also "Reaffirms that forced evictions may often constitute gross violations of a broad range of human rights, in particular the right to adequate housing, the right to remain, the right to freedom of movement, the right to privacy, the right to property, the right to an adequate standard of living, the right to security of the home, the right to security of the person, the right to security of tenure and the right to equality of treatment…

29 "Forced evictions," E/CN.4/Sub.2/2003/17, adopted by consensus, 13 August 2003.

IHL contains the specific prohibitions against "population transfer." At the same time, IDPs have specific needs distinct from those of the nondisplaced population that specific protection and assistance measures must address. The "Guiding Principles on Internal Displacement"[30] and "Basic principles and guidelines on development-based evictions and displacement"[31] detail those measures of State responsibility.

Claims arising from Israel's damage and destruction, forced eviction and the destruction and denial of vital civic services are grounded in HRAH, in particular the relevant entitlements forming the normative content of the right, including:

- security of tenure and freedom from dispossession and demolition
- habitability of adequate housing
- access to public goods and services
- location of adequate housing
- a safe and healthy environment[32]
- environmental goods and services, including water and land.[33]

In addition to HRAH, other codified human rights form a basis for claims against Israel for unjustifiable destructive on homes and other shelters, lands and civic infrastructure and service facilities. These violated human rights include:

- The right to food
- The right to livelihood
- The right to information
- The right to security of person
- The right to protection of the family
- The right to property (freedom from dispossession)
- The rights to return, restitution, resettlement, rehabilitation, compensation and a pledge of nonrepetition (i.e., reparations) for refugees and displaced persons.[34]

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30 E/CN.4/1998/53/Add.2. States recognize the Guiding Principles as "an important international framework for the protection of internally displaced persons" (General Assembly resolution A/60/1, para. 132).

31 "Basic principles and guidelines on development-based evictions and displacement" E/CN.4/2006/41, http://www.ohchr.org/english/issues/housing/annual.htm.

32 Arab Declaration on Sustainable Development for Human Settlements (Rabat Declaration) (1995) recognizes "Adequate housing is a fundamental right and requirement of the human being, who must be enabled to secure it in both urban and rural areas within a healthy and sound environment equipped with all services and utilities." General Principles and Goals, No. 8. Also the United Nations Framework Convention on Climate Change [Kyoto Protocol] (1992): *Recalling also* that States have, in accordance with the Charter of the United Nations and the principles of international law, …the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction…; and "Human Rights and the Environment," AG/RES. 1926 (XXXIII-O/03) (10 June 2003).

33 As set forth in CESCR General Comment No. 4, "right to housing," (1991) para. 8.

International Humanitarian Law: General Principles

Of the IHL rules applicable to attackers, the most relevant relate to the principles of distinction, proportionality and necessity, and the obligation to take related precautionary measures to protect civilians. These obligations are cumulative: an attack must comply with all of the rules in order to be lawful.[35]

In order to comply with the principle of distinction, the parties to a conflict must distinguish between civilians and combatants at all times,[36] and they may direct attacks only at military objectives. Such targets are defined as those objects that, by their nature, location, purpose or use, effectively contribute to military action, and whose total or partial destruction, capture or neutralization, in the current circumstances provides a definite military advantage.[37]

The only circumstance in which a conflict party may target civilians is at such time as they assume a direct role in hostilities.[38] Thus, attacks on civilian objects[39] are unlawful unless, at the time of the attack, they were used for military purposes and their destruction serves a definite military purpose, fulfilling the strict requirement of military "necessity."

Similarly prohibited,[40] indiscriminate attacks include those actions that (i) are not directed at a specific military objective, (ii) employ a method or means of combat that cannot be directed at a specific military objective, or (iii) employ a method or means of combat with effects that cannot be limited as required by international humanitarian law. In such cases, if the attack lacks the necessary distinction between military and civilian objectives, it is illegal.[41] Bombardment and missile strikes that treat a number of clearly separated and distinct military objectives located in an urban area or rural village as a single military objective are strictly prohibited.[42]

The proportionality principle governs attacks on legitimate military objectives such that prohibits excessive effect in relation to the concrete and direct military advantage sought.

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34 For the legal definition of remedy and reparation, see "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law," A/RES/60/147, 21 March 2006, http://www.un.org/Docs/asp/ws.asp?m=A/RES/60/147.

35 Therefore, humanitarian norms and violations relating to attacks on civilians (unrelated to attacks on the home or other shelter); the use of human shields; the mistreatment of prisoners of war; attacks on humanitarian services, equipment, institutions and personnel fall beyond the present scope.

36 *Ibid*., pp. 3–8 (Rule 1), 25–36 (Rules 7–10).

37 *Ibid*., pp. 25–32 (Rules 7–8).

38 *Ibid*., pp. 19–24 (Rule 6).

39 *Ibid*., pp. 32–34 (Rule 9).

40 *Ibid*., p. 37 (Rule 11).

41 *Ibid*., pp. 40–43 (Rule 12).

42 *Ibid*., pp. 43–45 (Rule 13).

Disproportionate attacks would be those that cause incidental civilian injury or loss of life, damage to civilian objects, or any combination thereof.[43]

An attacker must take all feasible precautions to minimize and, where possible, prevent incidental civilian injury or loss of life and damage to civilian objects.[44] IHL prescribes specific precautionary measures to be taken in the planning and conduct of attacks.[45] Moreover, an attacker is required to give effective advance warning of attacks that may affect the civilian population, unless circumstances do not permit. [46]

IHL also imposes obligations on defenders, requiring them to protect civilians by keeping them away from military targets[47] and prohibiting the use of human shields.[48] A violation of this principle involves the defender's specific intent to use civilian persons as a means to exclude otherwise legitimate military objectives from lawful attack.[49] Any conflict party's violation of these obligations *vis-à-vis* the civilian population does mitigate the obligations on any other party to the conflict to refrain from an excessive attack in relation to direct military advantage.

Within the general principles of IHL are guides for our consideration of violations of housing and land rights that constitute war crimes and crimes against humanity. The relevant war crimes also include specifically prohibited acts that have affected homes and other structures, land, and civic services and their facilities, including any combination of:

- Forced displacement
- Use of prohibited weapons
- Prohibited use of weapons not legally banned
- Attacks on civilian persons (in their homes or other shelters)
- Attacks on, damage and destruction of civilian (private and public) property.

For the purposes of this inquiry, "crime against humanity" includes any single or combined legally prohibited acts "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[50] Widespread or

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43 *Ibid*., p. 48 (Rule 14).

44 *Ibid*., p. 51 (Rule 15).

45 *Ibid*., pp. 51–67 (Rules 15–21).

46 ICRC Study, see note 21 above, pp. 62–65 (Rule 20). The duty to warn as part of the duty to protect life may also be derived from ICCPR article 6.

47 *Ibid*., pp. 68–76 (Rules 22–24).

48 *Ibid*., pp. 337–40 (Rule 97).

49 *Ibid*., p. 340 (Rule 97).

50 Rome Statute, op cit., Article 7 "Crimes against Humanity," which include: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within

systematic violations of housing and land rights may constitute crimes against humanity in the context of the following acts:

- Deportation or forcible transfer of population
- Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court
- Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.[51]

Serious violations mentioned above and other principles of international humanitarian law by individuals constitute war crimes. States are obliged under international law to investigate these and other war crimes committed within their jurisdiction,[52] allegedly committed by their nationals or armed forces, or on their territory, and to prosecute any suspected violators.[53]

These applicable legal standards form the first test of the potential claims to pursue. For the purposes of this inquiry, the scope of the exercise follow the parameters of violations of the human right to adequate housing and land rights, both in their definition in human rights law, as well as under the corresponding rights arising from international humanitarian law (IHL).

HRAH in International Humanitarian Law

Both Israel and its affected neighbouring states (Egypt, Lebanon, Jordan and Syria) are parties to the Geneva Conventions of 12 August 1949. Egypt, Jordan, Lebanon and Syria are parties to the Geneva Conventions' Additional Protocol I (international conflict), and Egypt, Jordan and Lebanon are parties to Protocol II (noninternational conflict). Israel is party to neither Additional Protocol. All of the parties to the conflict are subject to customary international humanitarian law.[54]

The relevant sources of law on international armed conflicts include, in particular, the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 (Fourth Geneva Convention, or Civilians Convention), and those provisions of

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the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

51 As defined in the Rome Statute, Article 8.

52 *Ibid*., pp. 568–603, 607–11 (Rules 156 and 158); see also E/CN.4/2006/53, paras. 33–43.

53 See also the recommendation contained in para. 107 below.

54 International Committee of the Red Cross, *Customary International Humanitarian Law*, Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), Cambridge University Press, 2005 (hereafter "ICRC Study"). See for example HRW, *Fatal Strikes: Israel's Indiscriminate Attacks against Civilians in Lebanon* (August 2006); Amnesty International, *Deliberate destruction or "collateral damage"? Israeli attacks on civilian infrastructure* (August 2006).

the Additional Protocol I that are declaratory of customary international law, and contractually binding those ratifying States. In addition, standards predating the Civilians Convention govern the conduct of States during war and occupation. According to most opinions today, the provisions of The Hague and the Geneva Conventions constitute customary international law.[55] The 1977 Additional Protocols to the Geneva Conventions of 1949 have not been universally ratified, Currently, 168 States parties have ratified Protocol I and 164 have acceded to Protocol II, but a number of their provisions are today generally accepted as constituting customary international law.

The Hague Convention IV concerning the Laws and Customs of War on Land, adopted in 1899 and revised in 1907, constitutes the fundamental a codified standard of the conduct of land warfare. As noted in the case of Israel's prolonged occupation of Palestine, some of those standards govern activities affecting housing and land rights.[56] However, the Geneva Conventions and Protocols relate to the particular circumstances of Israel's 2008–09 Operation Cast Lead, and this review also considers those norms that relate to military conduct affecting HRAH and related entitlements.

Every occupying army is obligated to protect the local population and ensure its safety and well-being. It is certainly permissible to derogate from this duty in the case of military necessity. However, in that instance, the welfare of the local population must be the primary military consideration. Consequently, the combatant or occupying State also must protect the civilian population's property, private and public. Article 23(g) of the Hague Regulations of 1907 states that it is forbidden "to destroy or seize the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war."[57] Article 46 of the Hague Regulations provides that a State's military must respect and protect private property, and that it cannot confiscate such property unless that action fulfils the strict criterion of military necessity, in which case any confiscation would be temporary. Article 53 of the Fourth Geneva Convention also provides that the destruction of property by the combatant State is forbidden, "except where such destruction is rendered absolutely necessary by military operations." Because military forces hold special obligations toward the civilian population, they bear an extremely heavy burden of proof that the injury was necessary. Article 147 of the Fourth Geneva (Civilians) Convention provides that, "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Convention. However, even if such objectives belong to a category of military

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55 See Christopher Greenwood, "Customary law status of the 1977 Geneva Protocols" in Tanja Delissen, ed., *Humanitarian Law of Armed Conflict: Challenges ahead* [Festschrift for Frits Kalshoven] (Dordrecht: XXXX, 1991), p. 113.

56 The Hague Regulations, particularly Convention IV respecting the Law and Customs of War on Land, enshrines the prohibition on an occupying Power amending the law of the country (Article 43). Violating this principle has enabled Israel to expropriate Palestinian land, natural resources and private properties at its discretion.

57 Israeli officials use to justify the demolition of houses and destruction of agricultural land. Israeli officials also argue that protecting security forces and settlers from Palestinian gunfire, and combating the digging of tunnels intended for smuggling weapons, are pressing military necessities that justify the demolition of property pursuant to article 23(g). See B'Tselem, "Demolition for Allegedy Military Purposes," *at:* http://www.btselem.org/english/Razing/Humanitarian_Law.asp.

targets or “dual use” objects, they cannot be considered as a military necessity where their total or partial destruction offers no military advantage.

There is no significant difference among these relevant articles of the Hague Regulations and the Civilians Convention, and the articles complement each other.

Even in the case of military necessity, which can provide an exception to the sweeping prohibition on destruction of property, the occupier must comply with the other provisions of international humanitarian law. Indeed, jurists and international tribunals firmly have negated assertions that military necessity prevails over other considerations and, thus, “necessity” nullifies application of these humanitarian provisions. Every act must comply with international humanitarian law, and, therefore, the parties are not free to choose the ways and means to wage combat.

To ensure that the exception set out in article 23(g) of the Hague Regulations and Article 53 of the Fourth Geneva Convention is not broadly construed, international humanitarian law also forbids damage property as a preventive means; that is, where the danger has not yet manifest. It further prohibits the destruction of property unless alternative, less injurious, means are not available to achieve the required military objective. In addition, it expressly forbids military forces from destroying property with the intent to deter, terrify, or take revenge against the civilian population. Injury to property intended to cause permanent or prolonged damage also is expressly forbidden.[58]

Evictions and Displacement in IHL

The Hague Regulations do not contain explicit mention of the practice of eviction or “population transfer.” One explanation for this omission is that "the practice of deporting persons was regarded at the beginning of this [20th] century as having fallen into abeyance," and that the prohibition of deportations "may be regarded today as having been embodied in international law."[59] The horrors connected to the mass deportations and transfers that took place during World War II, however, motivated the inclusion of an explicit prohibition of forcible transfers as “deportations” in the 1949 Civilians Convention. According to Jean Pictet, the intent of this important prohibition becomes obvious: "It will suffice to mention that millions of human beings were torn from their homes, separated from their families and deported from their country, usually under inhumane conditions. The thought of the physical and mental suffering endured by these “displaced persons” among whom were a great many women, children, old people and sick, can only lead to thankfulness for the prohibition embodied in this paragraph, which is intended to forbid such hateful practices for all time."[60]

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58 Adam Roberts and Richard Guelff, eds., *Documents on the Laws of War* (Oxford, Clarendon Press, 1982), pp. 55–57.

59 With reference to Article 49 of the Civilians Convention, Jean Pictet, ed., *Commentary to the IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (Geneva: International Committee of the Red Cross, 1958), p. 279.

60 Pictet, *Commentary*, *op. cit.*, pp. 278–79.

In the 1949 Civilian Convention's Article 49, "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory...are prohibited, regardless of their motive." The prohibition is absolute, apart from the exceptions stipulated in paragraph 2, which authorizes the occupying Power to evacuate an occupied territory wholly or partly only if "the security of the population or imperative military reasons so demand."

The commentary to the Convention's paragraphs 2 and 3 indicates that the intention behind the exception clause is to protect the interest of the population concerned and to mitigate the unfortunate consequences of evacuation.[61] Article 49 further prohibits the occupying Power to "deport or transfer parts of its own civilian population into the territory it occupies." The commentary states that the States adopted that clause "to prevent a practice adopted during the Second World War by certain Powers that transferred portions of their own population to occupied territory for political and racial reasons, or in order, as they claimed, to colonize those territories. Such transfers worsened the economic situation of the native population and endangered their separate existence as a race."[62] There is no exception clause to this prohibition.

Although the Civilian Convention's Article 49 was drafted with the intention to prohibit and, thereby, prevent population transfers and displacements in times of armed conflict, at the same time it sanctions such evacuations when "imperative military reasons so demand." Through inclusion of the exception clause, based on imperative military reasons, the principles contained in Article 49 can just as easily be used to give forced removals a legal basis as to protect the rights of potential displaced persons. The breadth with which combatant States interpret "imperative military reasons" leaves some doubt as to the actual protection of Article 49. Nonetheless, the basic guarantee contained in that provision is the clear and unambiguous prohibition of individual and mass forcible transfers.[63] Invocation of the exception clause by States to justify expulsion or population transfer contrary to the prohibition contained in Article 49, however specious, may nevertheless contribute to strengthening the claim to the article's customary law status. International human rights law also prohibits arbitrary displacement, including displacement in situations of armed conflict that is not warranted by the need to ensure the security of the civilians involved.[64]

The Regulations annexed to The Hague Convention IV, in particular, their provisions concerning the treatment of civilians provide the basis for the customary law content of a large number of the guarantees contained in the Civilians Convention.[65] However, Article 49 has no antecedents in The Hague Regulations. As to its legal status, Theodor Meron comments:

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61 *Ibid*., pp. 280–81.

62 *Ibid*., p. 283.

63 Scott Leckie, *When Push Comes to Shove: Forced Evictions and International Law* (The Hague: Ministry of Housing, Physical Planning and Environment, 1992), p. 46.

64 Guiding Principles on Internal Displacement, see note 20 above, principle 6, restating ICCPR article 12, and customary international humanitarian law (see ICRC Study, note 21 above, pp. 74–76, 457–68 (Rules 24 and 129–31).

65 Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon, 1991), p. 45.

> At least the central elements of article 49 (1), such as the absolute prohibitions of forcible mass and individual transfers and deportations of protected persons from occupied territories...are declaratory of customary law, even when the object and setting of the deportations differ from those underlying German World War II practices [that] led to the rule set forth in article 49. Although it was less clear that individual deportation was already prohibited in 1949, I believe that this prohibition has by now come to reflect customary law.

The general IHL principle of precaution also requires each party to the conflict to give effective advance warning of attacks that may affect the civilian population, providing enough time and opportunity to evacuate safely, unless circumstances do not permit. The prohibition of indiscriminate disproportionate attacks must determine not only the military strategy applied in an operation, but also the limitation or prohibition of certain weapons used in situations where the civilian population would be affected.

In accordance with Article 147 of the Civilians Convention, "unlawful deportation or transfer of protected persons" constitute grave breaches of the Convention, suspected perpetrators of which crimes the High Contracting Parties are under obligation to pursue and punish before their own courts. Each State is obliged also to enact legislation to provide for punishment of any person who has committed such a grave breach, regardless of nationality or place where the offense has been committed.[66]

The Protocols to the Geneva (Civilians) Convention

The development of new methods of conducting war, the experience in armed conflicts showing the shortcomings of the existing Conventions and contemporary developments in human rights law have given impetus to the further development of humanitarian law. In 1977, the High Contracting Parties added the two Additional Protocols to the Geneva Conventions of 1949. Additional Protocol I supplements the protection in situations of international conflict by extending its application to include situations "of armed conflict in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination."[67] (See relevant discussion below.) Protection against practices of population transfer is further extended by article 85 of Protocol I, which, *inter alia*, provides in paragraph 4 that:

> In addition to the grave breaches defined in the preceding paragraphs and in the Conventions, the following shall be regarded as grave breaches of this Protocol, when committed willfully and in violation of the Conventions or Protocol: (a) the transfer by the Occupying Power of its own civilian population into the territory it occupies, or the deportation or transfer of all parts of the population of the occupied territory within or outside of this territory, in violation of article 49 of the Fourth Convention.

Article 85, paragraph 5 of Protocol I provides that "grave breaches of these instruments shall be regarded as war crimes." Article 86 implements Article 85 by imposing on parties to the conflict an obligation to repress grave breaches. Article 85, paragraph 4 (c), referring to transfers of population into or away from a certain territory does not lay out particular

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66 Articles 146–47 of the Civilians Convention (1949); see also Pictet, Commentary, *op. cit.*, pp. 582–602.

67 Article 1, paragraph 4 of Additional Protocol I (1977).

consequences as constitutive requirements for a grave breach to occur. The main emphasis of that clause is on the transfer by an occupying Power of parts of its own civilian population into the territory it occupies. That practice constitutes a breach under the Civilians Convention, but is now a grave breach under the Protocol as well. According to expert commentary, that is because of the possible consequences for the population of the territory concerned from a humanitarian point of view.[68]

Article 86 also provides for the criminal responsibility of those who have failed in their duty to act according to the IHL prohibition. One obvious duty to act consists of taking appropriate measures to prevent breaches of the Conventions or Protocols, which implies a range of potential actions required of those subjects of the provisions.

Additional Protocol II to the Geneva Conventions applies in particular situations of internal conflict, and requires a certain degree of territorial control on the part of the organized armed group fighting the State.[69] Article 17 provides that: "The displacement of the civilian population shall not be ordered for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand."

The wording of this provision is based on Article 49 of the Civilians Convention. Its inclusion fills the gap in protection against forced displacement in noninternational armed conflicts, a situation in which the need for such protection is particularly acute.

From expert commentary, we learn that the adjective "imperative" in "imperative military reasons" reduces to a minimum the cases in which displacement may be lawfully ordered:

> Clearly, imperative military reasons cannot be justified by political motives. For example, it would be prohibited to move a population in order to exercise more effective control over a dissident ethnic group.[70]

Article 17 of Protocol II provides also that no displacement shall take place for reasons "related to the conflict," leaving open the possibility that transfer may be imperative in certain cases of epidemic or natural disaster, such as floods or earthquakes.[71]

As to its status in international law, Protocol II has been recognized as containing core rights, some of which already have been recognized as customary in international human rights instruments. In this context, the International Committee of the Red Cross commentary on Protocol II states that it:

> contains virtually all the irreducible rights of the Covenant on Civil and Political Rights.... These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part.[72]

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68 Y. Sandoz, C. Swinarski and B. Zimmerman, eds., *ICRC Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Dordrecht/Boston/London: Martinus Nijhoff, 1987), p. 1000.

69 See Georges Abi-Saab "Non-international armed conflicts" in *International Dimensions of Humanitarian Law* (Dordrecht/ Boston/ London, Henry Dunant Institute/UNESCO/ Martinus Nijhoff Publishers, 1988), pp. 217–241.

70 Sandoz, and others, *ICRC Commentary*, *op. cit.*

71 *Ibid*.

72 *Ibid*., p.1340; quoted in Meron, *op. cit.*, p. 73.

Some other authors have taken a more conservative view and concluded that most of Protocol II has to be regarded as confined to treaty law in the absence of more substantial State practice providing evidence of acceptance of its provisions into customary law.[73]

The ICRC Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War formed a precursor to the eventual Protocols. They provide specificity as to the obligations of a State's military conduct. The Draft Rules affirm that "it is also forbidden to attack dwellings, installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population."[74]

According to these Rules, "the attack shall be conducted with the greatest degree of precision" in towns and other places with a large civilian population [and] which are not in the vicinity of military or naval operations. Such attacks must not cause losses or destruction beyond the immediate surroundings of the military objective, and a person responsible for carrying out the attack is obliged to abandon or interrupt the operation if s/he perceives that these conditions cannot be respected.[75]

The body of preceding standards guide our consideration of violations of housing and land rights that constitute war crimes with a set of criteria comprised of the most-relevant IHL norms. In order to comply with these norms and with the standards of the most likely forums for legal remedy, the applicable issues to document are the facts and consequences of prohibited acts that have affected homes and other structures, land and civic services and their facilities, including any combination of:

- Forced displacement
- Use of banned weapons
- Prohibited use of weapons not legally banned
- Attacks on civilian persons (in their homes or other shelters)
- Attacks, including damage and destruction of civilian (private and public) property.

International Criminal Law

The conduct of war and other forms of armed conflict has given rise to well-established norms of criminal law prevailing in the context of Israel's Operation Cast Lead. The principal applicable instruments are the Rome Statute of the International Criminal Court (1998) and the London Charter of the International Military Tribunal (1942). The jurisprudence of the Nuremberg and Tokyo Tribunals, as well as the more-recent International Tribunal on the Former Yugoslavia and the International Tribunal on Rwanda provide important precedents and legal specificity. Although it is not within the scope of

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73 Greenwood, *op. cit.*, p. 113.

74 Chapter II: Objectives Barred from Attack, "Immunity of the civilian population," Article 6.

75 Chapter II: Precautions in Attacks on Military Objectives, "Precautions to be taken in carrying out the attack," Article 9.

this review to analyze the whole of that body of jurisprudence, certain examples may be elucidating.

Population displacement

The earliest explicit mention of population transfer in an international legal document was the recognition of "forced resettlements" as a war crime in the Allied Declaration on German War Crimes, adopted by representatives of the nine occupied countries, exiled in London, in 1942. It stated, *inter alia*:

> With respect to the fact that Germany, from the beginning of the present conflict, has erected regimes of terror in the occupied territories...characterized in particular by...mass expulsions…[76]

On 17 October 1942, the Polish Cabinet in Exile issued a decree on the punishment of German war crimes committed in Poland, which provided that life imprisonment or the death penalty would be imposed "if such actions caused death, special suffering, deportation or transfer of population."[77]

In reaction to the abundant and flagrant violations of the laws and customs of war during the Second World War, the Allied Powers established the International Military Tribunal (IMT) to try the principle war criminals. The IMT Charter introduced into international law the notions of crimes against the peace, war crimes and crimes against humanity. It defined "war crimes" as "Murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory..."[78]

Article 6 (c) of the Charter defined "crimes against humanity" as:

> Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population before or during the war... in execution of or in connection with any crime within the jurisdiction of the Tribunal...[79]

The notion of "crimes against humanity" differs from war crimes in that crimes against humanity can be committed before or after, as well as during, a war and against any population, including the perpetrator's own population.

In addition to the four Powers approving the IMT Charter, 19 other States acceded to it as well. Furthermore, the United Nations General Assembly affirmed the principles of international law recognized by the IMT Charter and reflected by the judgment of the Tribunal.[80]

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[76] British and Foreign State Papers, vol. 144, p. 1072.

[77] Louise W. Holborn, ed., *War and Peace Aims of the United Nations: 1 September 1939–31 December 1942* (Boston, World Peace Foundation, 1943), p. 462.

[78] Article 6 (b) of the Charter of the International Military Tribunal, in *International Military Tribunal, Trial of the Major War Criminals before the International Military Tribunal (IMT), Nuremberg, 1945–1946*, 42 vols. (London, H.M. Stationery Office, 1947–1949) vol. I, p. 11.

[79] *Ibid*.

[80] See General Assembly resolution 95 (1), adopted on 11 December 1946.

The Nuremberg judgment dealt in various instances with the practice of displacing civilians from the occupied territories and replacing them by German colonists. For example, count 3, section J of the judgment states:

> In certain occupied territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavoured to assimilate these territories politically, socially and economically into the German Reich. They endeavoured to obliterate the former national character of those territories.
>
> In pursuance of their plans, the defendants forcibly deported inhabitants who were predominantly non-German and replaced them by thousands of German colonists.[81]

During the trials, the prosecutors and judges addressed and repeatedly condemned the practice of "Germanizing" or "Nazifying" occupied or "annexed" territories by deporting or expelling the original population and moving in German settlers.[82] In conclusion, the Nuremberg judgment held that population transfers and colonization in occupied territory constituted both a war crime and a crime against humanity, and that deportation of persons was illegal.[83]

House demolitions

Nazi troops occupying northern and eastern European countries during the Second World War USED House demolitions, including the demolition of civilian infrastructure, as a military tactic. The practice produced one particularly notorious case tried at the Nuremberg Tribunal. From 1935 to 1938, Alfred Jodl, was chief of the National Defense Section in the German High Command and, later, Chief of the Operations Staff of the High Command of the Armed Forces. The International Military Tribunal found him guilty on all four counts of the indictment. Count Three: War Crimes addressed the German Government and the German High Command carrying out, “as a systematic policy, a continuous course of plunder and destruction.”[84]

On the territory of the Soviet Union the Nazi conspirators destroyed or severely damaged 1,710 cities and more than 70,000 villages and hamlets, more than 6,000,000 buildings and made homeless about 25,000,000 persons.” On 28 October 1944, Jodl ordered the evacuation of all persons in northern Norway and the burning of their homes so as to deter them from aiding the Russians. Jodl testified that he opposed the operation, but Hitler had ordered it. He also testified that the order was not fully executed. However, the

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81 IMT, vol. I, p. 63.

82 For instance, Justice F. de Menthon stated that persons recalcitrant to Nazification became victims of large-scale expulsions (IMT, vol. 5, p. 410); E. Faure declared that deportations and Germanization in France were "a criminal undertaking against humanity" (IMT, vol. 6, p. 427); L.N. Smirnov dealt with the clearance of Polish inhabitants from their villages and their replacement by Baltic Germans (IMT, vol. 8, p. 256; also vol. 8, p. 253 and vol. 19, p. 469).

83 Alfred M. de Zayas, "International law and mass population transfers," *Harvard International Law Journal*, vol. 16, No. 2 (1974), p. 214.

84 Indictment: International Military Tribunal, Part III, “Eastern Countries,” *Trial of the Major War Criminals before the International Military Tribunal*, Vol.1, (Nuremberg, 1947), p. 27.

Norwegian government provided evidence that such an evacuation did take place, and that 30,000 houses were damaged.

Consequently, the Nuremberg International Military Tribunal condemned the practice as a war crime,[85] and international humanitarian law permits an occupier to take the drastic step of destroying property only when "rendered absolutely necessary by military operations" in actual combat.[86] Under international humanitarian law, objects normally dedicated to civilian purposes, such as houses, are presumed not to be military objectives.[87] Article 147 of the Geneva Civilians Convention concludes that extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, is a grave breach of the Convention."[88]

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[85] Alfred Jodl, 1935 to 1938, was chief of the National Defense Section in the German High Command and, later, Chief of the Operations Staff of the High Command of the Armed Forces. The International Military Tribunal found him guilty on all four counts of the indictment. Count Three: War Crimes addressed the German Government and the German High Command carrying out, "as a systematic policy, a continuous course of plunder and destruction including: On the territory of the Soviet Union the Nazi conspirators destroyed or severely damaged 1,710 cities and more than 70,000 villages and hamlets, more than 6,000,000 buildings and made homeless about 25,000,000 persons." On 28 October 1944, Jodl ordered the evacuation of all persons in northern Norway and the burning of their homes so as to deter them from aiding the Russians. Jodl testified that he opposed the operation, but Hitler had ordered it. He also testified that the order was not fully executed. However, the Norwegian government provided evidence that such an evacuation did take place, and that 30,000 houses were damaged. See Opinion and Judgment of the Nürnberg International Military Tribunal" *The Avalon Project*, *at:* http://www.derechos.org/nizkor/nuremberg/judgment/cap9.html#Jodl.

[86] Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, Article 53. "Interpretation by the ICRC of Article 53 of the Fourth Geneva Convention of 12 August 1949, with particular reference to the expression 'military operations,'" Letter to al-Haq (Ramallah, Palestine) signed by Jacques Moreillon, Director of Department of Principles and Law and Jean Pictet, ICRC, November 25, 1981 ("… with a view to fighting") and "Occupation and international humanitarian law: questions and answers," ICRC press release, August 4, 2004 ("…when absolutely required by military necessity during the conduct of hostilities"). Cited in HRW, *Razing Gaza* (New York: HRW, 2004), p. 12.

[87] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, Article 52: "*General protection of civilian objects" reads: "*1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects [that] are not military objectives as defined in paragraph 2. 2. Attacks shall be limited strictly to military objectives. Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military of advantage. 3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." The United States has not ratified the Geneva Civilians Convention Protocols. However, the U.S. government stated in 1987 that it finds a number of Protocol I's provisions to be customary. Among them are: limitations on the means and methods of warfare, especially those methods which cause superfluous injury or unnecessary suffering (art. 35); protection of the civilian population and individual citizens, as such, from being the object of acts or threats of violence, and from attacks that would clearly result in civilian casualties disproportionate to the expected military advantage (art. 51); protection of civilians from use as human shields (arts. 51 and 52); prohibition of the starvation of civilians as a method of warfare and allowing the delivery of impartial humanitarian aid necessary for the survival of the civilian population (arts. 54 and 70); taking into account military and humanitarian considerations in conducting military operations in order to minimize incidental death, injury, and damage to civilians and civilian objects, and providing advance warning to civilians unless circumstances do not permit (arts. 57–60). Michael J. Matheson, "Remarks on the United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions," reprinted in "The Sixth Annual American Red-Cross Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions," *American University Journal of International Law and Policy*, vol. 2, no. 2 (fall 1987), pp. 419–27.

[88] Article 147 reads: "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or

The General Assembly adopted the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity in its resolution 2391 on 26 November 1968, and it entered into force on 11 November 1970. The Convention is relevant to the legal discussion concerning housing and land rights and evictions as it extends the concept of war crimes and crimes against humanity as defined by the Charter of the Nuremberg Tribunal. It also embodies the principle that no time limits to prosecution shall apply to the crimes referred to in the Convention, "irrespective of the date of their commission."[89] In accordance with article 1(b), the Convention includes the following acts among crimes against humanity:

> eviction by armed attack or occupation[90] and inhumane acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

Article 1 (b) also specifies that crimes against humanity may be committed "in time of war or in time of peace", thus delinking it from the ambiguity of article 6 (c) of the Charter of the Nuremberg Tribunal, which could be interpreted as not extending to the same category of crimes committed in time of peace not followed by war.

Article 2 stresses that inaction, as distinct from active involvement, on the part of the State authorities in not preventing the commission of international crimes is sufficient to bring those persons within the ambit of the Convention.

International Criminal Court

In July 2000, States adopted the Rome Statute of the International Criminal Court.[91] The Statute limits the jurisdiction of the Court to the most serious crimes of concern to the international community as a whole, which the Statute classifies as:

(a) The crime of genocide,
(b) Crimes against humanity,
(c) War crimes,
(d) The crime of aggression.

The General Assembly and its Special Committee on the Question of Defining Aggression arrived as a legal definition of aggression, which the Special Committee adopted by

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health, 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 willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly."

89 For a detailed discussion of the Convention, see Robert H. Miller, "The Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity," *American Journal of International Law*, vol. 65, No. 3 (July 1971), pp. 476–501.

90 Many participants in the negotiation of the Convention strongly approved inclusion of this particular inhuman act "as covering some of the most evil crimes against humanity [that] were being committed at present." *Ibid*., p. 490.

91 Rome Statute of the International Criminal Court, UN Doc. 2187 U.N.T.S. 90, *entered into force* 1 July 2002.

consensus and the General Assembly adopted without a vote in 1974.[92] However, as the Security Council has not yet adopted the legal definition of the crime of aggression, the Rome Statute only provides for the Court's jurisdiction over acts constituting aggression in that event and with the Security Council's determination of conditions under which the Court is to exercise jurisdiction. While the International Court of Justice has affirmed the principle that the Security Council's responsibilities relating to peace and security are "primary," but not "exclusive,"[93] it also has considered that the existing definition of aggression in GA resolution 3314 "may be taken to reflect customary international law"[94] and has found that the 3314 definition to "marks a noteworthy success in achieving by consensus a definition of aggression."[95]

While the 3314 definition does not claim to be wholly inclusive or exhaustive, the reasons for controversy over formally adopting it as the operative definition for the ICC may be more political than legal. However, genocide[96] and the other crimes are sufficiently defined in international law, including specific agreements for that purpose. Their definitions have been incorporated into the Rome Statute text.

The Statute defines "crime against humanity" to mean any of eleven acts "when committed as part of a widespread or systematic attack directed against any civilian

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92 United Nations General Assembly resolution 3314 (XXIX), "Definition of Aggression" defines the crime as follows: "Article 1: Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition….Article 3: Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its territory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."

93 Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 163.

94 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 103 , para. 195

95 "Separate Opinion of Judge Elaraby," *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, at: http://www.icj-cij.org/icjwww/idocket/ico/ico_judgments/ico_judgment_opinions_elaraby_20051219.pdf.

96 Genocide is defined in the International Convention on the Prevention and Punishment of the Crime of Genocide (1948), and its definition is incorporated in the Rome Statute as follows: (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.

population, with knowledge of the attack."[97] Related to the purposes of this review, these crimes include:

(d) Deportation or forcible transfer of population;…
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender…, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;…
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

For the purpose of Article 7, paragraph 1, "Deportation or forcible transfer of population" means forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.

The ICC also holds jurisdiction over war crimes, "in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes."[98] The Rome Statute defines such crimes in a detailed list. Those that pertain to the violations of HRAH and related aspects of land and civic services include:

(a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention:

(iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;
(vii) Unlawful deportation or transfer or unlawful confinement;

(b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:

(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;
(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

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[97] Rome Statute, op cit., Article 7 "Crimes against Humanity," which include: (a) Murder; (b) Extermination; (c) Enslavement; (d) Deportation or forcible transfer of population; (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) Torture; (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; (i) Enforced disappearance of persons; (j) The crime of apartheid; (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

[98] Rome Statute, op cit., Article 8 "War Crimes."

(viii) The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory;
(xii) Declaring that no quarter will be given;
(xiii) Destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war;
(xvi) Pillaging a town or place, even when taken by assault;
(xxv) Intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including willfully impeding relief supplies as provided for under the Geneva Conventions…

The Court has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute, on 1 July 2002, and if a State becomes a Party to the Statute after its entry into force, the Court may exercise its jurisdiction over crimes committed after the entry into force of this Statute for that State, unless that State has made a separate declaration accepting the Court's jurisdiction over the crime in question.[99] For the Court to exercise its jurisdiction, the following conditions must be met:

- One or more of the parties to a case is a national of a State party to the Statute, or has accepted the jurisdiction of the Court in accordance with paragraph 3;
- The State on the territory of which the conduct in question occurred is a party to the Statute, or has accepted the jurisdiction of the Court in accordance with paragraph 3;
- If the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft is a party to the Statute, or has accepted the jurisdiction of the Court in accordance with paragraph 3.

Legal Status of Armed Resistance

Resistance to occupation by force of arms, is wholly legitimate in the light of public international law, although controversies among States have emerged with the further development of the relevant provisions in General Assembly resolutions. By 1961, the General Assembly had adopted "The Declaration on the Granting of Independence to Colonial Countries and Peoples."[100] The Assembly acclaimed the principles that "the process of liberation is irresistible and irreversible" and that "all armed action or repressive measures of all kinds directed against dependent peoples shall cease in order to enable them to exercise peacefully and freely their right to complete independence, and the integrity of their national territory shall be respected."[101] Thus, the international community at the time recognized the illegitimacy of the use of force by States to repress

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[99] Rome Statute, op cit., Article 11, "Jurisdiction *ratione temporis*," para. 1. The State must make its declaration under article 12, paragraph 3. The paragraph states: "If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9."

[100] General Assembly resolution 1514 (XV).

[101] *Ibid*., Article 4.

legitimate aspiration of peoples to liberate themselves from "alien subjugation, domination and exploitation."

In 1970, the General Assembly (GA) adopted resolution A/2708, which recognized "the legitimacy of the struggle of colonial peoples and peoples under alien domination to exercise their right to self-determination and independence by all means at their disposal."[102] The GA also reaffirmed "the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle," in "Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights," Also in 1970, the GA affirmed that the continuation of the colonianism in all its forms and manifestations is a crime, and that "colonial peoples" have the inherent right to struggle by all necessary means at their disposal against colonial Powers and alien domination in exercise of their right of self-determination.[103]

In 1973, the Assembly adopted "Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights."[104] The resolution's Article 2 explicitly reaffirmed "the legitimacy of the peoples' struggle for liberation from colonial and foreign domination and alien subjugation by all available means, including armed struggle." One month later, the GA adopted "Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes."[105] It sought to advance the protection of combatants in the resistance against alien domination and established that "The violation of the legal status of the combatants struggling against colonial and alien domination and racist régimes in the course of armed conflicts entails full responsibility in accordance with the norms of international law."[106]

While the serial resolution of the GA indicate a record of international recognition for the legal status of liberation and non-State combatants, the progression of the voting pattern on each succeeding resolution indicates also a polarization in the Assembly. Western States increasingly voted against the resolutions recognizing the legitimacy of armed struggle not because of their opposition to self-determination, but out of conviction that only internationally recognized States should wield armed force. The ideological divide has widened in the current global "war against terror."

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[102] "Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples," A/2708, 14 December 1970.

[103] A/2661 (XXV) of October 1970.

[104] A/3070, 30 November 1973.

[105] A/3103, 12 December 1973.

[106] *Ibid*., Article 6.

State Responsibility and Remedy

A final consideration is due to the emerging principles of "State responsibility," which provides a basis for claims of a State against another State for wrongful acts under public international law. Unless and until the principle is codified, it remains unclear to what extent "State responsibility" could be invoked as the basis of an interstate claim. Nonetheless, as a principle and in the form of the International Law Commission's "Draft Articles on State Responsibility," it serves as a potential avenue for legal resolution of interstate disputes, such as those arising from environmental damage or population transfers across borders.

The following passages on State responsibility and remedy are excerpted from the interim and final reports of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities Special Rapporteur Awn Shawqat al-Khasawneh on "the human rights dimensions of population transfer, including the implantation of settlers."

The human rights dimensions of population transfer, including the implantation of settlers, E/CN.4/Sub.2/1994/18, 30 June 1994

VI. State Responsibility and Population Transfer

87. Reference was made in the preliminary report to the work of the International Law Commission on State responsibility.[107] It is now proposed to discuss that work in greater detail in order to ascertain, albeit in a preliminary manner, its implications for the phenomenon of population transfer and the implantation and settlement of settlers.

88. Such a discussion, the Special Rapporteur believes, has a bearing on the question of remedies and is useful in view of the fact that in spite of many general writings on the position of the individual in international law, to date the issue of the entitlement of individuals to such remedies in international law has not been sufficiently clarified.

89. The core of the theory of State responsibility is that responsibility arises in the inter-State system when there is a breach of an international obligation of the State through conduct consisting of an action or omission attributable to the State under international law. Responsibility, of course, is not an end in itself. The wages of sin is death, not responsibility. Its significance is that it leads to consequences for the wrongdoing State which vary according to the importance of the obligation breached; i.e., it could lead to the consequences normally associated with delictual responsibility for most breaches (delicts) or to those associated with criminal responsibility for particularly serious breaches (crimes).

90. The first duty that international law demands from a wrongdoing State is cessation[108] of the wrongful act if it is of a continuing character. However, compliance with such a duty

[107] E/CN.4/Sub.2/1993/17, para. 324.
[108] Report of the International Law Commission on the work of its forty-ninth session (A/48/10), pp. 132-142.

does not in itself relieve the wrongdoing State of its responsibility. Hence, in addition, reparation may also be demanded. Reparation is a generic term consisting in the various methods available to a State for discharging, or releasing itself from, responsibility. The Permanent Court of International Justice formulated the basic rule on this subject, as follows:

> It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form.[109]
>
> The essential principle contained in the notion of an illegal act - a principle which seems to be established by international practice and, in particular, by the decisions of arbitral tribunals - is that reparation must, so far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability, have existed if that act had not been committed.[110]

91. The forms through which full reparation may be obtained are: restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition. The injured State is entitled to obtain reparation through those forms either singly or in combination. The wrongdoing State may not invoke the provisions of its internal law as justification for the failure to provide full reparation.[111]

92. The first of these forms is restitution in kind. In the aforementioned passage from the judgement of the Permanent Court of International Justice, the concept was widely defined to cover not only the restoration of the *status quo ante*, but a return to a theoretical situation that would have existed (but did not) had it not been for the intervention of the wrongful act. Such a definition would encompass integrative compensation. The Commission, however, chose a more restrictive approach. Its definition of restitution in kind is confined to restoring the *status quo ante* without prejudice to possible compensation for lost profits.[112] While such a solution is not as close to the requirement that the consequences of a wrongful act should be "wiped out," it is supported by many decisions[113] and can be more easily verified than an assessment of a situation that never existed.

93. The primacy of restitution in kind overcompensation is generally acknowledged. As a matter of logic and morality, it would be untenable for any system of law, including international law, to allow its breaches to be settled by compensation (reparation by equivalent). By definition restoring the original situation before the breach took place is the primary concern of the law. Admittedly, restitution in kind is almost always more difficult to obtain than compensation, which may account for the fact that, statistically, a preponderance of reparation by equivalent is easily discernable in judicial and arbitral practice.[114] What is important to keep in mind is that even in such cases, the parties concerned usually insist on restitution in kind and "settle" for compensation in view of the

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[109] PCIJ, Series A, No. 9, p. 21.
[110] Ibid., No. 17, p. 47.
[111] Article 6 bis, A/48/10, pp. 142–51.
[112] Article 7, A/48/10, p. 151.
[113] Brian v. Chamorro Treaty Case (Anales de la Corte de Justicia Centroamericana), vol. VI, Nos. 16-18.
[114] See C.D. Greg, Judicial Remedies in International Law, Oxford, 1987.

improbability of obtaining restitution in kind. The Commission chose a flexible approach: while the commentaries to draft article 7 leave no doubt as to the primacy of restitution in kind rightly indicated as "*naturalis restitution,*" the opening words of article 7 were couched in terms of an entitlement of the injured State and makes the discharge of the duty of restitution in kind conditional upon a corresponding claim on the part of the injured State.[115]

94. While not oblivious to the reasons that led the Commission to adopt a flexible approach on this question, which pertain to the prospects of acceptability of the draft by States, the present Special Rapporteur thinks it unfortunate that too wide a discretion should be left to the injured State to decide on whether to substitute restitution in kind by reparation by equivalent (compensation). In the field of forcible population transfer and the implantation of settlers—indeed, in the whole area where breaches of human rights are concerned—the discretion of the injured State will, in practice, mean that the provision will work in favour of the rich and strong to the detriment of the weak and poor.

95. The victims of forcible population transfer may find that the State espousing their claims is forced or tempted to substitute their right to repatriation (restitution in kind) by compensation (pecuniary or in kind). Yet, how can compensation make up for the fact that exile is "a fundamental deprivation of homeland, a deprivation that goes to the heart of those immutable characteristics that comprise our personal and collective entities."[116] Indeed, coupled with the restrictive definition of reparation (article 6), such victims may find—once compensation is settled for—that the lost profits of their properties, projects, etc. might well be outside the scope of compensatable loss.[117]

96. The operation of restitution in kind is limited by four exceptions: first, *material impossibility*. Thus, if members of the population that had been forcibly transferred perish, their repatriation would become materially impossible. Conversely, if their homes were burnt, it would be impossible to implement restitution in kind. In the first hypothesis, their relatives should be able to claim restitution in kind; i.e., repatriation. What is not clear is for how long such a right can survive the passage of time. Material impossibility could also ensue from a fundamental change in the demographic balance in the State from which population transfer was affected. Thus, while the Crimean Tartars returning to their ancestral homes find that many of their homes and lands have been taken over by other immigrants, that would not constitute prima facie material impossibility. But the situation may be different if many decades had passed since the expulsion of a population from its homeland. It is suggested that, in this area, material impossibility should be narrowly construed so as to exclude the results of actions brought

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[115] A/48/10, p. 155. The opening words of article 7 read:
"The injured State is entitled to obtain from the State which has committed an internationally wrongful act restitution in kind ...".

[116] Bill Frelick, "The Right of Return," *International Journal of Refugee Law* 442, 443 (1990). Cited in Donna E. Arzt and Karen Zugaib, The New York University Journal of International Law and Politics, vol. 24 (399), p. 1440.

[117] A/48/10, pp. 163–68.

about by the State that caused the population transfer; i.e., by bringing in new inhabitants. At the same time, it is wise to exercise caution in passing sweeping judgements, because the exercise of the right to restitution in kind may involve, with the passage of time, the displacement of other people who might be innocent of the original population transfer.

97. Second, restitution in kind should not involve a breach of an obligation arising from a *peremptory norm of general international law*. Thus, a war of aggression may not be waged to obtain, for example, the repatriation of refugees to the State from which they fled. It is less clear whether a population transfer amounting to genocide or involving mass violations of human rights, and hence fit to be qualified as an international crime, could be opposed by forcible countermeasures and whether such a reaction would be legitimate only when there has been a prior determination by the Security Council.[118]

98. Third, restitution in kind should not involve a burden out of all proportion to the benefit which the injured State could gain from obtaining restitution in kind, instead of compensation. This so-called "excessive onerousness exception" is based on considerations of equity. As such, in the case of the most serious breaches, for example population transfer amounting to genocide, it would be inequitable to consider the effort of reparation excessive and to settle for compensation. As was indicated above (para. 89), those breaches may, in view of their gravity, entail the legal consequences of crimes. At this stage of the development of the ILC project, it is still not clear what fate will ultimately befall its concept of the international criminal responsibility of States (described in article 19, Part I). This uncertainty notwithstanding, it is likely and logical that the limitation of excessive onerousness will be eliminated or curtailed with regard to restitution of breaches of a very serious nature (crimes).

99. The fourth exception—as the commentary makes clear—"refers to very exceptional situations and may be of more restrospective than current relevance. Its content is that if the injured State would not be similarly affected, restitution in kind should not be sought when there is *serious jeopardy of the political independence or economic stability of the State* which has committed the internationally wrongful act."[119]

100. The field of application of this limitation relates primarily to the area of foreign investment and as such does not concern us.

101. Compensation is in practice the most commonly obtained remedy. As indicated above (para. 91), it might be sought singly or in combination with other remedies, primarily restitution in kind to obtain full reparation, i.e. the wiping out of the consequences of the wrongful act. In contrast to the relative scarcity of judicial and arbitral awards relating to mass population transfer, the political organs of the United

[118] A/48/10, pp. 116–17.
[119] A/48/10, p. 167.

Nations have had, on more than one occasion, a chance to address this question and to demand restitution in kind and/or compensation. Thus, acting upon the suggestion of the United Nations Mediator on Palestine, Count Bernadotte, the General Assembly adopted resolution 194 (III) of 11 December 1948, resolving in paragraph 11 that

> the refugees wishing to return to their homes and live at peace with their neighbours should be permitted to do so at the earliest practicable date, and that compensation should be paid for the property of those choosing not to return and for loss of or damage to property which under the principles of international law or in equity should be made good by the governments or authorities responsible.[120]

In 1950, the General Assembly adopted resolution 393 (V) on "Assistance to Palestine refugees, in which the Assembly considered that the reintegration of the refugees into the economic life of the Near East, either by repatriation or resettlement"—presumably in pre-existing Arab States as well as within Israel—was essential for the peace and stability of the area. Since 1948, the General Assembly has adopted many resolutions which typically note with deep regret that repatriation or compensation has not been effected. Resolution 242 (1967), adopted by the Security Council, is couched in more general terms—it only affirms "the necessity of achieving a just settlement of the refugee problem." In the current Middle East peace process, based on resolution 242, finding a just solution to the refugee problem is addressed both in the bilateral and multilateral talks. The two questions of compensation (integration of the refugees) and repatriation remain unresolved.

102. Language similar to General Assembly resolution 194 (III) can be found in the relevant resolutions on Afghanistan and Cambodia. Recently, addressing the situation of human rights in the territory of the former Yugoslavia, the General Assembly reaffirmed the right of all persons to return to their homes in safety and dignity. Likewise, the Commission on Human Rights stressed a few months ago the right of any victim [of ethnic cleansing] to return to their homes. In contrast to the resolution on Palestine, these resolutions are mostly silent on the question of compensation[121] except to the extent that such a notion of compensation is implicit in the call made in those resolutions that returning refugees should recover their assets.

103. Thus, in numerous resolutions adopted by the General Assembly with regard to the population transfer and implantation of settlers in Cyprus,[122] the call was made for the return of all refugees to their homes in safety and to settle all other aspects of the refugee problems. They should be able to recover their former assets, in particular their homes and other land owned by them at the time of their departure. In any assessment of

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[120] For a fuller treatment, see Donna Arzt and Karen Zagaib cited supra, note 54.

[121] The Special Rapporteur is grateful to Professor Christian Tomuschat for providing him with the text of his paper, "State responsibility and the country of origin", presented at the colloquium organized by the Graduate Institute of International Studies and UNHCR on "The problem of refugees in the light of contemporary international law issues" (Geneva, 26-27 May 1994), in which this question is addressed in greater detail.

[122] E.g. resolutions 3395 (XXX) of 25 November 1975, resolution 34/30 of 20 November 1979 and 37/253 of 13 May 1983, and Commission on Human Rights resolution 4 (XXXII) of 13 February 1975.

compensation, it is important to keep in mind that the situations giving rise to population transfer vary enormously and it is not inconceivable that compensation might operate to the detriment of the rest of the population who have remained in the country but who are innocent of the activities of the "criminal regime" that caused the population transfer. Thus, for example, a compensation claim on behalf of those who were transferred from South Africa by the former apartheid regime would today constitute a burden against the whole population of South Africa.

104. The last point on compensation is that after an extensive review of practice and doctrine, the Commission came to the conclusion that "economically assessable damage" covers, *inter alia*, damage caused to the State through the persons, physical or juridical, of its nationals or agents (so-called "indirect" damage) to the State. According to the commentary, this class of damage embraces both the "patrimonial" loss sustained by private persons, physical or juridical, and the 'moral' damage suffered by such persons.[123]

105. It must be pointed out, however, that although the injury is caused to private persons, the ILC draft views the responsibility relationship within an exclusively inter-State model. The standing of the individual to obtain effective remedies against other States, including his own, is essentially outside the scope of State responsibility, as codified by the ILC. As indicated above (at para. 88), the entitlement of the individual to obtain reparation (including compensation) is still unclear.

106. This is mainly the case because human rights treaties are implemented through national legislation. In addition, only when such treaties include provisions allowing individuals to seek a remedy from an international body does the relationship go beyond the confines of domestic law. It is, of course, encouraging that out of [167 States parties to the International Covenant on Civil and Political Rights (ICCPR), 116 State parties have ratified and an additional 35 States are signatories the First Optional Protocol addressing "effective remedy" under Article 2 of the ICCPR.][124] The Human Rights Committee, which has interpreted broadly the provisions of the Covenant that have a bearing on compensation (arts. 9 (5) and 14 (6)), and relying on article 2 (3), which provides that an individual whose rights under the Covenant have been violated must be given an effective remedy, has not hesitated; e.g., in the case against Paraguay, from stating that the State was under an obligation "to provide effective remedies to the victim."[125]

107. Again, one may discern a nebulous protection under the European Convention of Human Rights (art. 50) which stipulates that the Court shall, "if necessary, afford just satisfaction to the injured Party" on condition that the international law of the defendant

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[123] A/48/10, pp. 180–81.

[124] Updated to 2022. United Nations Treaty Collection, "Optional Protocol to the International Covenant on Civil and Political Rights," https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&clang=_en.

[125] The line of reasoning of the Committee has, however, been criticized on the grounds that remedy does not correspond to the French and Spanish texts: recours and recorso. See *supra*, note 60.

State allows only partial reparation to be made for the consequences of the unlawful conduct complained of and found to exist.

108. Similarly, the American Convention on Human Rights makes it incumbent on the Inter-American Court to rule, "if appropriate," that the consequences of the measure or situation that constituted the breach of such a right or freedom be remedied and that fair compensation be paid to the injured party.

109. At any rate, while the law of human rights is in constant development by these bodies, it would not escape the reader that, whether in the Covenant or in regional treaties, too much discretion is left to the appropriate body to allow for an entitlement of individuals to be sought with the necessary certainty.

110. Reverting to the forms of reparation, it may be observed that in addition to cessation, restitution in kind and compensation, the injured State is entitled in certain circumstances[126] to obtain satisfaction, which is the third form of reparation. Satisfaction may take a number of forms: an apology, nominal damages, damages reflecting the gravity of the injury, and disciplinary action and/or punishment of officials or private persons when the wrongful act arises from serious misconduct of private persons or criminal conduct by officials.

111. Satisfaction is an exceptional remedy and strongly affects the domestic jurisdiction of the wrongdoing State, while, arguably, the responsibility relationship is still delictual and not criminal, even when satisfaction is provided for as a remedy. Satisfaction carries an "afflictive nature" and borders on the consequences normally associated with crimes. Given the fact that it can be, and has been, abused by strong States,[127] the Commission sought to guard against such abuse by providing, in paragraph 3 of article 10, that the right to obtain satisfaction "does not justify demands which would impair the dignity of the State which has committed the initially wrongful act." While not unaware of the possible abuse of the remedy of satisfaction, the fact that it contemplates disciplinary sanction against criminal officials is welcome from the point of view of affording greater protection to human rights victims. Lastly, if the consequences of crimes should be developed fully by the Commission, it is likely that the exception contained in paragraph 3 of article 10 may be limited or eliminated.

112. The fourth and last remedy for an internationally wrongful act is assurances and guarantees of non-repetition.[128] Under this remedy, certain conduct may be required of the wrongdoing State; e.g., the adoption or abrogation of specific legislative provisions. Thus, for example, in the case against Uruguay, the Human Rights Committee, in addition

[126] Article 10, A/48/10, p. 143.
[127] A/48/10, p. 209.
[128] Article 10 *bis*, *ibid*. p. 210.

to demanding compensation for the victim, expressed the view that Uruguay is under "an obligation ... to take steps to ensure that similar violations do not occur in the future."[129]

113. We have dealt so far with the so-called "substantive" consequences of an internationally wrongful act. Given the lack of an effective international machinery to obtain the remedies dealt with above, an injured State may have to resort to unilateral countermeasures to compel compliance with the obligation breached. Such countermeasures, also known as reprisals, are treated in the International Law Commission's draft under the heading of "instrumental consequences."

114. Countermeasures are a controversial concept. By their nature, they are forms of self-help detrimental to the progress of the international society towards the institutionalization of the rule of law at the international plane. On the other hand, they constitute, in many cases, the only available sanction to ensure compliance with international law obligations. Although the development of the concept is still at an early stage in the draft, it can be discerned that while the Commission will include the concept in the draft - thus recognizing the legitimacy of an unpleasant, but all-too-often resorted to, measure in international relations - it will do so under conditions aiming at regulating their operation so as to reduce the possibilities of abuse by linking them to settlement of disputes procedure; imposing a limitation of proportionality on their operation; and prohibiting certain countermeasures.[130] What concerns us in particular in the area of prohibited countermeasures is the protection that

> An injured State shall not resort, by way of countermeasure, to:...(c) any conduct which (i)is not in conformity with the rules of international law on the protection of fundamental human rights.[131]

115. Thus, the mass expulsion of populations by way of countermeasures to an earlier population transfer, or indeed by way of countermeasure, to a breach in a different area of obligation is prohibited.

116. The question may arise whether the well-known cases of forcible population transfer treaties could not be viewed as legitimization of a process of countermeasure *ex post facto*, or during the process of population transfer. In view of the absolute prohibition of such transfers under the draft article, which reflects the fact—according to the fourth report of the ILC's Special Rapporteur—that limitations to the right of unilateral reaction to intentionally wrongful acts have acquired in our time, thanks to the unprecedented development of the law of human rights, a degree of restrictive impact which is second only to the condemnation of the use of force, it is now more doubtful that such treaties would, in our time, be valid.

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[129] Decision of 23 July 1980, para. 19 Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 40. (A/35/40).

[130] Eliza Fitzgerald, "Helping States Help Themselves: Rethinking the Doctrine of Countermeasures," *Macquarie Law Journal* 16 (2016), 67–87, http://classic.austlii.edu.au/au/journals/MqLawJl/2016/5.pdf.

[131] As contained in draft art. 14 proposed by the International Law Commission Special Rapporteur Gaetano Arangio-Ruiz, Fourth report on State responsibility, A/CN.4/444 and Add.1–3, paras. 80 and 96, https://www.ilsa.org/Jessup/Jessup15/ILC%20Commentary%20on%20Countermeasures.pdf.

117. So far, the responsibility relationship has been dealt with from a bilateral perspective. It is often the case, however, that the rights of more than one State might be infringed, either equally or differentially (indirectly). Apart from the principal victim, other States may be called differentially injured in view of the fact that the breach is of an *erga omnes* obligation and it should be remembered that human rights violations are violations by definition of *erga omnes* obligations. In such cases, it seems that there is a right to ask for cessation and guarantees of non-repetition with a view to the pursuit of the common interest affected by the breach. It is doubtful that States other than the principal victim may ask for pecuniary compensation. They may, according to some writers, ask for restitution in kind. The situation becomes problematic when the principal victim accepts compensation instead of restitution in kind. Should other States insist on restitution in kind? Equally problematic is the "faculty" to resort to countermeasures when the principal victim has accepted restitution in kind, or compensation. To allow for this would mean never-ending disputes and the subjugation of the wrongdoing State to impossibly severe consequences, but to deny them would be to reduce the responsibility relationship to a bilateral content, when community interests are clearly breached.

118. The problem becomes more complicated as the breach moves from delictual responsibility to a criminal one. It is too early to tell what solution the Commission will ultimately adopt, but it can be argued that, as the seriousness of the breach increases, it is reasonable that bilateralism of the responsibility relationship should be reduced. Thus, in a situation of population transfer amounting to a crime, the fact that the principal victim accepted compensation should not, in principle, bar other States from insisting on restitution in kind and satisfaction, including the punishment of the criminal officials.

119. In the case of crimes, there is always a plurality of States for, by definition (under art. 19 of Part I), a crime is an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental rights of the international community that its breach is recognized as a crime by that community as a whole.

120. Among the list of crimes contained in article 19, subparagraphs (b) and (c) of paragraph 2 speak of a serious breach of the right of self-determination, such as the establishment or maintenance by force of colonial domination, and a serious breach of the rights of the human being, such as slavery, genocide and apartheid.

121. Who should decide whether a crime exists is an equally difficult problem. Initially at least, the principal victim would do so. At any rate, it would have to qualify the action as a wrongful action. Ideally, of course, the International Court of Justice should do so, but its ability to do so is impaired by the essentially voluntary basis of its jurisdiction. The Security Council could be empowered to do so provided its determination is subject to judicial scrutiny and review by the International Court. The solution chosen will lie more in the realm of progressive development than of codification of existing law.

122. The existence of these possibilities highlights the complexity of the problems involved in delineating the consequences of international crimes. At this stage of the Commission's work, it is difficult to come to any final conclusions.

123. This notwithstanding, it is possible, on the basis of this discussion of State responsibility, to arrive at the following tentative conclusions:

1. The individual entitlement to seek effective remedies directly is still at a nascent stage of development. Even when such remedies may be obtained, e.g. under the Optional Protocol to the International Covenant on Civil and Political Rights, there is no certainty of the remedies.
2. The rules of State responsibility may operate to fill this gap in the protection of human rights. Their main disadvantage, however, is that they operate at the inter-State level and have been designed to include all wrongful acts, not only human rights violations which may require a differentiated regime to take into account the complexity of the situations created by human rights violations, e.g. the flexibility with regard to the remedy (compensation rather than restitution in kind) may have to be restricted in the case of human rights violations.
3. Mass forcible population transfer appears in certain circumstances to qualify as an international crime carrying all the consequences of crimes. These consequences have still to be worked out with greater clarity by the International Law Commission.
4. In other circumstances, such transfers, while not crimes, nevertheless constitute ordinary wrongful acts. This part, more developed by the ILC, has been described in greater detail in this chapter.
5. In yet different situations, a population transfer may be carried out in situations when responsibility is precluded; e.g., compelling national interest or military necessity. Such transfer nevertheless causes injurious consequences to the population or group in question. As a matter of equity, innocent victims should not be left to bear their loss alone. A responsibility for injury, rather than fault, could be contemplated, but this will cause an infusion of a greater amount of progressive development than most States are ready for."[132]

VII. Remedies

60. Population transfers engage both state responsibility and the criminal liability of individuals. Moreover, according to the principle *ubi jus, ibi remedium* (where there is a law, there is a remedy), it is important that certain remedies are available to the survivors and that victims of population transfers are entitled to appropriate remedies.

The heading under which such remedies can be considered is *restitutio in integrum* which aims, as far as possible, at eliminating the consequences of the illegality associated with

[132] "Human rights and population transfer," Final report of the Special Rapporteur, Mr. al-Khasawneh, E/CN.4/Sub.2/1997/23, 27 June 1997.

particular acts such as population transfer and the implantation of settlers. A crucial aspect of this involves the right to return to the homeland or the place of original occupation in order to restore the status quo and to reverse the consequences of illegality. This right is recognized, for example, in relation to Palestinians, in the Dayton Agreement, and Agreement on "Deported Peoples" of the Commonwealth of Independent States; it establishes a duty on the part of the State of origin to facilitate the return of expelled populations.

61. *Restitutio in integrum* would also involve the payment of compensation to the victims and survivors of population transfers. The Inter-American Court of Human Rights has stated that the compensation due to victims or their families must attempt to provide *restitutio in integrum* for the damages caused by the measure or situation that constituted a violation of human rights, and that the desired aim is full restitution for the injury suffered. The Court indicated that where this is impossible to achieve, it is appropriate to fix payment of fair compensation in sufficiently broad terms, in order to compensate, to the extent possible, for the injury suffered.[133]

62. It follows that the responsibility to compensate upon lies with the party responsible for the act of population transfer. In the case involving the displacement of Miskito Indians, the Inter-American Court held that the Nicaraguan Government had not only to assist in the resettlement of displaced persons who wished to return to their former lands, but also to pay them adequate compensation for the loss of their property. [1]/ The European Court of Human Rights has found Turkey to be responsible for the violation of the right to the peaceful possession or enjoyment of property by virtue of its occupation of northern Cyprus and required it to compensate the victims of such violations. [1]/ In a case involving fighting between Turkish armed forces and Kurdish separatist guerrillas, the European Court of Human Rights held that Turkey had violated the European Convention on Human Rights because its forces had destroyed the village of Kelekci in the south-east of the country in 1992 and 1993. The court found that the deliberate setting alight of the plaintiffs' houses was a grave violation of their right to respect of their family life, home and property. It ordered Turkey to pay the applicants a sum covering costs and expenses and recommended negotiations on further compensation.[136]

63. The problem of remedies summarized in the previous paragraphs was more fully dealt with in the progress report. What is important to emphasize here is that the suggestion that *restitutio in integrum* should not always be insisted on touches on the fundamental question of the innate antagonism between peace and justice. Obviously *restitutio in integrum* is the most just remedy because it seeks to wipe out the consequences of the

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[133] Inter-American Court of Human Rights, *Rodriguez v. Honduras*, Compensatory Damages Judgement of 17 August 1990, p.90.

[134] Organization of American States, "Report on the situation of human rights of the Nicaraguan population of Miskito origin" (OAS/Ser.L/V/11/62), doc. 10, Rev.3, 1983, p. 21.

[135] See *Loizidou v. Turkey (Merits)*, *op. cit*.

[136] European Court of Human Rights, Judgment of 19 September 1996.

original wrong. On the other hand, peace is ultimately an act of compromise. To put it differently, peace is by definition a non-principled solution reflecting the relative power of the conflicting parties, or simply the mere realization that no conflict, no matter how just it is perceived to be, can go on forever.

In reality, therefore, while the primacy of *restitutio in integrum* has to be continuously reaffirmed, most conflicts end with situations in which some form of pecuniary compensation—sometimes in the form of development aid—is substituted for the right of return. Only time can tell whether such solutions will withstand the test of durability without which peace becomes a formal truce.