

**Internally displaced persons
and the right to housing and property restitution**



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Abstract

This report examines the situation of internally displaced persons in terms of international law, with the right to housing and property restitution as the main concern. This issue is very topical at the moment, as there are over 25 million IDPs in the world today and the number is not decreasing, quite on the contrary. First of all, the definition of an IDP is under examination, it is necessary to begin with studying the distinctive features of internal displacement. IDPs and refugees seem to be two fairly similar categories of persons who need protection; therefore the issue of eventual similarities and differences between IDPs and refugees will be studied. In this connection, the question whether IDPs should have a specific legal status under international law, like refugees have, is considered. The issue of who bears the responsibility for IDPs leads to the question when does internal displacement qualify as a crime under international law. The third chapter of the report focuses on giving the essential background information related to the case studies of Chechnya in the Russian Federation and Liberia. These countries have been chosen as case studies because the civilian population in both countries has suffered from long and violent armed conflicts, which have caused massive displacement. The reasons leading to internal displacement will be discussed and compared.

The fourth chapter discussed the international legal framework in the form of international human rights law and international humanitarian law. In chapter five, the focus will be on some of the most significant rights of IDPs. These rights are the right to life, the right to be free from discrimination, the right to return and finally, the crucial right to housing and property restitution. The protection of these rights in the case study countries is then discussed in more detail after the general legal protection has been described. Women as a special category of internally displaced persons is discussed in a separate chapter, because women represent the majority of those displaced and they are also the ones who suffer the most during conflict situations. Women's special vulnerability to sexual abuse is a serious problem that merits to be examined in detail.

The report concludes that the definition of an IDP is well covered by the definition in the Guiding Principles on Internal Displacement, but it does not seem necessary to create a specific legal status for IDPs. International law provides the same rights for everyone, including

internally displaced persons, but there are certain rights relating to IDPs that need to be addressed more effectively. Such rights are the right to a safe return and the right to housing and property restitution, which are essential for those displaced attempting to return to their original areas of residence. The report notes that various types of human rights violations have been committed against IDPs in both of the studied countries, ranging from killings to rape, and there seems to prevail a climate of impunity, as the perpetrators have not so far been brought to justice. The plight of women has been especially cruel, as rape and sexual abuse have occurred on a massive scale, particularly in Liberia but also in Chechnya. The return process in Liberia has begun and the transitional government seems committed to establishing sustainable peace and reconciliation in the country, with elections coming up in the fall. While the civil war in Liberia has ended and the reintegration process of IDPs is underway, the developments in Chechnya are not as positive. Human rights violations still occur in Chechnya and the Russian Federation has been recently judged guilty of breaching the European Convention of Human Rights by the conduct of its forces in Chechnya. In other words, Chechnyan IDPs may have to wait for a long time before they can safely return. Both countries face difficulties with protecting housing and property rights of IDPs, as the destruction in towns and villages has been overwhelming. The Liberian conflict was closely connected to the civil wars in neighbouring states. Similarly, as regards Chechnya, currently the conflict and its possible expansion to neighbouring areas pose a real threat to human rights protection in the Russian Federation.

ABBREVIATIONS

CEDAW	Convention on the Elimination of all forms of Discrimination Against Women
CERD	Convention on the Elimination of all forms of Racial Discrimination
CIS	Commonwealth of Independent States
ECHR	European Convention on Human Rights and Fundamental Freedoms
ECOMOG	Economic Community Military Observer Group
ECOWAS	Economic Community of West African States
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICTY	International Criminal Tribunal for former Yugoslavia
IDP	Internally displaced person
ILO	International Labour Organization
LURD	Liberians United for Reconciliation and Democracy
MODEL	Movement for Democracy in Liberia
NPFL	National Patriotic Front of Liberia
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNMIL	United Nations Mission in Liberia
UNMIK	United Nations Mission in Kosovo
UNOMIL	United Nations Observer Mission in Liberia

1. Introduction

The question of internally displaced persons (hereinafter IDPs) has become the subject of international debate as one of the crucial issues having humanitarian, human rights and political implications. This is because forced displacement as such violates human rights and most often takes place in armed conflict situations. There are estimates according to which 20 to 30 million people in the world today have been forcibly displaced within the borders of their state and are in acute need of protection and assistance.¹ The growing number of IDPs and the international concern for preventing massive refugee flows has brought this issue into debate.² Even though there is now more attention focused on this topic, it does not mean that the situations causing forced displacement would be somehow easier to solve; quite the opposite, because civil wars and ethnic conflicts that cause people to flee are often prolonged and leave deep wounds in the society, thus making the return and reintegration process difficult. There is evidently a clear correlation between internal displacement, violent conflicts and human rights abuses in a given state. The reasons why the number of IDPs has increased are various; among them are the continuous global mobility and the fact that civilians are directly targeted in armed conflicts; thus displacement becomes more or less an actual aim of the conflict.

Persons, who have been forced to flee as the consequence of an armed conflict, are not always able to return to their original place of residence even though the conflict has ceased and peace agreements have been signed. They may remain displaced simply because the return is not possible for various reasons, such as the unstable security situation, complete destruction of housing, basic services and infrastructure not to mention problems in reclaiming their property. Living outside of their familiar surroundings leaves IDPs vulnerable to discrimination, hatred and few possibilities to go on with their lives. They may be deprived of education and employment, with only humanitarian aid to help them, and even that can be problematic if the home country does not allow for humanitarian agencies to get involved.

¹ Estimates on the number of IDPs vary depending on the organization, but the figure is usually set between 20 and 25 million, for instance the Danish Refugee Council's IDP project's statistics in 2004 counted the world's IDP population to be 24,6 million, latest statistics available at:
http://www.idproject.org/press/2005/Global_Overview_2004.pdf

² Roberta Cohen & Francis M. Deng 1998, *Masses in flight*, p.3.

IDPs do not enjoy specific protection under international law. The principles of human rights and humanitarian law evidently apply to them during conflict situations, but their specific needs tend to be neglected. The very experience of having to flee from one's home is traumatic and usually multiplied with various types of human rights violations, such as killings, kidnappings and sexual abuse that occur during armed conflicts. Women are especially vulnerable to sexual abuse during displacement situations and their situation requires special attention.

This paper aims to clarify first the definition of an IDP and then to discuss the available legal protection of IDPs. Then some of the essential human rights relating to internal displacement will be examined, such as the right to return and the right to housing and property restitution. The particular situation of women during displacement is also studied. Two case studies, Chechnya in the Russian Federation and Liberia, will be examined in order to demonstrate what internal displacement has meant in these two contexts; some comparisons will also be drawn, although the situations differ somewhat. Finally, conclusions and recommendations for further enhancement of protection for IDPs are made.

2. Quest for a definition – who are the internally displaced?

Before further examining the rights and protection of IDPs, it is necessary to focus on who they are and how an internally displaced person is defined in terms of international law. The reason why a common definition was deemed necessary within the United Nations was the thought that it would ease the gathering of statistical data, help to determine the needs of IDPs as well as help in reviewing the legal norms applicable to them and to finally help to identify the possible gaps in legislation.³

Categorising internally displaced persons has become a concern for the international community, as there has been certain uneasiness with the definition of refugee and how it excludes certain groups of persons from its sphere. Categories as such can be meaningless and

³ Francis M. Deng, Preface to the Guiding Principles on Internal Displacement, in Walter Kälin, Guiding Principles on Internal Displacement, Annotations, (Washington D.C: American Society of International Law, 2000) pp. v-viii, at p.v.

even negative to the extent that labels are reductive and can mask the heterogeneity of a group, but it is the corresponding entitlements that give particular significance to categories.⁴ Definitions are necessary for legal purposes. Barutciski argues that the reality of displacement is not the same with the reality of refuge, the important distinction being the fact that refugees are outside their country and thus in a fundamentally different situation in the eyes of the international legal order.⁵ One could argue that IDPs would not benefit from the types of rights afforded to refugees since they are still in their country of origin and that implies that the state shall protect them and respect their human rights. Refugee rights include basic socio-economic rights that allow refugees to survive in a foreign state where they do not have citizenship rights. Such rights would be redundant if they were granted ‘a second time’ for citizens in their own country.⁶ Barutciski further argues that evidently, the Refugee Convention is not applicable to IDPs since the Convention is based on the notion of having fled one’s country.⁷

2.1 Proposed definitions

Although the conditions in which persons are forced to flee their homes differ, there are some common features related to all IDPs. These features are visible in the definition of IDPs proposed by the former Special Representative on Internally Displaced Persons, Mr. Francis Deng in the Guiding Principles on Internal Displacement⁸, which states that:

“Persons or groups of persons who have been forced or obliged to flee or leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalised violence, violations of human rights, or natural or human-made disasters, and who have not crossed an internationally recognised state border”.

The defining elements in these sentences are the facts that the *movement has been forced* or otherwise *involuntary* and the *persons remain within national borders*. This is the broadest definition in regional or international level, but as it is descriptive, it can be broad. This

⁴ Michael Barutciski 1998, Tensions between the refugee concept and the IDP debate, *Forced migration review* 3, p. 11.

⁵ Barutciski 1998, p.12.

⁶ Barutciski 1998, p.12.

⁷ Ibid.

⁸ Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2, 11 February 1998, par.2. Hereinafter Guiding Principles. Francis M. Deng served as the Representative of the Secretary-General on Internally Displaced persons from 1992 until 2004. Walter Kälin was appointed as Representative on the Human Rights of the Internally Displaced Persons 21 September 2004.

definition includes the major causes of displacement; armed conflicts, generalised violence, human rights violations and disasters. It is drawn partly from the broad refugee concepts of the Organization of African Unity⁹ and the Cartagena Declaration on Refugees¹⁰.

As for the definition of who qualifies as an internally displaced person, the current definition of the Guiding Principles is widely accepted.¹¹ The wording “in particular” seems to imply that there still is room for manoeuvre in relation to future situations.¹² When considering the part whereby persons uprooted due to natural or man-made disasters are included, there is clear controversy in relation to the refugee definition. According to the refugee definition, a person fleeing the consequences of a natural catastrophe would not qualify as a refugee if he would cross the border. Internal displacement can be defined as such movement of persons that takes place against their own will inside their own country.¹³ Being relocated without giving consent and within the borders of the state of origin clearly violates the right to freedom of movement and the right to choose one’s residence.

Another tool for identifying or defining the IDPs is the London Declaration of International Law Principles on Internally Displaced Persons, adopted by the International Law Association in 2000. The Declaration addresses, together with the Declaration of principles of international law on mass expulsion of 1986 and Declaration of principles of international law on compensation to refugees of 1992, forced movement from the perspective of the responsibility of the state of origin. Through dealing with the root causes of displacement and the status of IDPs, the Declaration broadens the concerns of international law to include all persons who

⁹ The Convention Governing the Specific Aspects of Refugee Problems in Africa defines a refugee in the same terms as the refugee convention, see note 9 below, and adds the following features in its Art.1.a.2:” the term refugee shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country or origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”. Entry into force 20 June 1974, 1001 UNTS 45.

¹⁰ The Cartagena Declaration on Refugees defines refugee in par.3:”..who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.”. 22 November 1984, annual report of the Inter-American Commission on Human Rights, OAS Doc. OEA/Ser.L/V/II.66/doc.10, rev.1. See also Cohen and Deng, 1998, *supra* (note 2) p.16.

¹¹ Walter Kälin, *Guiding Principles on Internal Displacement*, 2000, p.vi.

¹² For further remarks; see David Korn 1999, *Exodus within borders*, Brookings Institution Press, p. 14. Korn argues that the inclusion of “in particular” does not arbitrarily exclude any serious future situation.

¹³ Maria Stavropoulou 1998, Displacement and human rights: reflections on UN practice, *Human Rights Quarterly* Vol. 20 No 3, p. 518. Stavropoulou has developed a glossary for the various terms used in the context of displacement related issues, see the above-mentioned article.

have been forcibly uprooted from their homes, whether or not they have crossed borders.¹⁴ This declaration can be seen as complementary to the Guiding Principles.

The London Declaration does not include the victims of natural or man-made disasters *per se* in its definition of an IDP in contrast to the Guiding Principles. This is because disaster-related problems are associated with the economic and social sphere and not with the civil and political sphere; therefore IDPs untouched by civil or political problems do not find themselves in a refugee-like situation.¹⁵ However, the IDP definition in the Declaration extends to cover persons who are “internally displaced by whatever causes, such as natural or man-made disasters or large-scale development projects, whenever the responsible state or de facto authority fails, for reasons that violate fundamental human rights, to protect and assist those victims”.¹⁶

2.2 IDP v. refugee

What is then the distinction between a refugee and a person who has been internally displaced? Internally displaced persons differ from refugees under international law in terms of protection mechanisms. Refugees are protected under the 1951 Refugee Convention, which grants them a special status under international law.¹⁷ The refugee concept is closely linked to two issues; being outside one’s own country and having fled due to well-founded fear of persecution. It can be argued that refugees and IDPs should only be treated ‘equally’ if their factual legal situations were comparable and that is not the case. Although these two categories of persons often face same types of threats and suffer from same types of violations of their human rights and freedoms, the separating factor is still the issue of actually crossing the border. Because IDPs are displaced within the borders of their own state, they are distinct from refugees. However, from a legal perspective, there seems to be no need to create a new legal status for the internally displaced. So one could argue that the definition of internally displaced persons does not exist

¹⁴ Luke T. Lee, The London declaration of international law principles on internally displaced persons, in *American Journal of International Law*, Vol.95, No 2, April 2001, p 454.

¹⁵ *Ibid.*, p.455.

¹⁶ Article 1.2 of the London Declaration.

¹⁷ Convention relating to the status of Refugees, art.1:”...the term refugee shall apply to any person who..owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.”, adopted 28 July 1951, entry into force 22 April 1954, 189 UNTS 150.

to give them a special status under international law but merely to ensure that their specific needs are adequately addressed.¹⁸ The term ‘internally displaced’ is of descriptive character and it does not confer any rights specific to the situation of IDPs unlike the status of refugee. Although parallels between IDPs and refugees were drawn in certain respects, IDPs were “not confined into a closed status” because it could potentially undermine the exercise of their human rights in a broader manner.¹⁹ The idea of ‘isolating’ IDPs into a category is perhaps not always so helpful, as human rights are universal and apply without distinction.

There are, however, arguments questioning the wording of the refugee definition. One claim is based on the fact that there are many more IDPs as compared to the number of refugees and that they leave their homes for the same reasons.²⁰ Since the root causes of both displacement and refuge are more or less the same, IDPs should not be excluded from the refugee definition. Another argument is that IDPs suffer more than refugees because refugees have crossed the border to ‘comparative safety’ and they are protected by international treaties and assisted by international organizations.²¹ On the one hand this is true; IDPs remain in their own country without effective protection or assistance, because their own government is supposed to protect them and yet that same government can in fact be the persecutor. Even though refugees and IDPs are two distinct categories, the guidelines and principles regarding refugees could be applied to internally displaced analogously.²²

Lee argues that using the factor of border crossing as the most important criterion for distinguishing between refugees and internally displaced persons, and hence determining whether they qualify for international aid, may be faulted on historical, practical, juridical and

¹⁸ Nils Geissler, “The International protection of internally displaced persons”, *International journal of refugee law*, Vol.11, No.3, (1999), p. 452.

¹⁹ Volker Turk and Frances Nicholson, “Refugee protection in international law: an overall perspective”, in: Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee protection in international law, UNHCR’s global consultations on international protection* (UK: Cambridge University Press, 2003), pp. 3-45, at p.27.

²⁰ Luke T.Lee, “The London Declaration of international law principles on internally displaced persons”, in: Musalo, Moore, Boswell (eds.), *Refugee law and policy – a comparative and international approach* (Durham: Carolina Academic Press, 2001), pp. 942-947, at p.945.

²¹ *Ibid.*

²² Report of the Representative of the Secretary General, Mr. Francis Deng, Further promotion and encouragement of human rights and fundamental freedoms, including the question of the programme and methods of work of the commission, human rights, mass exoduses and displaced persons, E/CN.4/1994/44, 25 January 1994, par. 27. And Ingrid Westendorp, “Housing rights and related facilities for female refugees and internally displaced women”, *Netherlands Quarterly of Human Rights*, Vol.19, No. 4, (2001), p.411. She argues that this is especially true for women as their situation, whether refugees or internally displaced, is very similar.

human rights grounds.²³ However, border crossing is not the only factor separating refugees and IDPs. While the IDP-definition included disasters, both natural and man-made, such events are not grounds for granting refugee status. The issue whether natural and man-made disasters should at all be included in the IDP- definition, has been debated; for instance, Cohen and Deng argue that it should be included because in some cases where a natural disaster has occurred, governments have reacted by discriminating certain ethnic or political groups and violated their human rights.²⁴ In other words, to include persons displaced due to natural catastrophes is to highlight their special need for protection.

However, this point of view has been contested by arguing that displacement due to natural disasters raises only few human rights question since persons do not find themselves in a refugee-like situation as would be the case in an armed conflict, for instance, and thus the problems they have are mostly related to economic and social rights.²⁵ Another argument for this would be that natural disasters evidently lack the element of coercion. The same is valid for persons displaced due to man-made disasters, although they might be in need of protection and assistance if the government neglects or violates their rights. For instance, dam projects, urban renewal schemes and other development-induced factors can cause involuntary displacement.²⁶ It has been argued that those displaced by natural disasters (usually) receive aid from their own governments and in such cases it is clear that there is no need for international attention.²⁷ However, natural or man-made disasters can occur with elements of racial, social or political causes from which a massive displacement commences. There have also been arguments for including persons who migrate because of extreme poverty and other economic factors but that has not been accepted, since although they face severe problems and their economic rights might be violated, the defining element of coercion is not so clear in this case either.²⁸ In the

²³ Luke T. Lee, Internally displaced persons and refugees: Toward a legal synthesis? *Journal of Refugee Studies*, Vol.9, No 1, 1996, p. 30.

²⁴ Cohen and Deng, 1998, *supra* (note 2), p.17.

²⁵ Nils Geissler, "The International protection of internally displaced persons", *International journal of refugee law*, Vol.11, No.3, (1999), pp. 451-478, at p. 455. See also Walter Kälin, "Legal protection of internally displaced persons – protection in international human rights law", in: Jean-Philippe Lavoyer (ed.), *Internally displaced persons, report of the symposium of the International Committee of the Red Cross* (Geneva: International Committee of the Red Cross, 1996), pp. 15-26, at p.15-16.

²⁶ Robert Muggah, "A tale of two solitudes: comparing conflict and development-induced internal displacement and involuntary resettlement", *International migration*, Vol. 41, No.5 (2003), pp. 5-28, at p.9.

²⁷ Report of the representative of the United Nations Secretary-General, Mr. Francis M. Deng on internally displaced persons, 1995, E/CN.4/1995/50, par.119.

²⁸ Cohen and Deng, 1998, *supra* (note 2), p.17.

final version of the definition, poverty or economic reasons were not included in the IDP-definition.

Refugees have crossed the border while IDPs stay in their respective country. However, both refugees and IDPs share the feature of involuntary movement; both have been forced to leave their homes behind, often in similar circumstances. In fact, IDPs do not enjoy any type of special status while the refugees have that special status. Why is that? The answer is in the fact that all persons who are still in their country of origin or of residence enjoy all the same human rights as others do and thus do not require any special status. Their rights do not cease to exist when they are displaced and the same state is subsequently still responsible for protecting their rights and freedoms.

2.3 State responsibility for IDPs

The most important duty stemming from state sovereignty is responsibility for the population. It is from this that the legitimacy of a government derives, regardless of the political system or the ideology behind it. The relationship between the controlling authority and the population should in the ideal scenario ensure the enjoyment of the highest human rights standards, but at the very least guarantee food, shelter, physical safety, basic health services and other minimum essentials. In addition, in many of those countries where armed internal conflicts take place causing massive displacement, the country is so divided on fundamental issues that legitimacy, and sovereignty, are sharply contested. That is why there is always a strong faction inviting or at least welcoming external intervention; furthermore, in order for a state to live up to these high standards, an effective monitoring system is necessary, which can then hold the sovereign state accountable.²⁹ The principle of national sovereignty as a doctrinal limit to the possibility of joint international action in internal matters is diminishing as more and broader grounds for intervention become accepted.³⁰ During an intervention, the relationship between national and international legal systems can be problematic as imported, international norms struggle with possibly contradictory national ones. Subsequently, there arise issues of legitimacy and acceptance.³¹ The former Special Representative for Internally Displaced Persons, Mr. Francis

²⁹ Francis M. Deng 1995, *Frontiers of sovereignty- a framework of protection, assistance and development for the Internally Displaced*, *Leiden journal of international law*, vol.8, No.2, p. 285-286.

³⁰ Marcus Cox 1998, *The right to return home*, *ICLQ* vol.47, p.629.

³¹ Marcus Cox 1998, p. 630.

Deng, has emphasised state responsibility as regards IDPs. He relies on the explicit recognition of internal displacement as a problem falling under the sovereignty of a state, whereby sovereignty is seen as a positive concept of state responsibility to protect and assist its citizens.³²

Protection against violations of human rights and humanitarian law and the right to humanitarian assistance are crucial for IDPs when the state and de facto authorities have failed in providing that protection. These rights are politically sensitive, not least by the fact that there lies the possibility of intervention from third parties if the state does not provide protection and aid to its own citizens. Such a sensitive right has not been explicitly addressed in the Guiding Principles or in the London Draft Declaration. As for refugees, their protection and assistance needs can be met due to their special status under international law without violating the sovereignty of the state of origin. However, physical protection and humanitarian assistance cannot be given to displaced persons if the state in question refuses such aid; the alternative being territorial intervention. Even NGOs are faced with the same problem; they can be refused access to those who need their help; this has been the case both in Liberia and Chechnya. While the Security Council may use all necessary means to deal with an issue that threatens international peace and security, including such issues that result in internal displacement, such action is a rare exception.³³

Even the Guiding Principles are silent on protection rights that the IDPs could claim against the international community. The Guiding Principles state that the national authorities have the primary responsibility for providing protection and humanitarian assistance.³⁴ Principle 25 notes that international organisations can offer such aid and protection and it urges states to facilitate the work of such organisations.³⁵ Nevertheless, there is no obligation on states to

³² Profiles in displacement: Russian Federation, UN Doc. E/CN.4/2004/77/Add.2, 24 Feb 2004, par.5.

³³ Joan Fitzpatrick 2000, Human rights and forced displacement: converging standards in Bayefsky & Fitzpatrick (eds.) *Human rights and forced displacement*, p.11-12.

³⁴ Guiding Principles, principle 3: "National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction. Internally displaced persons have the right to request and receive protection and humanitarian assistance from these authorities. They shall not be persecuted or punished for making such a request".

³⁵ Guiding Principles, principle 25: "...International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Such an offer shall not be regarded as an unfriendly act or an interference in a State's internal affairs and shall be considered in good faith. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the

accept international aid and protection as there is only the light wording “shall grant passage” and “shall facilitate”.³⁶

2.4 Aid and assistance for IDPs

The level of protection given to IDPs has so far been insufficient. Unfortunately, because there is no particular agency responsible for the issue of internal displacement, the overall response of the international community has been *ad hoc*.³⁷ This is a clear result from the fact that IDPs remain within their own borders and the state is thus responsible; it can be difficult for the international community to interfere with what is an internal matter, and this is even further complicated by the fact that there is no specific agency to assist IDPs. This leads to the question of what is the duty of states to accept and allow humanitarian aid for the IDPs on their territory? If the state cannot protect them with its own resources, can and should the international community interfere if the result otherwise would be a humanitarian crisis? It has been noted that the IDPs do not get same level of assistance as refugees do. For example, the IDPs in Burundian camps did not get the same services that were available across the border in Tanzania for refugees coming from Burundi, for instance health care services, food rations etc.³⁸ This is all linked to the question whether a state that is in fact the driving force behind displacement will actually assist those persons who have had to flee? If the forced displacement is linked to ethnic considerations, there will hardly be motivation for assisting those who are judged to be outside the community and who have been forced out.

The role of the UNHCR is first and foremost to assist refugees, persons who qualify as refugees under international law.³⁹ The UNHCR has been authorised to assist the full range of involuntary migrants, including the victims of all forms of both man-made and natural disasters; moreover, the organisation has been requested to assist refugees who remain within their state of origin, and to contribute to the resettlement of refugees returning home. This can be referred to as the extended mandate of the UNHCR. While this enhanced definition is linked primarily

required humanitarian assistance. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced”.

³⁶ Joan Fitzpatrick 2000, *supra* (note 33), p.12.

³⁷ *Ibid.*, p.4.

³⁸ *Ibid.*, p.12.

³⁹ General Assembly Resolution 428 (v) of 14 December 1950, Statute of the Office of the United Nations High Commissioner for Refugees, art.1.

to eligibility for material assistance, the UNHCR has been authorised with increasing frequency to extend international legal protection to cover also displaced persons within its broader mandate.⁴⁰

Why is it that people become internally displaced although more protection would be available if they were refugees? The reasons are, of course, numerous. It can be difficult to even get to the border of a state merely due to geographical obstacles. It is also common for uprooted persons to seek safety in familiar surroundings, especially for persons from rural areas.⁴¹ Neighboring states might also be reluctant to grant asylum. Therefore, displaced persons might not even have the choice whether to become refugees, the only alternative therefore is to be a displaced person within their state. What is the normative framework, what are the legal instruments protecting IDPs? And subsequently, what are their rights and needs?

2.5 Displacement as a crime under international law

In the beginning, only crimes committed during an international armed conflict were considered as crimes against humanitarian law. The first milestone in the creation of international criminal law was in the aftermaths of the Second World War when the criminal tribunals of Nürnberg and Tokyo were held against the major war criminals. A second major innovation was the adoption of the four Geneva Conventions for the protection of war victims on 12 August 1949.⁴² Within these instruments, the special framework for the prevention and punishment of the most serious violations was created. Nevertheless, these major innovations only dealt with conflicts of international nature. At that time it was generally considered that to extend the system of grave breaches to include internal conflicts would be to interfere in an unacceptable manner on state sovereignty.⁴³ However, today the character of armed conflicts has changed from international to internal and the international community has agreed that the perpetrators of serious violations have to be brought to justice and be held responsible for their acts. There is

⁴⁰ James C. Hathaway 2002, The Development of the refugee definition in international law, the law of refugee status, in Musalo, Moore and Boswell (eds.), *Refugee law and policy – a comparative and international approach*, p. 47.

⁴¹ Cohen and Deng, 1998, *supra* (note 2), p.29.

⁴² I Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, II Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, III Geneva Convention relative to the treatment of prisoners of war, IV Geneva Convention relative to the protection of civilian persons in time of war, entry into force 21 October 1950.

⁴³ Thomas Graditzky 1998, Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts, in *International review of the Red Cross* no 322, p.29.

agreement that universal jurisdiction does exist for two types of offences; genocide and crimes against humanity.⁴⁴

Regarding the crimes against humanity, the UN Secretary-General has in his report on the draft statute of the International Criminal Tribunal for the former Yugoslavia stated that such crimes could take place during an internal conflict or an international conflict.⁴⁵ In the Rome Statute of the International Criminal Court, crimes against humanity include “deportation or forcible transfer of population”⁴⁶. This is then interpreted as meaning “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted in international law”⁴⁷. Article 7 of the Rome Statute defines crimes against humanity as having the characteristics of a widespread or systematic attack directed against any civilian population.⁴⁸ In this respect, an isolated act committed by an individual without connections to a larger organisation could not be defined as a crime against humanity; the act must be of a large and systematic scale.

In order for internal displacement to qualify as a crime against humanity, it has to be forced. In practice, such act of coercion can be difficult to prove. For an act to be deemed as wide spread, it has to involve a large amount of persons, which usually is the case with internally displaced who are forced to leave their homes. And as regards the element of coercion, hardly anyone would leave their home and property behind if it were not a matter of survival; so in other words, displacement most often fulfils the criteria of crime against humanity as set out in the Rome Statute. In this respect, the question of whether to include natural or man-made disasters into the category of forced displacement merits to be discussed.

Even though natural or man-made disasters are external things and can occur unexpectedly, they can still be the first event on the way to forced displacement. When a catastrophe occurs, it can pave the way for harmful human action, which can subsequently cause human rights violations or even cause displacement as such. During a state of national emergency,

⁴⁴ Graditzky 1998, p.29.

⁴⁵ Paragraph 47 reads: “Crimes against humanity were first recognized in the Charter and Judgement of the Nürnberg Tribunal...*Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character.*” (emphasis added).

⁴⁶ Rome Statute of the International Criminal Court, entered into force 1 July 2002, art. 7(1)(d).

⁴⁷ Rome Statute of the International Criminal Court, art.7(2)(d).

⁴⁸ Rome Statute of the International Criminal Court, art.7.1.

derogations can be made to certain human rights in order for the society to survive; this does not exempt the state from fulfilling its duties to protect its citizens. As these derogations take place, they might pave the way for wider derogations and the exception might become the norm, so to say. As for economic factors causing migration, they tend to be a sign of bad governance by the state and implicitly cause displacement. It could be argued that if a state is not capable of protecting its citizens against such poverty that causes them to flee, it has not fulfilled its duties and obligations as a sovereign state. And by failing to protect the citizens, the state actually forces persons to migrate in search for better possibilities for survival. In other words, there can be an element of forced displacement even in cases of natural or man-made disasters. And the situation can be even more aggravated if the derogations from basic rights are only made regarding certain ethnic groups etc. as this can lead to further tensions in the country.

ICCPR, article 4 allows states to unilaterally derogate from a part of its obligations under the Covenant.⁴⁹ However, both the very act of derogation and its material consequences are subjected to a specific regime of safeguards.⁵⁰ The aim of a state declaring a state of emergency must be the restoration of a situation of normalcy. As regards the state of emergency, the Human Rights Committee has in its General Comment 29 addressed the issue in order to assist States Parties to meet the requirements of article 4 in the ICCPR. First of all, the measures that derogate from the provisions of the Covenant must be of an exceptional and temporary nature.⁵¹ In order for a State to invoke article 4, it must be a situation that threatens the life of the nation and the State must have officially declared a state of emergency. This latter requirement is essential for the principles of legality and the rule of law to be upheld when they are most needed, under harsh circumstances. The scope of what amounts to a state of emergency is rather narrow. During armed conflict, international or national, the rules of international humanitarian law become applicable and provide help to prevent the abuse of a State's emergency powers in

⁴⁹ ICCPR art. 4.1 reads: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, *the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant* to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin". (Emphasis added).

⁵⁰ ICCPR art. 4.3 reads: "Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation". (Emphasis added).

⁵¹ Human Rights Committee, General Comment 29, states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), par.2.

addition to the provisions of articles 4 and 5, paragraph 1 of the Covenant. It should be noted that even during armed conflicts, the Covenant requires that measures derogating from its provisions be only allowed *if and to the extent that the situation actually constitutes a threat to the life of the country*. If a state considers invoking article 4 under other circumstances than armed conflict, it should carefully consider the justifications of such an act and why such an act would be necessary and legitimate in such circumstances.⁵²

A fundamental requirement for a state derogating from the provisions of the Covenant is laid down in art. 4.1; that such measures are to be limited to the extent strictly required by the demands of the situation. This requirement has been interpreted by the Human Rights Committee as relating to the duration, geographical coverage and the material scope of the state of emergency.⁵³ The obligation to limit the derogations strictly to those required by the demands of the situations reflects the principle of proportionality, common to derogation and limitation powers.⁵⁴ In addition, the fact that a permissible derogation from a particular provision may, of itself, be justified by the exigencies of the situation does still mean that the specific measures taken pursuant to the derogation must also be necessary in relation to the situation.⁵⁵

In other words, the derogations can be made only to the extent to which they are necessary under the circumstances and the same is valid for the measures taken to implement such derogations. In practice, this means that no provision of the Covenant, even though validly

⁵² Human Rights Committee General Comment 29, states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001), par.3.

The Human Rights Committee has, however, noted on several occasions that states appear to have derogated from the rights provided by the Covenant or that their domestic laws appear to allow for such derogations in situations, which are not covered by art.4 and as mentioned above. For example, in considering the periodic report by Tanzania, the Committee expressed its concern over the fact that the grounds for declaring a state of emergency are too broad and the extraordinary powers of the President are too far-reaching; see Human Rights Committee, Concluding observations on the United Republic of Tanzania 28.12.1992, UN Doc. CCPR/C/79/Add.12, par.7.

⁵³ Human Rights Committee General Comment No 29, states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) par.4.

⁵⁴ Proportionality has been one of the issues raising concern in the examination of the reports by States Parties; see for example the Concluding Observations on Israel, where the Committee notes with concern the still prevailing state of emergency, which has been effective ever since independence. The Committee recommends that the situation be reviewed with the aim of limiting the scope and territorial applicability of the state of emergency and the associated derogation of rights. See the Human Rights Committee, Concluding Observations on Israel, UN Doc CCPR/C/79/Add.93, 18.8.1998, par.11.

⁵⁵ Human Rights Committee, General Comment No 29, states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) par.4.

derogated from, will be entirely inapplicable to the behaviour of the State Party. Any declarations of state of emergency and subsequent measures need to be carefully justified. States need to be able to show that the decision of state of emergency is based on a situation threatening the life of the nation and that all derogations from the provisions of the Covenant are strictly required by the exigencies of the situation.⁵⁶ According to the Committee, the possibility of restricting certain Covenant rights under the terms of freedom of movement (art.12), for instance, is generally sufficient under such circumstances and no actual derogation from the provisions in question would be justified under the exigencies of the situation.

The Committee further states that all derogative measures have to be consistent with the State Party's other obligations under international law, particularly with the rules of international humanitarian law. The Committee also addresses the issue of non-derogable provisions. There is an attempt to enumerate such rights in art.4.1 and it is related to the question whether some human rights obligations have the nature of peremptory norms of international law. The fact that some rights have been proclaimed as being of non-derogable nature is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant (articles 6 and 7). However, some other rights were included in the list of non-derogable rights because it can never become necessary to derogate from these rights during a state of emergency (articles 11 and 18).⁵⁷

To establish grounds for what is a legitimate derogation, one could start by defining what is not. One criterion is in the definition of certain human rights violations as crimes against humanity. According to the Human Rights Committee, "if an action conducted under the authority of a State Party constitutes a basis for individual criminal responsibility for a crime against humanity by those persons committing the act, article 4 of the Covenant cannot be invoked as a justification that a state of emergency would exempt the state in question from its responsibility

⁵⁶ Human Rights Committee General Comment 29, states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) par.5.

⁵⁷ Human Rights Committee, General Comment 29, states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) par.11.

to the act”.⁵⁸ Therefore, the Rome Statute of the International Criminal Court is of importance when interpreting article 4.⁵⁹

3. Background to the case studies

3.1 Background to the conflict in Chechnya

Before examining the international legal framework, the events that have led to internal displacement in Chechnya and Liberia will be described. Since 1989, more than 10 million people have moved across the previously internal borders of the former Soviet Union. After the collapse of the USSR, around 65 million people were left outside of what they had regarded as their ethnic home. The number of various categories of displaced persons is between 3-4 millions; including refugees, asylum seekers, IDPs and others.⁶⁰

Chechens are an ethnically distinct group within the Russian Federation with a language, culture and an Islamic religion.⁶¹ Most Chechens have historically lived in the mountainous area of North Caucasus, Chechnya. The history of armed conflict between Russia and Chechnya began already in the 19th century when the Russian empire expanded into Caucasus. Later, Soviet campaigns to collectivise agriculture and to “russify” the regions in the 1930s instigated armed clashes. Chechens have been displaced even before the current crisis. The armed conflicts culminated in Stalin’s order for the hundreds of thousands of Chechens to be deported in 1944 to Soviet Central Asia.⁶² Those deported were not allowed to return until 1957. Upon return, they found their homes to be occupied by others and were forced to relocate to Grozny in the 1970s, where they could find work in factories.

Internal displacement within the Russian Federation has been linked to the break-up of the Soviet Union in the early 1990s. The North Caucasus became an area of large, forced movements. The collapse of a highly centralised regime was combined with the resurfacing of identity-based political agendas; that produced political and ethnic tensions in various parts of

⁵⁸ Human Rights Committee, General Comment 29, states of emergency, UN Doc CCPR/C/21/Rev.1/Add.11 (2001) par.12.

⁵⁹ See the Rome Statute of the International Criminal Court, articles 6 and 7.

⁶⁰ Council of Europe’s report on the situation of refugees and displaced persons in the Russian Federation and some other CIS countries, Doc. 10118, 25 March 2004, par.8.

⁶¹ Maxine Marcus, Post-conflict justice in Chechnya: faltering justice, 2000, pp. 696-670.

⁶² Mary Holland 2004, Chechnya’s internally displaced and the role of the Russia’s non-governmental organisations, *Journal of Refugee Studies*, p. 335.

the Federation as well as in the newly formed independent states CIS (Commonwealth of Independent States).⁶³ In the CIS-states, the reasons for displacement were linked to unresolved territorial disputes and those displaced belonged to the dominant ethnic group, such as in Abkhazia and South Ossetia in Georgia, where the majority of the displaced were ethnic Georgians; ethnic disputes and unresolved conflicts arose with violent consequences.⁶⁴ In some cases, the Prigorodny region in North Ossetia for instance, it was the minority of Ingush who were displaced.⁶⁵ In the beginning of the conflict in Chechnya, the Russian minority was displaced. After the first war in Chechnya, displacement has been linked to fear of indiscriminate violence and the majority of those displaced have been of Chechen ethnic origin.⁶⁶ The current number of IDPs in the Russian Federation is estimated to be 340 000 of which over 60% are IDPs in Chechnya.⁶⁷

3.2 The first Chechen war

After the collapse of the Soviet Union, Chechnya, one of the Soviet republics, did not gain the independence it had wished for. In 1990, Chechen National Congress was convened and it elected Yokhar Dudayev as the chairman of the executive committee.⁶⁸ National movement rose in the republic and on 6 September 1991, the Congress of the Chechen People proclaimed sovereignty. Presidential elections were held in October 1991 and Dudaev was elected the first president. There were, however, underlying tensions between those who supported Dudayev and those rather conservative pro-Russians; internal conflicts between these two fractions began to emerge.⁶⁹ Dudayev issued a presidential decree on state sovereignty of the Republic of Chechnya in November 1991, although the Russian Constitution refers to Chechnya as one of

⁶³ Francis M. Deng, Profiles in displacement: Russian Federation, UN Doc. E/CN.4/2004/77/Add.2, 24 February 2004, par.10.

⁶⁴ Mark Cutts 2000, The state of the world's refugees 2000 – fifty years of humanitarian action, UNHCR, Oxford University Press, p.185.

⁶⁵ Ibid.

⁶⁶ Ibid.

⁶⁷ These are the latest statistics from the Global IDP Project, 14 March 2005, and the estimated IDP population in Chechnya is 209 600. Statistics available 'Russian Federation: government ignores its obligations towards IDPs', at www.idpproject.org.

⁶⁸ Maxine Marcus, 2002, *supra* (note 61), p. 699. Dudayev, a Chechen, was committed to the idea of independence and opposed the attempts of the Russian Federation to limit Chechnya's sovereignty.

⁶⁹ Maxine Marcus, 2002, *supra* (note 61), p. 699.

the republics within the Russian Federation. Chechnya adopted its own Constitution in 1992.⁷⁰ Even the new, 1993 Russian Constitution refers to Chechnya as a republic within the Federation, and this has perhaps influenced other nations not to recognise Chechnya as an independent state.⁷¹ According to Russia, Chechnya is an integral part of the federation and the status of Chechnya is defined by the Constitution of 1993. Chechnya is listed in the Constitution among the 89 subjects of the federation and only constitutional law amendment can change such status.⁷²

After this, around 150 000 non-Chechens left the territory and relocated to other parts of the Russian Federation. The response of the president of the Russian Federation, Boris Yeltsin, was to declare a state of emergency on the territory of Chechnya on 8 November 1991.⁷³ The Chechen president wanted to negotiate with Yeltsin and he referred to the United Nations Declaration on the granting of independence to colonial countries and peoples.⁷⁴ Russian president refused to recognise Dudaev's position and claimed that it was not a matter of a crisis between two sovereign states, but an internal matter for the Russian Federation.⁷⁵

Fighting erupted in 1993 when opponents of the Chechen rebel government began an offensive. Following this, Russia launched an attack against Chechnya the goal being to invade the republic with the intention of restoring peace and order and preventing secession.⁷⁶ The Russian troops probably looked forward to a quick victory and little resistance but the Chechens did not

⁷⁰ The unofficial translation of the Chechen Constitution is available at:

http://www.oefre.unibe.ch/law/icl/cc01000_.html.

⁷¹ Maxine Marcus, 2002, *supra* (note 61), p. 700. Marcus refers to the Russian Constitution as having such a strong stance that other nations would not oppose it by recognising the sovereignty of Chechnya.

⁷² Russian Constitution art.66.5:” The status of a subject of the Russian Federation may be changed only with mutual consent of the Russian Federation and the subject of the Russian Federation in accordance with the federal constitutional law.” Article 137 continues:” Changes to Article 65 of the Constitution of the Russian Federation, which determines the composition of the Russian Federation, shall be made on the basis of the federal constitutional law on admission to the Russian Federation and the formation within the Russian Federation of a new subject and on a change of the constitutional-legal status of the subject of the Russian Federation.”

⁷³ Arthur C. Helton and Natalia Voronina 2000, *Forced displacement and human security in the former Soviet Union: Law & policy*, p. 1. New York: Transnational Publishers Inc.

⁷⁴ United Nations General Assembly Resolution 1514 (xv) of 14 December 1960.

⁷⁵ Soili Nystén-Haarala 2002, Conflict between Chechnya and Russia seen in the light of Russian Constitutional law, Finnish Yearbook of international law, p. 265

⁷⁶ Helton and Voronina 2000, *supra* (note 73), p. 16. Russia imposed blockades on Chechnya and finally, a full-scale attack was launched on Grozny with the idea of destroying the opposition quickly. However, Russian troops faced heavy resistance and the war was prolonged.

surrender and eventually, the Russian troops were defeated.⁷⁷ The fighting, bombings and artillery attacks destroyed the capital Grozny to a large extent as well as neighbouring villages and as a result forced over 250 000 persons to leave their homes.⁷⁸ These people fled to other parts of Chechnya and to Ingushetia, Dagestan and North Ossetia. The first Chechen war was concluded with a peace treaty after a cease-fire had been established and the Russian troops were withdrawn.⁷⁹ Aslan Maskhadov was elected president and he signed the peace treaty with Boris Yeltsin in May 1997.⁸⁰ This did not resolve the question on the status of Chechnya. During the next couple of years, many of the displaced returned to their homes in Chechnya, although the situation remained volatile and there were frequent human rights violations such as kidnappings and arbitrary killings.⁸¹

3.3 *The second Chechen war*

The peace was, however, short-lived as Putin was elected president and in his campaign, he emphasized the idea of restoring order in Chechnya by all necessary means and destroying the Chechen terrorists.⁸² Hostilities broke out in the second half of 1999. Fighting in neighbouring Dagestan between Chechen armed groups and Russian army troops forced 30 000 persons to flee.⁸³ Air strikes in September were the beginning for Russian troops' entry into Chechnya. Heavy air strikes caused over 80 000 persons to flee the area of Grozny. Such a strategy resulted in heavy civilian casualties and the amount of destroyed property augmented. In October, a new war between Russia and Chechnya began. This time, over 200 000 persons fled the violence. At this point, civilians who tried to cross the border into Ingushetia were prevented from doing so and there were casualties.⁸⁴ Aslan Maskhadov was elected as Chechnya's president.

⁷⁷ Maxine Marcus, 2002, *supra* (note 61), p. 700-701. Chechens were well prepared for battles on the ground, but the air raids were destructive, often targeting civilians.

⁷⁸ *Ibid.* As a result of the conflict, 50 000 people had died and hundreds of thousands were left homeless. The fragile peace did not prove to be lasting.

⁷⁹ Profile in displacement: Russian Federation, *supra* (note 32), par. 17.

⁸⁰ Maxine Marcus, 2002, *supra* (note 61), p. 704.

⁸¹ Mark Cutts 2000, *supra* (note 63), p.204.

⁸² Maxine Marcus, 2002, *supra* (note 61), p. 695. Putin, as his predecessor Yeltsin, has described his aggression in Chechnya as necessary anti-terrorist activities. Putin has built his popularity largely on the propaganda surrounding the concept of an anti-terrorist war, which was been fought in Chechnya. He declared such ideas already as Prime Minister, how the Russian government would not recognise Maskhadov as the president of Chechnya and would thus not negotiate with him, see Marcus, p. 707.

⁸³ Profiles in displacement: Russian Federation, *supra* (note 32), par.18. The war in Dagestan was caused by a group of 2000 armed Chechens who aimed to proclaim an Islamic republic there. Russian forces quickly finished such an attempt and re-entered Chechnya.

⁸⁴ See the case brought before the European Court of Human Rights, *Isayeva, Yusupova and Bazayeva v. Russia* discussed below, p.45.

Subsequently, he signed the Khasavyurt Peace Agreement with the Secretary of the Russian Security Committee, General Lebed. This agreement defined itself as a regulation of “an international regional dispute between two parties” whereby Chechnya was defined as a sovereign state within the Russian Federation.⁸⁵ This document was more of a ‘gentlemen’s agreement’ meant to freeze the situation for five years and to cease the fighting.⁸⁶ Nystén-Haarala argues that the Russian interpretation of sovereign state is not the same as it is merely an empty statement without any legal bearings.⁸⁷ The second Chechen war became highly politicised internationally. No Western country was then or has been now ready to dispute the right of the Russian Federation to carry out what the government maintained to be an internal dispute, an anti-terrorist campaign on its own territory. However, many countries have criticised the means used and the use of excessive force unleashed against the civilian population by the Russian troops.⁸⁸ The fighting still continues in Chechnya and much of the infrastructure and housing has been destroyed. The capital Grozny has become the scene of destruction and thousands still remain displaced, without a certain future.

Autonomy in the Russian Federation is a concept connected with territorial entities, which are formed on an ethnic basis. In the case of Chechnya, a sovereign republic in the Soviet sense, autonomy or internal self-determination could in principle be developed through a federal administrative treaty between the federation and Chechnya. After the peace negotiations in 1996, such a treaty was concluded and it defines Chechnya as a sovereign state.⁸⁹ In March 2003, a referendum was held, which strongly endorsed a new constitution proposal by the Russian government. The new constitution would further strengthen the links between Russia and Chechnya and grant the Chechen republic a more autonomous status. The presidential elections of 5 October 2003 in Chechnya, where Akhmat Kadyrov was elected, were not seen as fair and free by all observers.⁹⁰

⁸⁵ Nystén-Haarala, *supra* (note 75), p. 269.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*, p.270.

⁸⁸ Cutts 2000, *supra* (note 63), p.208.

⁸⁹ Nystén-Haarala 2002, *supra* (note 75), p. 286.

⁹⁰ Deng, 2000, Profiles in displacement: Russian Federation, *supra* (note 32), p. 22.

Russian view of the conflict has been that it is 'war on terror' instead of an internal armed conflict. This is precisely where the principal difficulty in applying international humanitarian law rises; states refuse to apply it and claim that the occurring conflict is merely internal disturbances and does not amount to such conflicts as mentioned in the Geneva Conventions.⁹¹ States are likewise politically sensitive to admit that the strife, which is taking place on their territory, has reached such proportions that it has become an armed conflict even in cases of prolonged, widespread and bloody hostilities.⁹²

Nystén-Haarala argues that the agreement could have started a process towards greater self-determination; maybe even independence after a transitory period, but resorting to violence changed everything. Autonomy cannot be developed, even with international support, without the consent and good faith of the state concerned. Independence would give Chechnya the possibility to receive foreign aid, both financial and humanitarian. Nowadays all aid is channelled through Russia and does not always reach its target.⁹³

Recent events have led to increasingly tense atmosphere in the region. In May 2004, the Chechnyan president Akhmat Kadyrov was assassinated. Alu Alkhanov, who is pro-Russian minded, was elected president although the elections were not regarded as open. After the summer of fighting, Chechens terrorists kidnapped a school in Beslan, Northern Ossetia; a tragic event leading to the death of over 300 persons, over half of them children. This further intensified the violence in the region. In the aftermaths of Beslan, Russia has affirmed its policy of anti-terrorism and that the terrorist acts in Russia are directly attributable to Chechens. The violent climate persists and persons are still arbitrarily kidnapped and killed.⁹⁴

Current events in Chechnya include continuous fighting between the separatists and Russian troops and this keeps Chechnya continuously in the press headlines. The Political Affairs Committee of the Parliamentary Assembly of the Council of Europe convened a round table

⁹¹ Meron 1987, *Human rights in internal strife: their international protection*, p. 43.

⁹² Meron 1987, p. 47

⁹³ Nystén-Haarala 2002, *supra* (note 75), p.288.

⁹⁴ Human Rights Watch: 'Worse than a war – disappearances in Chechnya a crime against humanity', Briefing paper, March 2005, available at: <http://hrw.org/backgrounder/eca/chechnya0305/>

discussion on the situation in Chechnya, which took place 21 March in Strasbourg.⁹⁵ The participants included among others Chechen president Alu Alkhanov, Russia's Human Rights Commissioner Vladimir Lukin and Dmitry Kozak, President Putin's Representative in the Southern Federal District. The round table participation is not open to persons who refuse to recognise the territorial integrity of the Russian Federation or who resort to terrorism in order to achieve their goals.⁹⁶ In other words, the separatists will not be represented at the round table; therefore real long-lasting solutions to the conflict are not likely to surface during the discussions. The violence will not end before the separatists are somehow included in the discussions on the future of Chechnya.

Another major event occurred as the Russian forces announced the death of the separatist leader Aslan Maskhadov on 8 March in the village of Tolstoy-Yurt. His death has been estimated to intensify the rebellion from the separatist side of the conflict.⁹⁷ There have been speculations regarding who will be the next leader after Maskhadov; at least the names of Shamil Basajev and Doku Umarov have come up.⁹⁸ One thing seems to be sure, the new leader of the separatist regime will turn it towards a more radical direction, whereas Maskhadov was willing to negotiate with Putin regarding a solution to the conflict. However, Putin did not accept this, as he would not negotiate with a terrorist. The future of the Chechnyan conflict shows no signs of calming down, and as there are at present no negotiation attempts between Russia and Chechens, violence is most likely to persist.

3.4 Background to the conflict in Liberia

⁹⁵ Council of Europe press release 23 February 2005. This round table is organised in accordance with the PACE Resolution 1402 (2004) on the political situation in the Chechen Republic: measures to increase democratic stability in accordance with Council of Europe standards.

⁹⁶ PACE resolution 1402 (2004), par. 24.

⁹⁷ Global IDP-Project: "Russian Federation: government ignores its obligations towards IDPs", p. 1, 14 march 2005, available at [http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/wSummaryPDFs/80ABA9CE160E7094C1256E6A004C9947/\\$file/Russia_summary.pdf](http://www.db.idpproject.org/Sites/IdpProjectDb/idpSurvey.nsf/wSummaryPDFs/80ABA9CE160E7094C1256E6A004C9947/$file/Russia_summary.pdf)

⁹⁸ Ibid., p.3. Basajev has been described as a terrorist leader and he has claimed responsibility for several terrorist acts, including the siege of Dubrovka-theater in Moscow in 2002, and the attack upon the school in Beslan in 2004. In 1997, Basajev was for a moment prime minister of the Ichkeria Republic of Chechnya but invaded Dagestan with his fighters in 1999 thus giving Putin an indirect reason to attack Chechnya and begin a second war there.

The extent of internal displacement in Liberia has been so pervasive that it has been argued that the whole society has become displaced.⁹⁹ The prolonged nature of the conflict in Liberia has evidenced that when a civil war deteriorates into anarchy, the majority of the people become displaced. In the case of Liberia, displacement has affected all ethnic groups, whereas displacement usually affects a certain minority group.¹⁰⁰ The number of internally displaced persons is estimated to be around 430 000.¹⁰¹

Liberia became an independent state in 1847.¹⁰² The years of instability began in the 1980s when Master Sergeant Samuel Doe staged a military coup during which president Tolbert was executed. Doe won presidential elections in 1985. The civil war in Liberia, which has caused hundreds of thousands of persons to flee their homes, some to neighbouring states and some to seek refuge elsewhere in Liberia, began 15 years ago. The fighting between government forces and the National Patriotic Front of Liberia, NPFL, led by Charles Taylor, began in late 1989. The NPFL launched an attack against the Samuel Doe regime first in the north of the country from where the fighting quickly spread to other parts of Liberia. The NPFL executed Doe during the 7-year long ethnically divided civil war. Doe was a member of the indigenous Krahn ethnic group while Taylor represents both indigenous and Americo-Liberian roots. The Economic Community of West African States undertook various attempts to restore peace with the support of the United Nations through the establishment of an observer force, the Military Observer Group or ECOMOG. In 1992, the UN Secretary-General imposed an arms embargo on Liberia and appointed a Special Representative to assist in the peace negotiations between the warring parties. A peace agreement was signed in 1995 in Cotonou and subsequently, the Security Council established an Observer Mission in Liberia (UNOMIL) to provide assistance to ECOMOG in implementing the peace agreement.¹⁰³

⁹⁹ Korn 1999, *supra* (note 12), p.17. Estimates vary from one third to the whole of the population of Liberia been displaced during the violent prolonged civil war, see for example UNHCR Global Appeal 2005. Colin Scott, 'Liberia: a nation displaced', in Roberta Cohen and Francis M. Deng, *The forsaken people*, 1998, p. 97.

¹⁰⁰ Cohen and Deng, *supra* (note 2), pp. 42, 44. As for the case of Chechnya, during the first Chechen war, more or less the whole Russian ethnic minority was displaced whereas during the second war, the Chechens were displaced.

¹⁰¹ Statistics from the Global IDP Project, 'Liberia: still too soon for IDPs to return home?', available at www.idpproject.org.

¹⁰² Resettling freed slaves from the United States created the state. The resulting Americo-Liberian elite ruled the state for 150 years, often through exploiting and dominating the indigenous people. For criticism on the American influence see Colin Scott, Humanitarian action and security in Liberia 1989-1994, Occasional Paper no 20, The Thomas J. Watson Institute for International Studies 1995, p.1.

¹⁰³ Security Council resolution S/RES/866, 22 September 1993.

Elections were to be held in early 1994 but due to delays in the implementation of the provisions of the peace agreement and the new eruption of hostilities, the elections had to be postponed. After several amendments were made regarding the Cotonou peace agreement, elections were finally held in 1997 and Charles Taylor was elected president by a landslide victory. His National Patriotic Party won a majority of seats in the National Assembly.¹⁰⁴ He emphasized that his government would implement a policy of reconciliation and national unity. There were arguments that the elections were organised too soon as the security situation continued to be fragile and the infrastructure was underdeveloped after the civil war. The elections were also criticised of not being open or democratic. Even though Taylor won by a landslide, his government could not establish a peaceful transit to democracy, but instead the state was again torn in civil war.¹⁰⁵

The Government's policy of exclusion and harassment of political opponents, as well as systematic abuses of human rights committed by governmental military forces and security agents seriously damaged the pledges for any reconciliation and peace.¹⁰⁶ One of the root causes for the civil war in Liberia has been ethnic tension, which generates violence and further political tensions. During Taylor's regime, the government discriminated against those ethnic groups that had opposed Taylor during the war.¹⁰⁷ Grave violations and the lack of security sector reform gave rise to a new break-up of hostilities. In 1999, the rebels attacked in the north, some of them were suspected of coming from Guinea, and fighting began between the military forces and the newly formed rebel movement, Liberians United for Reconciliation and Democracy, LURD. The conflict was centred on the gold and diamond rich areas close to where the borders of Liberia, Sierra Leone and Guinea meet. Fighting displaced more than 25 000 persons.

¹⁰⁴ Global IDP Project, 'Liberia: still too soon for IDPs to return home?', 30 September 2004, available at: www.idpproject.org.

¹⁰⁵ Ibid.

¹⁰⁶ U.S. Department of State, Country reports on human rights practices 2000: Liberia, released by the Bureau of Democracy, Human Rights and Labour on 23 February 2001.

¹⁰⁷ US Department of State, Country reports on human rights practices 2000: Liberia, released by the Bureau of Democracy, Human Rights and Labour on 23 February 2001.

In March 2001, the United Nations Security Council re-imposed an arms embargo on Liberia as a sanction against Taylor for having traded diamonds for arms with rebels from Sierra Leone.¹⁰⁸ When the rebel forces were getting too close to the capital of Monrovia, the government forces launched a new attack. This forced people to flee from one temporary location to another and the conditions for IDPs worsened; some IDPs still remained in the ruins of Monrovia but the government did not allow for any aid agencies to enter the capital and thus IDPs were trapped there without any help. Sporadic yet intense fighting continued throughout 2002, causing continuous displacement of thousands of persons. The situation continued the same in the following year; thousands of families were displaced due to civil war as the fighting spread from western and northern regions to the south-western port of Robertsport and a new rebel group, Movement for Democracy in Liberia or MODEL, emerged.¹⁰⁹ MODEL launched attacks on the border areas of Côte d'Ivoire. The fact that Charles Taylor was indicted in June 2003 by the Sierra Leone war crimes court, seemed only to further aggravate the war.¹¹⁰ LURD launched violent attacks in the centre of Monrovia and caused massive movements of IDPs. West African troops arrived in August 2003 and were closely followed by the UN peacekeepers, UNMIL troops. These troops helped to restore some order in Monrovia although there were still reports of continuous insecurity in the area.

Finally in August 2003, after considerable international pressure, Charles Taylor handed power over to his vice-president Moses Blah and left Liberia for Nigeria. Subsequently, peace talks were initiated in Accra and the different parties signed the Comprehensive Peace Agreement on 18 August 2003.¹¹¹ The Peace Agreement provided for the immediate end of the war and the establishment of National Transitional Government to ensure the implementation of the Agreement, as well as the preparation of elections in 2005. The elections will take place in October 2005, as planned.¹¹² Gyude Bryant was appointed Chairman of the National Transitional Government. The current security situation in Liberia has been described as having

¹⁰⁸ Security Council Resolution 1343, 7 March 2001, paras. 2, 5 and 6. Subsequently, the Security Council has reaffirmed these sanctions in its resolution 1521. 22 December 2003, par. 2.

¹⁰⁹ Global IDP Project, 'Liberia', available at www.idpproject.org.

¹¹⁰ Global IDP Project, 'Liberia', available at www.idpproject.org.

¹¹¹ Comprehensive Peace Agreement between the Government of Liberia and the Liberians United for Reconciliation and Democracy (LURD) and the Movement for democracy in Liberia (MODEL) and Political Parties, Accra 18 August 2003.

¹¹² Integrated regional information networks (IRIN), 7 February 2005, Liberia: Elections set for 11 October.

improved significantly after the peace agreement.¹¹³ This results from the deployment of UN peacekeeping forces and the process of disarming and demobilizing ex-combatants.¹¹⁴ The United Nations Security Council has, however, still determined that the situation in Liberia remains a threat to international peace and security in the region and that the measures on arms imposed by the Resolution 1521 will be renewed for a period of one year, until the end of 2005.¹¹⁵

4. The applicable international legal framework

In order to assess how international law covers the needs of IDPs, those needs have to be identified first. The specific problems that IDPs face are often related to the trauma of being uprooted from their homes, and being separated from family members adds to the terrible experience of fleeing.¹¹⁶ The primary concern therefore relates to security.¹¹⁷ Security concerns may be addressed through guaranteeing the right to life and protection against torture and other forms of inhuman or degrading treatment. Internally displaced persons are torn from their familiar ways of life, have lost their livelihoods and even the means of generating an income of their own. They are often forced to settle in isolated or economically marginal areas, where land and overall conditions for gainful employment are poor or in camps for IDPs. There can also be legal restrictions on employment and income generation and thus IDPs are heavily dependent on the good will of the host community and humanitarian aid. These basic needs, food, shelter and health care need to be taken care of. When IDPs leave their homes, they lose their housing and property. These losses need to be compensated. Displacement, by its very nature, generally entails the deprivation of several human rights. In addition to its emotional cruelty, displacement often breaks up the nuclear family and cuts off important social and cultural ties to one's community, ends employment, hinders education and deprives those in need of special

¹¹³ UNHCR Global Appeal 2005, p.169.

¹¹⁴ Ibid. See also Human Rights Watch World Report 2005:Liberia. The Peace Agreement provides in Part three, Article vi for the cantonment, disarmament, demobilization, rehabilitation and reintegration (CDDRR) of the country.

¹¹⁵ United Nations Security Council Resolution 1579, 21 December 2004, UN Doc. S/RES/1579, par.1.

¹¹⁶ Refugees and Internally Displaced Persons, Women waging peace and international alert joint publication at www.womenwagingpeace.net/toolkit.asp

¹¹⁷ Catherine Phuong 2004, *The international protection of internally displaced persons*, p. 40.

protection, such as infants, expectant mothers and the sick, of vital services.¹¹⁸ How do international human rights and humanitarian law respond to these various needs?

Displaced persons do not lose their rights and freedoms due to displacement but remain entitled to protection; it is the obligation of the state to ensure respect for human rights of its citizens. Because internal displacement most often occurs during internal disturbances and non-international armed conflicts, the main basis for the protection of IDPs is found in international and regional human rights law and in humanitarian law, applicable to non-international armed conflicts. The case studies of Chechnya and Liberia can both be categorized as internal armed conflicts. Case studies will reflect the needs identified above in the context of the particular conflicts.

One set of international legal instruments that can protect the IDPs is international humanitarian law. This branch of law can be defined as principles and rules limiting the use of violence during armed conflicts. The relevant instruments of humanitarian law in the context of this report are the Geneva Conventions¹¹⁹ and their Additional Protocols¹²⁰. A common feature of the four Geneva Conventions is that they establish minimum rules to be observed in armed conflicts. The aims of humanitarian law are to protect persons who are not, or are no longer, directly engaged in hostilities; such as the wounded, shipwrecked, prisoners of war and civilians. In the context of this paper, the relevant category will be the civilian population. International humanitarian law applies to internally displaced persons when an armed conflict exists. Human rights law naturally applies as well, but there may be restrictions and derogations. Human rights law restrains the abusive practice of only one party to the conflict, namely the State/Government and its agencies, since only states are parties to human rights treaties; usually thus governments are internationally responsible for human rights violations under the treaties.

¹¹⁸ Deng, Compilation and analysis of legal norms, part I, par.9. (Hereinafter Compilation and analysis of legal norms, Part I.).

¹¹⁹ I Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, II Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, III Geneva Convention relative to the treatment of prisoners of war, IV Geneva Convention relative to the protection of civilian persons in time of war, adopted on 12 August 1949, entry into force 21 October 1950.

¹²⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of international armed conflicts (Protocol I), Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the protection of victims of non-international armed conflicts (Protocol II), adopted 8 June 1977, entry into force of the Additional Protocols 7 December 1978.

Today's conflicts have different characteristics than the conflicts of the past. The expression "new conflicts" covers various types of armed conflict; those that are 'anarchic' and those where the group identity becomes the central element.¹²¹ The strong ethnic component in armed conflict often seeks to exclude the adversary through extreme measures, which has, at the most severe cases, culminated into ethnic cleansing like in Rwanda, where the aim was to eliminate a whole group of the population. Another feature of the ethnic component was visible in the former Yugoslavia, where the conflict resulted in forcing people to leave a certain territory. In the so called anarchic conflicts, the state structures are so weakened or broken down that armed groups may attempt to grab power as there is a political vacuum in the country.¹²² The old state structures have become so loose that all authority disappears and thus leaves room for worst kinds of atrocities committed by rebellious groupings that can involve even small children, as arguably was the case in Liberia.¹²³ What is the scope and content of humanitarian and human rights law in these situations? Exactly how relevant is the international humanitarian law under such grave circumstances? IDPs need protection for their rights in several types of armed conflict situations. There are actually various categories of situations under humanitarian law of armed conflict; situations of tensions and disturbances, internal armed conflicts, national liberation armed conflicts and international armed conflicts.¹²⁴ Internal conflicts can fall under common article 3 or Protocol II, depending on the conflict. IDPs need legal protection in all types of armed conflict. Examining the various types of armed conflicts is relevant for determining which legal norms will apply.

4.1 Different types of conflicts as causes for internal displacement

4.1.1 Tensions and disturbances

Many internally displaced persons live under the first category of displacement situations, namely under tensions and disturbances or disasters. The term 'internal tensions and

¹²¹ International Committee of the Red Cross 2002, *International Humanitarian Law*, p. 18.

¹²² *Ibid.*

¹²³ Jean-Philippe Lavoyer 2002, *Forced displacement: the relevance of international humanitarian law* in Bayefsky & Fitzpatrick, *Human rights and forced displacement*, p.58.

¹²⁴ René Provost 2002, *International human rights and humanitarian law*, p. 248. Francis Deng has proposed the categorisation to include three sections; inter-state armed conflict, internal armed conflict and finally, tensions and disturbances, see *Compilation and Analysis of legal norms part I*, par.27. The jurisprudence of the ICTY and ICTR and the Statute of the ICC have eliminated some of the differences between these categories of armed conflicts by expanding war criminality to all types of conflicts, regardless of categorical distinctions.

disturbances' refers to a situation that does not qualify as an armed conflict but nevertheless involves the use of force and other repressive measures by government agents to maintain or to restore public order.¹²⁵ There is a clear rupture in the order of the society due to such violence.¹²⁶ These types of situations involve, by nature, specific types of human rights violations such as large-scale arrests, ill treatment of detainees and in-human detention conditions, for example. Examples of tensions and disturbances include riots and violent ethnic conflicts, which do not amount to hostilities; however, drawing the line is difficult.¹²⁷ Disasters are either natural or man-made; for instance floods or nuclear disasters. During tensions and disturbances the primarily relevant legal basis is human rights law, while international humanitarian law is inapplicable as long as it is not a question of an armed conflict.¹²⁸ Although situations of tensions and disturbances and disasters could justify the restriction of certain human rights, there is seldom such a genuine public emergency situation that would in fact permit the state to derogate from the guaranteed human rights.¹²⁹

4.1.2 Internal armed conflicts

The second type of situation, non-international armed conflict does bring forward international humanitarian law. Human rights law continues to apply but the rights may be subject to restrictions and even derogations, except for non-derogable rights; thus humanitarian law is of utmost importance. Human rights law and humanitarian law reinforce each other during internal armed conflict situations.¹³⁰ For a situation to be determined as a non-international armed conflict, the fighting between the armed forces of the Government and so called unidentified armed forces must have reached a certain level of intensity and have been going on for a certain

¹²⁵ Internally displaced persons, Compilation and Analysis of legal norms part I, report of the Representative of the UN Secretary General Mr. Francis M. Deng, par.28. E/CN.4/1996/52/Add.2, 5 December 1995.

¹²⁶ International Committee of the Red Cross 2002, *International Humanitarian Law*, p.4.

¹²⁷ Geissler, 1999, *supra* (note 18), p. 460 argues that governments prefer to label a conflict a riot or other internal disturbance rather than an internal armed conflict as to avoid the application of the common article 3 to the four Geneva Conventions.

¹²⁸ Francis Deng 1995, Compilation and analysis of legal norms (part I), E/CN.4/1996/52/Add.2, par.28-29.

¹²⁹ Internally displaced persons, Compilation and Analysis of legal norms part I, par.35.

¹³⁰ Internally displaced persons, compilation and analysis of legal norms part I, par.37. And Erin Mooney, "Towards a protection regime for internally displaced persons", in: Edward Newman and Joanne van Selm (eds.), *Refugees and forced displacement*, (Hong Kong: United Nations University Press, 2003), pp. 159-180, at p.161. See also Jean-Philippe Lavoyer, "Refugees and internally displaced persons: international humanitarian law and the role of the ICRC", *International review of the Red Cross*, No. 305, (1995), pp. 162-180, at pp.162-163.

period of time.¹³¹ In situations of internal conflicts, applicable humanitarian law is in Article 3 common to the Geneva Conventions and in the 1977 Additional Protocol II.¹³² Even though humanitarian law provides protection for IDPs during displacement, it is important to note that it actually aims at preventing displacement; population movements could even be avoided, evidently, if the rules of humanitarian law and human rights law were fully respected.¹³³

Internal armed conflicts can have a strong impact on international peace and security. Firstly, this can be due to the fact that hostilities can spill over to neighbouring states just like refugee and IDPs flows. This has already happened in West Africa, where the causes of conflicts are intertwined and the problems are regional instead of national. Third states may also intervene in an internal conflict on behalf of one of the warring parties and that may cause the conflict to escalate. Secondly, as international law is no longer concerned only with states and their mutual relations, the manner in which a state treats its own citizens concerns the international community as well.¹³⁴ This is the case for example when a state is not able to offer humanitarian aid and protection for its IDPs. The protection of victims and civilians is particularly acute during internal conflicts because the authorities usually find it very difficult to accept regulation or help from the outside.¹³⁵

¹³¹ International Committee of the Red Cross 2002, *International Humanitarian Law*, p.4. See also René Provost 2002, *International human rights and humanitarian law*, p. 241 on discussion how to determine whether the hostilities and their intensity amounts to an armed conflict.

¹³² Common article 3 (1) to the four Geneva Conventions reads as follows: "Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria". Common article 3 is the only provision of the Geneva Conventions that specifically applies to internal armed conflicts. Article 4(1) of the Additional Protocol II reads: "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honor and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors". Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of international armed conflicts, adopted 8 June 1977, entry into force 7 December 1979, 1125 UNTS 3.

¹³³ Jean-Philippe Lavoyer, "Guiding Principles on Internal Displacement", *International review of the Red Cross*, No. 324 (1998), pp. 467-480, at p. 467.

¹³⁴ Lindsay Moir 2002, *The Law of internal armed conflicts*, p.2.

¹³⁵ Lindsay Moir 2002, p.21.

4.1.2.1 Common article 3

Common Article 3 to the Geneva Conventions governs *all internal armed conflicts*. It has in fact been called a “Convention in miniature”.¹³⁶ It binds both parties to the conflict. However, common article 3 does not apply to mere acts of banditry or unorganised and short-term rebellions, but typically applies in armed conflicts between governmental armed forces and organised armed dissidents. In other words, it is the only article applicable to non-international conflicts. It has been argued that the scope of application of Article 3 should be as wide as possible, as it merely demands parties to a conflict to respect certain rules.¹³⁷ The conflicts referred to in the article are armed conflicts similar to international wars but have the distinctive feature of taking place within one single country.

Common Article 3 is an attempt to impose the underlying humanitarian principles of the Four Geneva Conventions upon the parties to internal armed conflicts. But what are the criteria for applying the common Article 3? The article itself presupposes two criteria; one of them being the positive requirement regarding the actual geographic location of the conflict, “..in the territory of a High Contracting Party..”. In fact, there is today very little territory, which falls outside this criterion. The second requirement is that it should be a matter of “an armed conflict” although there is no clear universally accepted definition on what constitutes an armed conflict.¹³⁸ The Appeals Chamber of the International Criminal Tribunal for former Yugoslavia decided that the provisions of common Article 3 together with basic rules of customary law, the Genocide Convention and the law concerning crimes against humanity were applicable in non-international conflicts.¹³⁹ The requirements were interpreted as a state of protracted armed violence, in which organised armed non-governmental groups are involved; such an

¹³⁶ Jean S. Pictet (ed.) 1958, *Commentary to the IV Geneva Convention relative to the protection of civilian persons in time of war*, p. 34.

¹³⁷ Ibid. Pictet argues that article 3 does not limit the powers of a state to finish off a rebellion nor does it increase the powers or authority of the rebellious party.

¹³⁸ Lindsay Moir 2002, *supra* (note 134), p.31. Earlier discussion on what constitutes an armed conflict not of an international character can be found in Jean S. Pictet (ed.) 1958, *Commentary to the IV Geneva Convention relative to the protection of civilian persons in time of war*, pp.35-36. The International Court of Justice has pronounced on article 3 that it defines certain rules to be applied in non-international armed conflicts and these rules represent a minimum requirement and they are rules, which in the Court’s opinion “reflect elementary considerations of humanity”; see the ICJ Reports 1986, International Court of Justice Judgement 27 June 1986 on the Case concerning military and paramilitary activities in and against Nicaragua, at.218.

¹³⁹ Leslie C. Green 2000, *The contemporary law of armed conflict*, p. 60

interpretation still excludes isolated and sporadic acts of violence such as riots and other disturbances, which fall under a different category.¹⁴⁰

For common article 3 to apply, the country on whose territory the conflict occurs, does not have to be involved in the conflict, contrary to the application of Protocol II.¹⁴¹ State does not have to grant any amount of recognition to the insurgents and the insurgents do not have to control part of the territory; these requirements are also contrary to those for the application of Protocol II.¹⁴² Provost points out that if the insurgents do control a part of the national territory, it will be more difficult for the State to dispute the fact that an internal armed conflict is in fact taking place.¹⁴³ For instance, if the Chechens were deemed to control their republic or at least part of it, the Russian Federation's claim that there is no internal armed conflict, would be ill founded. In general, the vagueness of the conditions for the common article 3 to apply has resulted in States' rather flexible interpretation and use of the common article 3; states have refused to apply the article and Provost names the first Chechen war as an example of such conduct.¹⁴⁴

However, the category of national liberation armed conflicts is also relevant, for at least the conflict in Chechnya might have some characteristics of such strife. For a conflict to be categorised as national liberation, it has to be a conflict by people against colonial domination, alien occupation, or a racist regime and the conflict should attempt to advance that people's right to self-determination. However, all the peoples fighting, or declaring to fight, to uphold their right to self-determination are eligible for the status of national liberation movement. Wars fought on political, social or religious grounds do not fall under the definition.

In the case of Chechnya, the Government of Ichkerian Republic of Chechnya has proclaimed independence already in 1991 and has fought subsequently with the State authorities, however this cannot be interpreted to be a fight against colonialism, alien occupation or a racist regime.

¹⁴⁰ International Criminal Tribunal for Yugoslavia, Trial Chamber, Prosecutor v. Tadic, judgement IT-94-1-T, 7 May 1997, par.562. See also Lindsay Moir 2002, *supra* (note 134), p.42.

¹⁴¹ Protocol II, art.1 on the material field of application states that it shall apply to all armed conflicts that take place in the territory of a High Contracting Party and involve its armed forces and dissident armed forces.

¹⁴² Provost 2002, *supra* (note 124), p. 267.

¹⁴³ Provost refers to the way in which Bosnian Serbs controlled a part of the territory in the Republika Srpska, see Provost 2002, *supra* (note 124), p. 268.

¹⁴⁴ Provost 2002, *supra* (note 124), p.268.

Furthermore, for a conflict to be about national liberation, the national movement must be representative of the people, and possess the characteristics of armed forces¹⁴⁵ and be recognised by a regional intergovernmental organisation.¹⁴⁶ If a national movement is deemed to be a party to national liberation conflict, then Protocol I applies. As for Chechnya, the independence movement is probably representative of the people to a certain extent. Whether or not it has the characteristics of armed forces is debatable since its organisation seems to be rather loose; and finally, the Republic has not been recognised by any organisation or state. In addition, the conflict should be of the same intensity as those categorised under Protocol II and the liberation movement should exercise control over some part of the national territory.¹⁴⁷ The Chechens do fulfil the demand for controlling the territory to some extent, but there are still Russian forces present in the republic. The requirement of a certain degree of intensity of the conflict is probably fulfilled as well. However, it can be argued that the Chechen conflict does not qualify as an armed conflict for national liberation because it does not fulfil all the essential requirements.

Also the Liberian civil war has characteristics of a national liberation conflict. The civil war began when the previous president was overthrown as a result of a military coup and the subsequent new president also raised opposition in the society and several rebel movements emerged. Common nominator for these movements was that they claimed to be fighting in order to overthrow the new president, Charles Taylor, and his regime. The requirement of intensity is certainly fulfilled merely by looking at the fact that almost the whole of the population was displaced at one time or another during the war due to intense fighting. Whether the rebels were sufficiently organised and controlled a part of the territory is less evident, and the fact that there were several movements that did not work together but each for its own purposes does not comply with the requirement of organisation and management of the troops.

Common article 3 also applies to cases in which two or more armed factions within a country confront each other without the involvement of governmental forces; for example when the

¹⁴⁵ This means that it should be organised under responsible command, there should be an internal disciplinary system, and the group should have institutional capacity to apply Protocol I and the Geneva Conventions.

¹⁴⁶ Provost 2002, *supra* (note 124), p. 256-257.

¹⁴⁷ *Ibid.*, p. 259. The requirement that the conflict has to be of not lower intensity than those covered by Protocol II has no foundation in Protocol I; this introduces a concept of minimal intensity in the context of international armed conflict and it has been rejected up to now in customary international law.

established government is too weak to interfere or it has already dissolved.¹⁴⁸ Application of common article 3 is automatic as soon as a situation of armed conflict exists.¹⁴⁹ Subsequently, individual civilians, including IDPs, are entitled to the absolute guarantees laid down in Article 3 when they are captured by or subjected to the power of the dissident forces or the government forces. Common Article 3 does prohibit the direct attack on IDPs or other civilians living in combat zones or in other areas controlled by the enemy.

Common article 3 provides for humane treatment of those who are not involved in hostilities. Although nationality is not explicitly mentioned in the article, it must be read to ensure humane treatment for all persons caught up in internal hostilities, regardless of their nationality.¹⁵⁰ Therefore also nationals of a State party to hostilities will be protected under this article vis-à-vis their own government. Common article 3 also includes a non-discrimination clause just like human rights treaties. Human rights law can be useful when determining whether adverse distinction has occurred in the context of common article 3, especially on the basis of ‘any other similar criteria’. Article 3 prohibits discrimination namely on fewer grounds than human rights law. There are, however, justifications for this; one of them being the fact that in times of internal armed conflicts, it may be seen as necessary or even desirable for the State to treat insurgents in a discriminatory manner, like enemy nationals would be treated during an international armed conflict.¹⁵¹ This could then justify the exclusion of political or other opinion, national or social origin from the grounds of prohibited discrimination and it is linked to the fact that derogations from human rights obligations are permissible, provided that they do not involve discrimination based “solely on the ground of race, colour, sex, language, religion or social origin” as stipulated in ICCPR art.4.1.

Non-derogable human rights are listed in international and regional human rights instruments, such as the ICCPR, ECHR and the American Convention as well as in common article 3; these treaties and common article have listed same 3 rights of right to life, prohibition against torture and freedom from retroactive penal laws.¹⁵² The human rights treaties have one more right in common, namely the prohibition of slavery. This prohibition is an example of the type of

¹⁴⁸ Compilation and analysis of legal norms (part I), par. 37-39.

¹⁴⁹ Jean S. Pictet (ed.) 1958, *supra* (note 136), p. 35.

¹⁵⁰ Theodor Meron 1987, *supra* (note 96), p. 33.

¹⁵¹ Lindsay Moir 2002, *supra* (note 134), p. 198.

¹⁵² ICCPR, articles 6,7, and 15; ECHR articles 2,3,and 7 and the American Convention articles 4, 5, and 9.

protection afforded by human rights law that extends beyond the scope of humanitarian law.¹⁵³ These provisions remain applicable during internal armed conflicts.¹⁵⁴

4.1.2.2 Protocol II

Although Protocol II offers enhanced humanitarian protection, states have been unwilling to apply either Protocol II or common article 3 when involved in hostilities of internal character.¹⁵⁵ Such practice is very unfortunate in the light of the suffering that civilians endure during armed internal conflicts. However, in such internal armed conflicts, which meet the requirements for the application of common Article 3 but at the same time fall outside the application of Protocol II, common Article 3 continues to apply. Protocol II governs some armed conflicts if they fulfil the requirements but only as a subset of internal armed conflicts in general; the Protocol II has not changed the sphere of the common Article 3. Green argues that Protocol II creates treaty law only for those who ratify or accede to it.¹⁵⁶ Scope of Protocol II is clearly narrower and more restrictive than the scope of common Article 3.

Some have argued that the common Article 3 contains a basic core of human rights.¹⁵⁷ The ICTY case of Prosecutor against Tadic was the first case to suggest that there is a body of customary international law applicable to internal armed conflicts and that a violation of these rules can involve individual criminal responsibility.¹⁵⁸ Recent publication of the long-awaited ICRC study on customary norms of international humanitarian law may more generally shift attention from treaty norms to customary law in addressing applicable rules of IHL, also in respect of IDPs.

¹⁵³ Ibid.,p.208.

¹⁵⁴ List of non-derogable rights should not be understood narrowly, see General Comment No.29 of the Human Rights Committee.

¹⁵⁵ Lindsay Moir 2002, *supra* (note 134), p.131. There have been only two cases of internal armed conflict where both the government forces and the insurgents have accepted the application of both common article 3 and Protocol II, namely El Salvador and the Philippines.

¹⁵⁶ Leslie C. Green 2000, *supra* (note 139), p. 320.

¹⁵⁷ Theodor Meron 1989, *Human rights and humanitarian norms as customary law*, p. 34. Meron argues that the norms in common article 3.1 a)-c) are of such an elementary, ethical character and that they reflect many provisions of human rights and humanitarian treaties that they must be regarded as embodying the minimum standards of customary law that applies to non-international conflicts as well. Furthermore, he states that the norms in article 3 are of an indisputable humanitarian character.

¹⁵⁸ Tadic-case, paras. 622-623. See also Lindsay Moir 2002, *supra* (note 134), p.133.

4.1.3 International armed conflicts

The last category of situations is an inter-state, in other words, an international armed conflict. Human rights law applies and it is extremely important to protect IDPs against their own governments, as international humanitarian law may not afford sufficient protection for them. Due to the nature of an international conflict, human rights may be restricted or even derogated from as explained earlier. The Geneva Conventions, Additional Protocol I and the customary laws of war become fully effective for States Parties in international armed conflicts, which are defined in article 2 common to the Geneva Conventions (hereinafter common article 2). According to common article 2, armed conflict of inter-state type involves a *declaration of war* or in its absence, *any conflict between two or more states that leads to the intervention of armed forces, including occupation* of the other's territory.

Most norms related to the protection of civilians during international armed conflicts were designed to protect non-nationals of the State that effectively holds the power on that territory. Definition of who those 'protected persons' are, is included in article 4 of the Fourth Geneva Convention.¹⁵⁹ Therefore most of the provisions in the Geneva Conventions are not applicable to IDPs who are on an area still controlled by their own government as they fall under the notion "are (not) nationals". The Convention remains faithful to a recognised principle of international law, whereby it is not permitted to interfere in the internal affairs of a state; article 3 does not interfere with the relations between a state and its citizens.¹⁶⁰ These provisions are in Part III, section III of the Fourth Geneva Convention, but its scope is limited to persons under foreign occupation. The provisions in this section include the crucial and clear obligations to grant passage to humanitarian operations (art.59), which would be essential for IDPs as well.¹⁶¹ Among the norms, which only protect against the authorities of a *foreign state*, are many of those provisions that would address the needs of IDPs in the most comprehensive way. Article 27 in Part II states the basic guarantees for the treatment of protected persons; including the concept of humane treatment, special protection for women and the principle of equal treatment.

¹⁵⁹ Fourth Geneva Convention, article 4: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals". (Emphasis added).

¹⁶⁰ Jean S. Pictet 1958, *supra* (note 136), p. 46.

¹⁶¹ Compilation and analysis of legal norms (part I), par. 42-44.

Broader scope of applicability is in Part II of the Fourth Geneva Convention, article 13, as it covers the *whole of the population in the countries of conflict*, and therefore includes also IDPs.¹⁶² The aim of Part II is to provide civilians with general protection against the consequences of war. Provisions of Part II therefore apply to protected persons but also to enemy and other aliens and to neutrals, as was defined in article 4. The simple fact that a person resides on the territory of a party to the conflict is sufficient grounds for making Part II applicable to him.¹⁶³ Article 49 of the Fourth Geneva Convention prohibits ‘forcible transfers’. Meron argues that this absolute prohibition is declaratory of customary law although the object and the settings for deportations differ from those underlying German practices during the Second World War.¹⁶⁴ It seems to be less clear that individual deportations were prohibited in 1949, but it has by now come to reflect customary law.

Part IV of Protocol I is of importance for internally displaced as almost the whole of this protocol is applicable to them. Article 49 of the Protocol has a territorial aspect whereby also internally displaced are protected.¹⁶⁵ The negative aspect is that there is only a limited amount of ratifications of this protocol so far.

4.2 *The Guiding Principles*

The Guiding Principles on Internal Displacement were developed in order to enhance protection and assistance for those who have been forcibly displaced. The United Nations Commission on Human Rights requested Mr. Francis Deng to develop an appropriate normative framework for the internally displaced.¹⁶⁶ He was asked to examine to what extent the existing international law provides adequate protection for IDPs. Deng presented a *Compilation and Analysis of Legal Norms*¹⁶⁷ to the Commission in which he concluded that although existing law does substantially cover the IDPs, there are still areas in which it fails to provide adequate basis for

¹⁶² Fourth Geneva Convention, Part II, article 13:” The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the sufferings caused by war”.

¹⁶³ Jean S. Pictet 1958, *supra* (note 136), p. 118-119.

¹⁶⁴ Meron 1989, *supra* (note 156), p. 48.

¹⁶⁵ Commentary to the Additional Protocols 1987, p. 605. According to the Commentary on article 49, it is clear that the provisions of Protocol I relating to attacks and their results apply to the *whole of the population* present in the territory of the Party to the conflict.

¹⁶⁶ UN Commission on Human Rights resolution 1995/57, 3 March 1995.

¹⁶⁷ Internally displaced persons, *Compilation and Analysis of Legal Norms*, E/CN.4/1996/52/Add.2.

the protection of their rights.¹⁶⁸ Subsequently, Deng was requested to prepare a normative framework for the IDPs based on the findings of the Compilation¹⁶⁹ and that was introduced in 1998. Although the Guiding Principles are not a binding instrument, they reflect and are consistent with international human rights law and international humanitarian law. They address all the phases of displacement; from the protection against arbitrary displacement to protection during displacement and afterwards, in post-conflict situation, by setting forth guarantees for safe return, resettlement and reintegration.¹⁷⁰ Deng himself argues that they should serve as a morally binding statement, which should raise awareness of the particular needs of the IDPs.¹⁷¹ Guiding Principles consist of 30 principles that identify essential rights and guarantees, which are relevant for protecting and assisting IDPs. They address internal displacement from the perspective of the needs of IDPs.¹⁷²

Although the existing laws provide protection also for the IDPs, there still remain gray areas and gaps in the laws as has been identified in the Guiding Principles. There are two categories of such gaps. On the one hand, there is a lack of explicit norms to address the identified needs of the internally displaced; for instance the lack of an explicit right not to be arbitrarily displaced, or the right to compensation for property loss due to displacement.¹⁷³ These needs are not explicitly covered by any human rights principles. On the other hand, even though a general norm exists, there is no corollary provision to specifically address those issues that are of special importance for the IDPs; for instance, there is a general human rights principle guaranteeing the freedom of movement but there is no guarantee for IDPs against forcible

¹⁶⁸ Ibid., par. 413: "Where the analysis shows that the needs of internally displaced persons are insufficiently protected by existing international law, it is important to restate general principles of protection in more specific detail and to address clear protection gaps in a future international instrument on the protection of internally displaced persons."

¹⁶⁹ UN Commission on Human Rights resolution 1996/52, 19 April 1996 and UN General Assembly resolution 52/130, 12 December 1997.

¹⁷⁰ Roberta Cohen, "Recent trends in protection and assistance for internally displaced persons", in: Janie Hampton (ed.) *Internally displaced people, a global survey*, (London: Earthscan publications Ltd, 1998), pp.3-10, at p. 3. See also Mooney, 2003, *supra* (note 130), at p. 163.

¹⁷¹ Deng, 2000, *supra* (note 3), p. vi. See also Roberta Cohen, "The Guiding Principles on internal displacement: a new instrument for international organizations and NGOs" *Forced Migration review* No. 2, (August 1998), pp. 31-33, at p. 31.

¹⁷² Kälın 2000, *supra* (note 11), p.2.

¹⁷³ Mooney, 2003, *supra* (note 130), p.163. See also Kälın and Goldman, 1998, p. 74. The actual legal gaps in the protection of the needs of the IDPs are enumerated in the Compilation and Analysis of Legal Norms, part I, par.416.

return comparable with the non-refoulement principle applicable to refugees.¹⁷⁴ Thus IDPs have a general freedom of movement but they cannot be protected against forcible returns in the same manner as refugees are protected.

4.3 Opinion of the Russian Constitutional Court

The Russian Constitutional Court has taken a decision relating to the conduct of the Russian military forces in Chechnya. This occurred already in 1995, when the Court was asked to review the constitutionality of several presidential decrees authorising the use of armed forces to stop the insurgencies in Chechnya.¹⁷⁵ The Court had to review two issues, whether the Chechen Republic had the right to secession under international law and whether the Additional Protocol II or other rules of international humanitarian law applied to the armed conflict in Chechnya. As for the first issue, the Court referred to Chechnya's wishes for independence by declaring that the Constitution does not allow for a unilateral resolution of the issue of changing the status of one of the subjects of the Federation and its secession from the Federation.¹⁷⁶ The issue of state integrity was emphasized as a condition for human rights and freedoms. The constitutional goal of preserving state integrity is, according to the Court, in conformity with the universally recognised principles concerning the right to self-determination.¹⁷⁷

It was claimed that during the armed conflict in Chechnya, excessive military force had been used, which had resulted in several civilian casualties. The Court had thus been asked to examine whether the military action by the Russian forces in Chechnya had resulted in breaches of international humanitarian law. The Court did not examine the actual acts of the parties to the conflict from the point of view of the Protocol II as this does not fall under its jurisdiction.

The Court only examined the normative content of the decrees and did not comment on their actual application. In the ruling, the Court first acknowledged that between 1991-1994, an

¹⁷⁴ Mooney, 2003, *supra* (note 130), p. 162. The situations where a corollary more specific right relevant to the protection of the IDPs are numerous and listed under par.415 of the Compilation and Analysis of Legal Norms, part I.

¹⁷⁵ Constitutional Court of the Russian Federation, judgment on the constitutionality of the presidential decrees and the resolutions of the Federal Government concerning the situation in Chechnya, 31 July 1995.

¹⁷⁶ *Ibid.*, p.2.

¹⁷⁷ *Ibid.*, p.3.

extraordinary situation had arisen on the territory of Chechnya Republic, which is a subject of the Russian Federation.¹⁷⁸ During this situation, the validity of the Constitution of the Russian Federation and federal laws was denied and the system of legitimate bodies of power had been destroyed, regular unlawful armed groups have emerged and widespread human rights violations occurred. Furthermore, the Constitution provides that the president of the Federation is obliged to take measures to protect the sovereignty of the Federation, its independence, security and State integrity.¹⁷⁹

The Court pointed out that the bodies in power are bound by both internal and international law and that universally recognised principles and norms of international law and international treaties are a part of the legal system of the Federation and must thus be observed.¹⁸⁰ In relation to this, the Geneva Conventions and their Additional Protocol II were discussed. The USSR ratified the Protocol in 1949 and directed the Council of Ministers to prepare and submit proposals for making corresponding amendments to the national legislation. However, such amendments were not made. Nevertheless, the Court emphasized that the provisions of the Protocol II are binding on both parties to the conflict.¹⁸¹ Here, the reference on the fact that the provisions are *binding on both parties* is to be noted in particular.¹⁸² The Court tried to excuse the lack of compliance with the provisions by the fact that the Protocol II had not been incorporated to the Russian legislation.¹⁸³ Although under general principles of international law, the lack of incorporating Geneva Conventions into domestic legislation cannot excuse non-observance of the provisions by the state concerned; the effectiveness of the Conventions is clearly hindered if they have not been properly transformed into domestic laws.¹⁸⁴ Such non-observance and its consequences are visible in the Chechen conflict.

The Court explicitly states that the improper consideration of the provisions of Protocol II in domestic legislation has been one of the reasons for the non-compliance with those provisions,

¹⁷⁸ Ibid, par.2, p.2.

¹⁷⁹ Judgement of the Constitutional Court of the Russian Federation on the constitutionality of the Presidential Decrees and the Resolutions of the Federal Government concerning the situation in Chechnya, July 31 1995, p.4.

¹⁸⁰ Ibid., par.5, p.5.

¹⁸¹ Ibid., p.5.

¹⁸² This would imply that the Court meant that the Protocol confers rights and obligations also on the insurgent groups operating in Chechnya. Paola Gaeta 1996, The armed conflict in Chechnya before the Russian Constitutional Court, *European Journal of International Law*, Vol. 7, No.4, p. 569.

¹⁸³ Ibid.

¹⁸⁴ Meron 1987, supra (note 96), p. 39.

which state that the use of force must be appropriate with the aim and every possible effort must be made to avoid causing harm for civilians and their property.¹⁸⁵ Criticism towards the legislator for not taking account of the Protocol II when passing the laws governing the armed forces was related to such instances where the armed forces were to be used in domestic situations, as was the case in Chechnya.¹⁸⁶ It would have been necessary to enact *ad hoc*-legislation to implement Protocol II.¹⁸⁷ It has been argued that it was a surprising decision for the Court to decide to categorise the conflict in Chechnya as a civil war fulfilling the conditions required by article 1 of Protocol II; that it is a prolonged internal armed conflict of great intensity. Why the Court chose this category instead of referring to the conflict as something falling below the threshold for the application of the Protocol II is not clear.

As for the presidential decrees, the one on “measures to put an end to the activities of illegal armed groups on the territory of the Chechen Republic and in the Ossetia-Ingushetia area of conflict” was enacted within the limits of the president’s constitutional powers. However, the provisions on the expulsion from Chechnya of persons constituting a threat to public security as well as to the safety of citizens and the refusal to accredit journalists working in the area of armed conflict, included in the decree on “guaranteeing State security and the territorial integrity of the Russian Federation, compliance with the law, the rights and freedoms of citizens, and the disarmament of illegal armed groups on the territory of the Chechen Republic and of the adjacent regions of Northern Caucasia” were found by the Court to be unconstitutional.¹⁸⁸

The Court did recognise the applicability of Protocol II in relation to the armed conflict in Chechnya and admits that the Protocol was not duly respected because national measures for its implementation were not sufficient. The Court also refers to Protocol II when considering the constitutional legality of the use of armed forces in such situations.¹⁸⁹

¹⁸⁵ Judgment of the Constitutional Court, 31. July 1995, par.5, p.5.

¹⁸⁶ Bakhtiyar Tuzmukhamedov 2003, The implementation of international humanitarian law in the Russian Federation, International Review of the Red Cross Vol. 85, No 850, p. 395.

¹⁸⁷ Paola Gaeta 1996, *supra* (note 182), p. 569. Gaeta argues that Protocol II cannot be considered as self-executive in all its provisions even though the Russian Constitution, in article 15, provides that international treaties are part of the Russian domestic legal system.

¹⁸⁸ Judgment of the Constitutional Court, 31. July 1995, p.7.

¹⁸⁹ See the International Red Cross’ national case law section on international humanitarian law and implementation in the Russian Federation available at www.icrc.org/ihl-nat.nsf/0/ac8db8b32b8a2a5d432564dc0048bda4?OpenDocument, visited 14 February 2005.

However, it is worth noting that the Court completely ignored the fact that a set of international treaty rules on internal civil strife has become part of customary international law.¹⁹⁰ The Russian Constitution states in article 15.4 that “commonly recognised principles and norms of international law” are a part of the national legal system. Gaeta argues that such customary rules are self-executing in that they do not require further implementing legislation.¹⁹¹ For instance, Protocol II has several provisions which could be deemed as self-executing; such as article 4 on fundamental guarantees, article 7 on protection and care, article 12 on distinctive emblem, article 13 on protection of the civilian population and article 16 on protection of cultural objects could be seen as reflecting customary international law. From this it would follow that Russian military authority should apply such customary rules even if there is no domestic implementing legislation.

How could the protection of IDPs be enhanced under international human rights and humanitarian law?

Lavoyer proposes new strategies for better implementation of the international humanitarian law. These include as a first step encouraging states to ratify the Additional Protocols to the Geneva Conventions. National legislation should also be adapted to implement the principles of humanitarian law, such as allowing for the prosecution of war criminals. Another valid argument is that the armed forces should receive more education on the subject of humanitarian law.¹⁹² The cruelty of internal armed conflicts together with the frequent lack of regard and respect for the principles of humanity by the parties to a conflict and the uncertainty as to the binding rules that regulate internal armed conflicts makes the identification and the development of applicable customary rules both urgent and compelling.¹⁹³ Meron sees Protocol II as a significant addition to the core of non-derogable rights designed to humanize internal armed conflict.¹⁹⁴

¹⁹⁰ The customary nature of common article 3 of the Geneva Conventions has been affirmed by the International Court of Justice in its Nicaragua-judgement ICJ Reports 1986, at 218. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia has also affirmed the position of common article 3 in its Tadic-judgment, par.98.

¹⁹¹ Paola Gaeta 1996, *supra* (note 182), p. 569.

¹⁹² Lavoyer 2002, *Forced displacement: the relevance of international humanitarian law in Bayefsky & Fitzpatrick, Human rights and forced displacement*, p. 60.

¹⁹³ Meron 1989, *supra* (note 156), p. 72. Meron relies on the common article 3 and the essential core of non-derogable human rights in this context.

¹⁹⁴ *Ibid.* Protocol II contains a basic core of human rights. See Commentary to the Additional protocols, p. 1340:” Protocol II contains virtually all the irreducible rights of the ICCPR. These rights are based on rules of universal

5. IDPs and specific human rights

5.1 *The right to life*

Internally displaced persons are often face to face with various types of violence; ranging from killings, torture, rape, and the use of land mines to forcible disappearances. Therefore it is necessary to examine the legal norms offering protection for their life and personal safety. The personal safety of IDPs is at risk when they flee from their homes but also when they are in camps. The most acute risks are killings and the indirect effects of hostilities, especially from direct and indiscriminate attacks and acts of terrorism. The right to life is the very basic human right that is obviously non-derogable by nature. Unfortunately, many IDPs have been the victims of genocide; a grave violation of human rights, in the former Yugoslavia for example, during ethnic cleansings.¹⁹⁵ On the issue of the right to life, the Human Rights Committee has interpreted the contents of the right as placing a duty on States to prevent wars, acts of genocide and other acts of massive violence, which could result in arbitrary loss of life.¹⁹⁶

As regards the right to life and situations of non-international armed conflict, international humanitarian law provides in common article 3 minimum standards for the humane treatment applicable for all persons who do not or do no longer participate in hostilities. Common article 3 does not explicitly prohibit attacks against civilian populations in non-international armed conflicts. Such attacks are, however, prohibited under customary law. The issue is also addressed in the United Nations General Assembly resolution 2444 entitled “Respect for human rights in armed conflicts”, which declares a customary principle of civilian immunity.¹⁹⁷ The resolution states that the fundamental principles of civilian immunity and distinguishing civilians from combatants must be respected at all times during armed conflicts.¹⁹⁸ The International Commission of the Red Cross sees these principles as basic rules of the laws of war that apply in all armed conflicts.¹⁹⁹ Therefore, customary principles of civilian immunity

validity to which States can be held, even in the absence of any treaty obligation”. However, Meron notes that beyond the scope of Protocol II and its express provisions, regulation of an internal armed conflict relies on the state and its domestic laws.

¹⁹⁵ Vienna Declaration and Programme of Action reads in part 1, par.28:” The World Conference on Human Rights expresses its dismay at massive violations of human rights especially in the form of genocide, "ethnic cleansing" and systematic rape of women in war situations, *creating mass exodus of refugees and displaced persons*. While strongly condemning such abhorrent practices it reiterates the call that perpetrators of such crimes be punished and such practices immediately stopped.” (Emphasis added).

¹⁹⁶ Human Rights Committee 1982, General Comment 6, HRI/GEN/Rev.1 par.2.

¹⁹⁷ General Assembly Resolution 2444 (XXIII), Respect for human rights in armed conflicts, 19 December 1968.

¹⁹⁸ GA resolution 2444 (XXIII) art.1a, b, c.

¹⁹⁹ International Committee of the Red Cross 2002, *International Humanitarian Law*, p.6.

and distinguishing civilians from combatants must be adhered to in internal and international armed conflicts. Subsequently, IDPs must not be made the target of attacks during such conflicts. They will, however, lose their immunity if they assume a role of combatant.

Article 4 of the Protocol II contains the fundamental guarantees of humane treatment laid down in common article 3.²⁰⁰ Its non-derogable provisions apply to all persons, including IDPs.²⁰¹ Article 17 (1) of that Protocol refers directly to the security of IDPs by providing that, exceptionally, displacement may take place when the security of the civilians is at stake or if there are 'imperative military reasons' and in such cases, there is an obligation to take 'all possible measures' to receive the displaced persons into sufficient conditions, in 'safety'.²⁰² The drafters of the Protocol wanted to prevent IDP camps from being placed near military objects where the persons would be exposed to the effects of attacks.

In cases of armed international conflicts, IDPs are most often protected persons when they find themselves under the powers of the adversary. As protected persons, they are entitled to protection offered by article 32 of the Fourth Geneva Convention.²⁰³ According to that provision, protected persons shall be at all times treated humanely, and shall be protected

²⁰⁰ Protocol II art.4.1: "All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors."

²⁰¹ Compilation and analysis of legal norms (part I), par.80.

²⁰² Protocol II, art.17: "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. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."

²⁰³ Protected persons are defined in art.4 of the Fourth Geneva Convention: "Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State, which is not bound by the Convention, are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are. The provisions of Part II are, however, wider in application, as defined in Article 13. Persons protected by the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, or by the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949, or by the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, shall not be considered as protected persons within the meaning of the present Convention." in case internally displaced persons are still under the power of their own government, they are not considered to be protected persons by this definition; but if they are in the hands of a foreign power although on the territory of their state of origin, they would qualify as protected persons by this definition.

against all acts of violence or threats of violence.²⁰⁴ In case IDPs should fall outside the category of protected persons, they must still be accorded the minimum guarantees provided in art.75 of Protocol II.²⁰⁵ In conclusion on the issue of the right to life and personal security, the rights of IDPs are fairly well protected in international law. The gap in the Fourth Geneva Convention originating from the narrow definition of what constitutes a protected person is filled to a large extent by Protocol I and non-derogable human rights law. The frequent violations of these rights are not the result of legal gaps but more the result of shortcomings in the effective implementation of the existing norms. Once again, it would be useful to have an explicit clause of protection for IDPs.

5.1.1 Protection of the right to life – Chechnya

The fundamental human right, right to life, is guaranteed in the Russian Constitution by article 20 and the ICCPR, ECHR and common article 3 to the Geneva Conventions and Protocol II. The Russian Federation has, however, violated this obligation during both the first and the second war in Chechnya. There are various reports by Russian and international NGOs, Council of Europe and other bodies, which articulate the grave breaches of widespread summary executions of Chechen civilians and suspected rebels. In addition, Russian forces have systematically failed to prevent civilian casualties and have treated those detained brutally, even in such a way that leads to the death of a detainee. Such practices constitute arbitrary deprivation of life, which is a violation of article 6 of the ICCPR, article 2 of the ECHR and article 20 of the Russian Constitution.²⁰⁶ The brutal detention conditions and treatment give rise to the right to be free from torture or other cruel, inhuman or degrading treatment. Such acts are prohibited under article 7 of the ICCPR, article 3 of the ECHR and article 21.2 of the Russian Constitution. Common article 3 to the Geneva Conventions also prohibits violence to life and person and cruel treatment, torture and outrages upon personal dignity. Protocol II prohibits

²⁰⁴ Fourth Geneva Convention, art.32:” The High Contracting Parties specifically agree that *each of them is prohibited from taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands*. This prohibition applies not only to murder, torture, corporal punishments, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality whether applied by civilian or military agents.” (Emphasis added).

²⁰⁵ See footnote 85.

²⁰⁶ ICCPR article 6.1.:” Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”. ECHR art.2:” Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence..”: Russian Constitution art.20.1:”Everyone shall have the right to life”.

violence to life, health and physical or mental well-being of persons, pillage and outrages upon personal dignity, including rape.²⁰⁷

The Russian Federation is party to the ICCPR and therefore has to submit periodic reports to the respective Committee on its compliance with the Covenant. The last report was examined in 2003 and although the Human Rights Committee noted some positive aspects, there were many points of concern, some of which related to IDPs. The continuous reports of human rights violations in Chechnya, including extra judicial killings, disappearances and torture, including rape, were the starting point for the Committee's views as such acts are in violation of various provisions of the Covenant. The Committee questioned why investigations of the alleged violations have not been brought to conclusion.²⁰⁸ According to the Committee, Russian Federation should ensure that any (military) operations carried out in Chechnya are in conformity with the State's obligations under international treaties.²⁰⁹ As for the alleged human rights violations, the State should guarantee that such abuses are not committed with impunity *de jure* or *de facto*; this should include also violations committed by the military forces during anti-terrorist operations. All accusations of violations should be investigated, prosecuted and victims of such violations compensated.²¹⁰ The emphasis is clearly on state responsibility for the safety of its citizens and its task to uphold the rule of law.

In 2002, the Committee against Torture expressed its concern over the events in Chechnya; the continuous reports on extra- judicial killings, disappearances, and other forms of torture and ill treatment.²¹¹ As its recommendation, the Committee requested Russian Federation to clarify what the jurisdiction over the events in Chechnya is as there is no state of emergency and there is clearly a non-international armed conflict in progress.²¹² The importance of setting up an independent and impartial investigation body to address the various human rights violations was also emphasized.²¹³

²⁰⁷ Maxine Marcus, 2002, *supra* (note 61), p. 711.

²⁰⁸ Human Rights Committee, Concluding observations: Russian Federation. UN Doc. CCPR/CO/79/RUS, 6 November 2003, par.13.

²⁰⁹ *Ibid.*

²¹⁰ *Ibid.*

²¹¹ Committee against Torture, conclusions and recommendations: Russian Federation. UN Doc CAT/C/CR/28/4, 28 May 2002, par. 7a.

²¹² *Ibid.*, par.9a.

²¹³ *Ibid.*, par.9b.

5.1.2 Russian Federation and the European Court of Human Rights

In this context, the recent judgements from the European Court of Human Rights regarding Chechnya and alleged human rights violations merit to be examined. The Russian Federation is State Party to the European Convention on Human Rights and Fundamental Freedoms and therefore its citizens have the right to appeal to the European Court of Human Rights. The Court decided on 19 December 2002 to declare admissible six complaints²¹⁴ against Russia concerning the events in Chechnya. All the complaints relate to alleged violations of the applicants' rights by the Russian military forces in Chechnya during 1999-2000. The complaints were declared admissible under article 2 (right to life), article 3 (prohibition of torture and inhuman or degrading treatment), article 13 (right to an effective remedy) of the European Convention on Human Rights and article 1 of the Protocol No.1 to the European Convention (protection of property).

The case of *Khashiyev and Akayeva v. Russia* concerned alleged extra-judicial executions of their relatives by members of the Russian army in Grozny at the end of January 2000. The applicants claimed that their relatives were tortured and murdered by members of the army, that the subsequent investigation was insufficient and that they had no access to an effective remedy at domestic level. The judgment was issued on 24 February 2005.²¹⁵ As regards article 2, the Court emphasized the importance of the right to life as one of the fundamental provisions and found that the death of applicants' relatives was established and that military servicemen had killed them; thus the deaths were attributable to Russia. The Court had not received an explanation from the Government regarding the circumstances of the deaths. Russia was therefore judged liable for the deaths and the Court found a violation of article 2.²¹⁶ In addition, the ineffective criminal investigation also violated article 2.

The case of *Isayeva and others v. Russia* relates to an alleged indiscriminate bombing by Russian military planes on civilians leaving Grozny on 29 October 1999. Due to the bombing,

²¹⁴ The six complaints were joined together by the Court so that they are three in total; case of *Khashiyev and Akayeva v. Russia* applications no. 57942/00 and 57945/00, *Isayeva and others v. Russia* applications no. 57947/00 to 57949/00 and *Zara Isayeva v. Russia* application no. 57950/00. Press release issued by the Registrar, 16.1.2003.

²¹⁵ Press release issued by the Registrar 24 February 2005.

²¹⁶ Judgement of 24 February 2005, *Khashiyev and Akayeva v. Russia* (applications nos. 57942/00 and 57945/00), par. 147.

Ms. Isayeva was wounded and her two children and daughter-in-law died, Ms. Yusupova was wounded and Ms. Bazayeva's car containing the family belongings was destroyed.²¹⁷ The applicants complain that their relative's and their own right to life and to protection from inhuman and degrading treatment were violated. In addition, the destruction of the car is claimed to have constituted an infringement of the right to property. Furthermore, applicants claim that investigation in the issue was insufficient and they lacked access to an effective remedy at domestic level. The government replied that the bombing was a justified counter measure to an attack on the planes committed by the armed insurgents.²¹⁸

In its judgment, the Court pointed out that article 2 covers not only intentional killing but also situations where it is permitted to use force, which may result, as an unintended outcome, to the loss of lives.²¹⁹ Any use of force must be not more than 'absolutely necessary'. The Court found it to be undisputed that there had been an aerial missile attack to which the applicants had been subjected to and therefore the complaint is within the scope of article 2.²²⁰ The Court also found that the situation that existed in Chechnya at the time did call for exceptional measures by the State to regain control over the Republic and to suppress illegal armed insurgency.²²¹ Such measures could include military planes equipped with heavy combat weapons. Furthermore, if the planes were attacked by insurgents, that could have justified the use of lethal force. However, the Government failed to provide evidence supporting their claim that such an attack would have taken place. Therefore, the Court found that the aerial attack was not planned or executed with sufficient care for the civilian population.²²² Subsequently, there had been a violation on the part of the state to protect the right to life of the three applicants and of the two children of the applicants. The same aerial attack caused the destruction of the applicant's vehicle and therefore constituted a grave and unjustified breach of the applicant's right to her property, as provided in Article 1, Protocol No. 1.²²³

²¹⁷ Judgment of 24 February 2005, Isayeva and other v. Russia (applications nos. 57947/00, 57948/00 and 57949/00), paras. 19-22.

²¹⁸ Judgment of 24 February 2005, Isayeva and others v. Russia (applications nos. 57947/00, 57948/00 and 57949/00), par. 160.

²¹⁹ Judgment of 24 February 2005, Isayeva and others v. Russia (applications nos. 57947/00, 57948/00 and 57949/00), par. 169.

²²⁰ Ibid., par.174.

²²¹ Ibid., par. 178.

²²² Ibi., par.199.

²²³ Ibid., par.233-234.

The case of *Isayeva v. Russia* is a complaint over the alleged indiscriminate bombing by the Russian military forces of the village of Katyr-Yurt on 4 February 2000. Insurgent fighters had entered the village that was full of civilians and Russian troops attacked the village by bombing it heavily; however, civilians were not provided with safe exit routes.²²⁴ As a result of the bombing, Ms. Isayeva's son and her three nieces were killed. The applicant complains that the right to life of her relatives was violated, that the investigation was not sufficient and that she lacked access to an effective remedy. Therefore she relies on article 2 and 13 of the ECHR. The Russian government replied that the attack, which had been spontaneous, and its consequences were legitimate under article 2, as they had resulted from the use of force that was absolutely necessary in the circumstances in order to suppress the resistance of armed illegal groups, who were threatening the lives of civilians.²²⁵

The Court was of the opinion that the attack on the village of Katyr-Yurt had not been spontaneous and the operation had been planned in advance.²²⁶ This would imply that the military troops would have had the time to instruct the civilians to leave the village before the fighting intensified. The heavy bombing was also considered by the Court as a breach of the degree of caution expected from a law-enforcement body in a democratic society.²²⁷ When conducting such an operation in an area filled with civilians, the operation should take into account the duty to protect the civilians. Therefore, the Court found a violation of article 2 also in this case. In all the three cases, violation was found also under article 13, right to an effective remedy and the State was to pay compensation to the applicants.²²⁸

5.1.2 Protection of the right to life - Liberia

The armed conflict in Liberia has resulted in serious violations of human rights and humanitarian law. These violations include deliberate and arbitrary killings, disappearances, torture, widespread rape and sexual abuse of girls, women and boys, arbitrary arrests and detention, forced conscription, recruitment and use of child soldiers, systematic and forced

²²⁴ Judgment of 24 February 2005, *Isayeva v. Russia* (application no. 57950/00), paras. 17, 19.

²²⁵ Judgment of 24 February 2005, *Isayeva v. Russia*, par. 170.

²²⁶ *Ibid.*, par.188-189.

²²⁷ *Ibid.*, par.191.

²²⁸ In the case of *Khashiyev v. Russia and Akayeva v. Russia*, State was sentenced to pay over 40 000 euros; in the case of *Isayeva and others v. Russia*, State was to pay over 60 000 euros and in the case of *Isayeva v. Russia*, State was to pay over 50 000 euros.

displacement and indiscriminate targeting of civilians.²²⁹ All parties to the conflict have been guilty of these violations. The promotion and protection of human rights has suffered from a grave deterioration and the civil society is very weak; it lacks all capacity to be an effective tool in securing the rights and freedoms of persons.²³⁰ The Comprehensive Peace Agreement has a rather short sighted view of human rights. It explicitly provides for the respect of civil and political rights, which include the right to life and liberty, freedom from torture, the right to a fair trial, freedom of conscience, expression and association and the right to participate in the governance of the country.²³¹ There is no mention of equality or of non-discrimination among the basic rights to be guaranteed nor is there any reference to relevant basic economic, social and cultural rights.

The fact that Liberia has signed the ICCPR already in 1967 is of importance when considering the human rights violations that have taken place during the civil war. According to the ICCPR, the Covenant will enter into force once the ratifying state has deposited its instrument of ratification; in the case of Liberia, this took 37 years.²³² So in practice, the Covenant has only just entered into force in Liberia. One could perhaps argue that the state could be held responsible for upholding its obligations under the Covenant even during the time when it had signed the Covenant but the instrument of ratification had not been deposited. The state should at least refrain from such acts that would undermine the purpose and object of a treaty after having signed a treaty until the time it has made clear that it does not wish to become a party after all.²³³ The Human Rights Committee or the Committee on Economic, Social and Cultural Rights have thus not yet had the possibility to examine Liberia's periodic reports; the future

²²⁹ Report of the Secretary-General to the Security Council on Liberia, UN Doc. S/2003/875, par.26. Committee on the Rights of the Child, concluding observations: Liberia, UN Doc CRC/C/15/Add.236, 1 July 2004, par.58, 60-63, expresses special concern for child soldiers and children who have been internally displaced.

²³⁰ Report of the Secretary-General to the Security Council on Liberia, UN Doc. S/2003/875, p 28.

²³¹ Comprehensive Peace Agreement, 18 August 2003, part six, art.xiii: Human rights.

²³² ICCPR, art. 49.2. Liberia ratified the ICCPR on 18 April 1967 but the Covenant entered into force on 22 December 2004, same for ICESCR

²³³ Vienna Convention on the Law of Treaties, 1155 UNTS 331, entry into force 27 January 1980, art. 18:” A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed”.

reports will be interesting in light of the achievements by the transitional government, whether the goals have been met etc.

5.2 Non-discrimination

Another essential human rights principle is the right to be free from discrimination, which is also the fundamental requirement for the implementation of other human rights. The concepts of equality before the law, equal protection by the law and non-discrimination form the basis of international human rights law. Internally displaced persons, as they often live in alien surroundings and have lost their security, property and social status, are especially vulnerable to discriminatory practices. There is no explicit prohibition of discrimination against internally displaced persons because of their being displaced. Many of the international and regional human rights treaties require states parties to respect the rights and freedoms enumerated in the treaties without discrimination. General provisions prohibiting discrimination can be found in several human rights treaties. An important provision is article 26 of the CCPR, which guarantees equality before the law and freedom from discrimination and the equal protection of the law in general. The scope of this article extends to all rights, whether protected by the Covenant or not.²³⁴

The term "discrimination" is generally understood to mean "any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms"²³⁵; such definitions are also to be found in the CERD²³⁶ and the CEDAW²³⁷, which focus on race and gender as specific grounds for discrimination. Human rights treaties often refer to 'other status' as one of the forbidden grounds of discrimination. This concept of 'other status' was intended to be

²³⁴ Human Rights Committee 1994, General Comment 23 (article 27). Paragraph 4 reads: "...In addition, *there is a distinct right provided under article 26 for equality before the law, equal protection of the law, and non-discrimination in respect of rights granted and obligations imposed by the States. It governs the exercise of all rights, whether protected under the Covenant or not, which the State party confers by law on individuals within its territory or under its jurisdiction, irrespective of whether they belong to the minorities specified in article 27 or not. Some States parties who claim that they do not discriminate on grounds of ethnicity, language or religion, wrongly contend, on that basis alone, that they have no minorities.*" (emphasis added).

²³⁵ Human Rights Committee 1989, General Comment 18, non-discrimination, par.7.

²³⁶ Convention on the Elimination of all forms of Racial Discrimination, art.1.

²³⁷ Convention of the Elimination of all forms of Discrimination Against Women, art.1.

interpreted broadly and has been read as including nationality and disability, and it reasonably includes youth and old age as well.²³⁸ Therefore, one could argue that non-discrimination clauses would appear to prohibit discrimination against internally displaced persons. In addition, non-discrimination clauses would thus also prohibit discriminatory acts based on grounds that often are related to displacement situations, such as race, religion, nationality or social origin and the lack of property.²³⁹ In conclusion, one could argue for a more explicit prohibition against discrimination based on IDP-status.

Principles of equality and non-discrimination apply also in non-international armed conflicts. As for international humanitarian law, it provides for humane treatment without adverse distinction in situations of non-international armed conflicts. Human rights principles also apply in inter-state conflicts, although there is a possibility of derogation. The concept of humane treatment applies as well. The Fourth Geneva Convention art.27 (3) provides for that but it applies only to the category defined as protected persons and does thus not include internally displaced.²⁴⁰ However, art.75 of the Protocol I offers full protection for IDPs and contains an extensive list of guarantees.²⁴¹

5.2.1 Non-discrimination and Chechnya

The right to be free from discrimination has been addressed in the CERD Committee's view on Russia's compliance with the obligations of the Convention. The Committee pointed out the difficulties arising from the entry into force in 2002 of Federal Laws on Russian Citizenship and on the legal status of foreign citizens in the Russian Federation. These laws have made a large number of former Soviet citizens, who previously resided legally within the territory,

²³⁸ Marc J. Bossuyt 1987, *Guide to the "travaux préparatoires" of the International Covenant on Civil and Political Rights*, p. 486: "Proposals to add 'association with minority groups', 'economic or other opinion' and 'educational attainment' to the enumeration were deemed adequately covered by the expressions 'discrimination on any ground' and 'other status'".

²³⁹ Compilation and analysis of legal norms (Part I), par.52.

²⁴⁰ The article reads: "Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion."

²⁴¹ Article 75 begins: "In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honour, convictions and religious practices of all such persons." After this general guarantee, there follows a more detailed list of prohibited acts.

illegal migrants.²⁴² In this context, the Committee expressed its concern over the fact that Chechens who have sought refuge outside of Chechnya have been denied the status of a forced migrant, although discrimination is prohibited.²⁴³ The Committee expressed concern for the reports on coerced return practices. The CERD Committee also points that the lack of residence registration has been used to deny persons of their economic, social and cultural rights, as was also pointed out by the ESCR Committee.²⁴⁴ There have been NGO reports on discrimination against Chechen IDPs and how they have not been granted the status of forced migrants, which in turn hinders them from obtaining the social assistance that is linked to the status of a forced migrant. Chechen IDPs have been discriminated against, according to the NGO reports, due to their ethnic origin, which clearly violates the right to be free from discrimination.²⁴⁵

5.2.2 *Non-discrimination and Liberia*

The Committee on the Rights of the Child has issued concluding observations regarding Liberia in which it states that the prolonged armed conflict has seriously hampered the implementation of the Convention and caused serious human rights violations.²⁴⁶ According to the Committee, there still seems to be de facto discrimination in Liberia, especially of those belonging to vulnerable groups, such as girl children, disabled children and children belonging to certain ethnic groups.²⁴⁷ This problem could be interpreted to cover adults likewise; women and ethnic groups are likely to be discriminated against although the Constitution of Liberia prohibits discrimination.²⁴⁸ Whether the government actually enforces such provisions, is disputed, as there are no laws specifically prohibiting gender discrimination or ethnic discrimination.²⁴⁹

²⁴² Committee on the elimination of all forms of racial discrimination, concluding observations: Russian Federation. UN Doc. CERD/C/62/CO/7, 21 March 2003, par.12.

²⁴³ Committee on the elimination of all forms of racial discrimination, concluding observations: Russian Federation. UN Doc. CERD/C/62/CO/7, 21 March 2003, par.17.

²⁴⁴ Committee on the elimination of all forms of racial discrimination, concluding observations: Russian Federation. UN Doc. CERD/C/62/CO/7, 21 March 2003, par.14. Committee on Economic, Social and Cultural Rights, concluding observations: Russian Federation, UN Doc. E/C.12/1/Add.94, 12 December 2003, par.12.

²⁴⁵ Svetlana Gannushkina, *Report on the situation of Chechnya residents in the Russian Federation June 2003-May 2004*, Memorial Human Rights Center and Migration Rights Network, Moscow 2004, p. 10-11. This issue is dealt with below in the chapter 5.3.1, 'Right to return – Chechnya'.

²⁴⁶ Committee on the Rights of the Child, Concluding observations: Liberia, 1 July 2004, UN Doc. CRC/C/15/Add.236, paras. 4-5.

²⁴⁷ *Ibid.*, par.23.

²⁴⁸ Constitution of Liberia, article 11 b):" All persons, irrespective of ethnic background, race, sex, creed, place of origin or political opinion, are entitled to the fundamental rights and freedoms of the individual, subject to such qualifications as provided for in this Constitution."

²⁴⁹ U.S. Department of State, country reports on human rights practices: Liberia 2004, released by the Bureau of Democracy, human rights and labour, 28 February 2005, section 5:Discrimination, societal abuses and trafficking in persons.

Ethnic differences between various groups still persist and continue to cause political violence and abuses.²⁵⁰

Liberia has failed to report to the Committee on the Elimination of Racial Discrimination and the Committee examined the situation of the state under its review procedures. The Committee expressed its grave concern for various reports relating to discrimination based on ethnicity.²⁵¹ There is very little information available on the measures used to fight racial prejudices. The Committee reiterated that those guilty of committing human rights abuses targeting particularly certain ethnic groups should be brought to justice.²⁵² The Committee urged Liberia to ensure the implementation of the Convention in order to fulfil its obligations under the Convention.²⁵³

5.3 *Forced displacement and the right to return*

The freedom of movement is one of the central rights in relation to internal displacement.²⁵⁴ It is enshrined in the UDHR article 13 and in several other international and regional human rights instruments. The ICCPR guarantees the freedom of movement and the right to choose one's residence in article 12. The same article includes the right to leave and enter one's own country, and it defines the possible legal limitations of that right. The Covenant provides that this right is to be ensured on the basis of the principles of non-discrimination and equality and further defines the possibilities for derogating from the right.²⁵⁵ The right to freedom of movement entails more than the right to cross an international border. It also implies the right to have normal or adequate living conditions in the country of residence.²⁵⁶

²⁵⁰ Ibid.

²⁵¹ Committee on the Elimination of Racial Discrimination, Concluding observations. Liberia, 14 August 2001, UN Doc. A/56/18, par.429.

²⁵² Ibid., par.439.

²⁵³ Ibid., par.443.

²⁵⁴ Stavropoulou 1998, *supra* (note 13), p. 521 argues that it is a misconception to claim that the right to freedom of movement is the basis of the right not to be displaced and the right to return, because they both have a much wider basis in international law. This may be true, but this right does form the core of the right not to be displaced and the right to return. Freedom of movement is a right that entails the respect for various other rights, such as the freedom from discrimination for instance.

²⁵⁵ ICCPR art.2 guarantees non-discrimination, art.3 addresses equality and art.4 allows for derogations under certain circumstances.

²⁵⁶ *Working paper on the right to freedom of movement and related issues* prepared by Mr. Volodymyr Boutkevich in implementation of decision 1996/109 of the Sub-Commission on prevention of discrimination and protection of minorities. UN Doc E/CN.4/1997/22, 29 July 1997, par.39.

Right to freedom of movement is an important right for IDPs. The implementation of the freedom of movement and the right to choose one's residence is especially important in states where massive population movements, which often are involuntary, occur.²⁵⁷ Freedom of movement is guaranteed under article 12 of the ICCPR. It is not included in the list of the non-derogable rights, is it thus a right that can be set-aside during a state of emergency? Because forced displacement typically occurs in external or internal violent conflict situations or as a result of natural catastrophe alleged to constitute public emergency threatening the life of a nation, it is relevant to examine whether the right to freedom of movement can be derogated from.²⁵⁸ The answer is in article 4.1 of the Covenant, which states that even though not all rights were included in the list of non-derogable rights, it does not mean that a state can consider itself free to interfere with that right as soon as it declares a state of emergency.

Furthermore, *any derogation* must be limited to the demands arising from the situation, as is stated by the principle of proportionality. Article 4.1 establishes a precondition under which states' derogations cannot be inconsistent with their other obligations under international law²⁵⁹; even during a state of emergency, states cannot wilfully denounce their obligations, but can only derogate to the extent that is required whilst at the same respecting all its obligations. Scheinin argues that it is justifiable to say that prohibition of forced displacement belongs to the category of fundamental standards of humanity, from which *no derogation is acceptable under any circumstances*.²⁶⁰

The right to freedom of movement is linked to the right to return home, a difficult right to implement in practice. It clashes with refugee law in that asylum claims have in some cases been turned down on the grounds that the claimant has, according to the state of asylum, an 'internal flight' alternative and therefore does not need asylum because it is possible to find a

²⁵⁷ See for example the Report by the Committee on Migration, Refugees and Demography, Council of Europe, Parliamentary Assembly, Doc. 9262, 12 December 2001.

²⁵⁸ Martin Scheinin 2002, Forced displacement and the ICCPR in Bayefsky & Fitzpatrick (eds.) *Human rights and forced displacement*, p. 69.

²⁵⁹ ICCPR art.4.1: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin."

²⁶⁰ Scheinin 2002, *supra* (note 258), p.70. See also the Turku/Åbo Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University in Turku/Åbo Finland, 30 November – 2 December 1990, articles 7 and 11.

safe place in the state of origin. Such arguments are to be addressed with concern, for the intention of promoting the rights of IDPs is not intended to undermine the right to seek asylum.²⁶¹ While the protection of IDPs is certainly a legitimate response to an increasingly hostile environment towards asylum, there is the risk that ‘states of asylum’ might refer to such standards as the basis to further limit their international obligations.²⁶²

Towle argues that the focus of the international community is moving towards concentrating on the plight of the IDPs, and that this might be happening at the expense of a rights-based approach to asylum and refugee protection.²⁶³ He also points out the misleading concept of ‘safe havens’, places where the internal/international conflict is not so intense and where people could relocate to, as an excuse to refuse asylum, the same type of excuse being the above mentioned ‘internal flight alternative’.²⁶⁴ Such excuses have been made in European countries, for example, when refusing to grant asylum to Tamils fleeing from Sri Lanka the reason for denial being that the open relief centres created by the UNHCR are a valid alternative and no asylum is required.²⁶⁵ As such inhospitality towards asylum-seekers grows, and while states see it as too expensive or troublesome to admit refugees on their territory, the number of IDPs continues to grow and outnumbers the amount of refugees.²⁶⁶ Arbitrary displacement has been the subject of pronouncements by various treaty bodies. The CERD Committee condemned arbitrary displacement and subsequent ethnic cleansing in the context of the conflict in Bosnia-Herzegovina.²⁶⁷

Once persons are internally displaced, their right to return voluntarily and in safety to their place of residence must be guaranteed. There is, however, no general rule that would affirm such a right but it can be deduced from the right to freedom of movement and the right to choose one’s residence. Internal displacement, by its very nature, restricts the fundamental right to move within the territory of a state and the corresponding right to choose one’s residence.

²⁶¹ Ibid.

²⁶² Richard Towle 2002, Human rights standards – a paradigm for refugee protection? In Bayefsky & Fitzpatrick, *Human rights and forced displacement*, p.30.

²⁶³ Ibid.

²⁶⁴ Ibid., p. 31.

²⁶⁵ Cohen & Deng 1998, *supra* (note 2), p.30.

²⁶⁶ Ibid.

²⁶⁷ CERD Committee, CERD/C/247/Add.1, paras.4-5. The Committee describes the forcible displacement to have been carried out with the intention of creating an ethnically pure territory. Also CERD Committee A/50/18, par. 219, the Committee condemns such acts as massive, gross and systematic violations of human rights.

Freedom of movement and choosing a place of residence is affirmed as a basic human right in the UDHR and similarly explicitly guaranteed in the ICCPR.²⁶⁸ There are parallel guarantees in regional human rights instruments and in the ILO Convention No 169 relating to indigenous peoples' rights. The freedom of movement is a derogable right; however, the derogation must comply with the criteria referred to above. Common article 3 does not address freedom of movement/ residence or the prohibition of forced displacement of civilians. The remedy under international humanitarian law is in Protocol II, article 17 that explicitly deals with prohibition of forced movement during internal armed conflicts. During an international conflict, the Fourth Geneva Convention and Protocol I become applicable.²⁶⁹ The Security Council has also affirmed the right to return in relation to IDPs.²⁷⁰ There are firm guarantees, however, for the right of refugees to return to their homes. This guarantee, the principle of non-refoulement, in the context of the Refugee Convention does not apply as such to IDPs since it refers explicitly to conventional refugees.²⁷¹

Forced displacement as such means that a person is denied the exercise of his right to freedom of movement and choice of residence, since it deprives a person of the actual choice of whether to relocate or not.²⁷² A particularly serious type of forced displacement is the case whereby individuals or groups are displaced from their habitual areas of residence on grounds such as race, colour, religion, culture, descent and national or ethnic origin. In recent years, forced movement of this type has become the objective of policies endorsing ethnic separation as well as the aim of extreme military campaigns to achieve ethnic cleansing.²⁷³ Although international human rights law lacks explicit provisions regarding displacement, such practices are undoubtedly prohibited under international law.²⁷⁴ Certain forced movements in the context of ethnic cleansing can even amount to genocide, which in turn constitutes an extreme form of

²⁶⁸ UDHR art.13.1 and ICCPR art.12.1: "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence".

²⁶⁹ Fourth Geneva Convention, articles 49.1, 49.2, 49.6, 147 and Protocol I articles 51.7, 78.1 and 85.4 address movement of civilians.

²⁷⁰ Security Council resolution 876 (1993) 19 October 1993, situation in Abkhazia, par.5. See also Compilation and analysis of legal norms part I, par.243.

²⁷¹ Refugee Convention, art.33 prohibits expulsion or return = refoulement.

²⁷² Compilation and analysis of legal norms part II, par.34.

²⁷³ Compilation and analysis of legal norms part II, par.70. Such separation tactics have been evident for example in the former Yugoslavia, where ethnic cleansings occurred.

²⁷⁴ ICCPR article 26 guarantees the right to equality before the law and the freedom from discrimination. The Human Rights Committee has elaborated in its General Comment 18 further on the interpretation of the article. It is clear that in case of forced displacement that only relocates persons belonging to a certain minority based on race, religion, ethnic origin etc. is discriminatory and thus in violation of the Covenant.

violation of the right to life. An explicit prohibition of arbitrary displacement is contained only in international humanitarian law and in the law relating to indigenous peoples, while general human rights law has only implicit recognition in right to freedom of movement, choice of residence, freedom from arbitrary interference and right to housing, which can all be subjected to restrictions and derogations, should the situation so demand.²⁷⁵

A massive relocation of population groups can be legally valid only if done with the consent of the population involved.²⁷⁶ According to Beyani, this principle of consent, together with the principle of compensation, must rank in status as a general principle of law.²⁷⁷ As such, consent could be argued to present a guarantee against forcible relocation; however, consent alone is not a sufficient guarantee but should be seen as an addition to the human rights of freedom of movement and choice of residence.²⁷⁸ Complete absence of consent in relation to displacement can be taken as an indicator of the involuntary character of displacement. This argument could also be applied to other cases than those regarding the relocation of indigenous groups, such as religious or ethnic minorities, for instance. The principle of consent would mean that the participation of the population under threat of displacement would be required in the decision-making process and they would have the opportunity to exercise their right to freedom of movement and to choose one's residence. As regards the right to return, the ILO Convention 169 is clear on the principle that those relocated have the right to return to their original areas of residence. In case return is not possible, the ILO Convention 169 provides explicitly that following relocation and subsequent loss or injury, those relocated have to be compensated either by providing them with land similar to the one they had or with money, should they so desire.²⁷⁹

²⁷⁵ Compilation and analysis of legal norms part II, par.84.

²⁷⁶ This was the view of the Inter-American Commission on Human Rights in the case regarding the relocation of the Miskito Indians in Nicaragua. OEA/SER.L/V.II.62, 29 November 1983, par. E 27.

²⁷⁷ Chaloka Beyani 2000, *Human rights standards and the movement of people within states*, Oxford University Press, p. 102. Beyani argues that this principle, as upheld by the Inter-American Commission in the Miskito case independently of any treaty basis, shows that it is a principle of international law. See the Inter-American Commission on Human Rights, OEA/Ser.L/V.II.62, doc.10 rev.3, 29 November 1983, part 2 E:par.27 and part 3 B: par.3.

²⁷⁸ ILO Convention 169 on Indigenous and Tribal Peoples provides in article 16.2 that the relocation of the aforementioned peoples shall only take place with their free and informed consent. This would thus indicate that consent has to be obtained for the relocation/displacement to be valid under international law. Although the ILO Convention directly applies only indigenous and tribal peoples, the provision can be used to argue for the principle of consent to be applied also in relocation of other minority groups, based on ethnic origin for instance. This ILO Convention has not been ratified by Russian Federation or Liberia.

²⁷⁹ ILO Convention 169 on Indigenous and Tribal Peoples, art. 16.3- 16.5.

In addition to the lack of an explicit norm to guarantee the right to return, there is no norm prohibiting the forcible return of IDPs to unsafe, dangerous conditions. However, protection of IDPs can be sought from the prohibition of torture and cruel or degrading treatment. Several human rights treaties include such a provision. There is case law from the European Court of Human Rights and the Human Rights Committee, although it concerns return across international borders.²⁸⁰ Nevertheless, case law could prove to be relevant and valid for IDPs as well because they address the act of handing an individual over to the hands of a torturer, human rights violator, which constitutes a violation of the obligation to protect individuals against torture. Deng develops the argument even further and argues that it is thus valid for cases of forcible return of IDPs to areas where they may face serious risks of torture and cruel or inhuman treatment or violation of their right to life.²⁸¹ It remains the responsibility of the state not to make torture and similar practices a possibility when handing persons over. There should thus be no reason why the state's responsibility would be any slighter when forcible return takes place *within* the same state. State should monitor the return process in order to make sure that such forbidden acts will not take place when persons return.

In a ideal situation, the return and reintegration of the IDPs and other returning groups, such as refugees and demobilised combatants, would be undertaken within an agreed framework adopted by both national and local authorities, the international community, the local civil society and the displaced themselves. The return of IDPs is most successful when it is accompanied by so called 'pull factors' in the areas of origin; these pull factors can be created through ensuring basic services and even upgrading them, creation of livelihood opportunities and, most importantly, by establishing law and order. Another type of return is one created by so called 'push factors'; these features more or less force persons to return by way of discrimination and overt hostility from the host community authorities or the community population. In such cases, returnees require special assistance and protection both during and

²⁸⁰ For example, the European Court found in *Soering v. the UK* a violation of art.3 of the European Convention, if the person in question would have been extradited to the United States, see ECHR, *Soering v. the UK*, judgment of 7 July 1989, series A Vol 161. Similarly, the Human Rights Committee found in *Charles Chitat Ng v. Canada* a violation of art.7 of the ICCPR if the applicant was extradited, see Human Rights Committee, Communication No. 4669/1991, *Charles Chitat Ng v. Canada*, report of the Human Rights Committee, Vol.II, GAOR, forty-ninth session, Suppl. No. 40 (A/49/40).

²⁸¹ Compilation and analysis of legal norms part I, par. 252.

also after return.²⁸² Although protection requirements are often only associated with the actual situations and areas of displacement, the protection needs follow the displaced to the return areas as well. Internally displaced persons who return should not be treated as a special category of persons since that would usually entail worse conditions than the ‘normal citizens’ have and discrimination towards the IDPs.

One of the key aspects of the right to return is the idea that it has to be voluntary. Voluntary return should also include involvement of the displaced in the process of decision-making regarding their return, resettlement and reintegration. There should also be other alternatives available, including the choice not to return but to stay in the place of current residence instead, and these alternatives should be made a real possibility. IDPs should be aware of the situation in the area where they wish to return, whether it is safe and what the conditions are in terms of infrastructure and housing, for instance. When considering return, truthful and realistic information regarding the conditions in the area of origin should be provided so that the decision to return is based on knowledge and genuine will to return.²⁸³

Post-conflict situations do not present optimal conditions for a safe and dignified life. Prolonged conflicts usually bring about massive destruction to the area; infrastructure can be totally ruined, basic services collapse and economies disrupt. Farmland and agricultural land turns into bush or is filled with land mines and unexploded weaponry. The situation is often politically unstable and human rights abuses are frequent.²⁸⁴ It is thus not much that waits the returning displaced when peace eventually comes. The expectations of the displaced may be rather high, however, because they may have become dependent on the services provided in the camps. Returning to an area where there is no infrastructure in place, not to even mention a safety net, can be a depressive experience and make the reintegration a long and difficult task. One thing adding to the problem in return is that the local authorities may be quite incapable of dealing with the needs and special requirements of the returning IDPs, or the special categories among IDPs such as women and children, for instance. The authorities need to start with building

²⁸² John Rogge and Betsy Lippman 2004, Making return and reintegration sustainable, transparent and participatory, *Forced migration review* 21, p.4.

²⁸³ Tullio Santini, 2004, North Caucasus: upholding IDPs’ right to ‘voluntary’ return, *Forced migration review* 21, p. 53.

²⁸⁴ Joan Fitzpatrick 2002, Human rights and forced displacement: converging standards, in Bayefsky & Fitzpatrick, *Human rights and forced displacement*, p.15.

capacity for governance, rule of law, mine clearance and development. This is currently an ongoing project in areas of return in Angola and Liberia; it is, however, a costly and problematic project.²⁸⁵ One of the main questions therefore is, to what extent should certain core human rights be restored in practice before people actually return? An important feature in securing the rights to return is the realization of the right to return to one's previous home, which is not always a simple task, as there may be secondary occupiers.

A major challenge in securing a safe return is the creation of a secure environment. Post-conflict environments are prone to weapons and violence, carrying of small arms is more the norm. Establishment of security and rule of law is a fundamental precondition to the successful return and reintegration process. A key component on this is the demobilisation, disarmament and reintegration (DDR) of combatants.²⁸⁶ If displacement was caused by a general breakdown in human rights situation of the state that was severe enough to cause people to flee, the first thing should be to restore human rights protection to an acceptable level before even considering return.²⁸⁷ International refugee law remains largely indifferent to the question whether refugees choose to return to their homes of origin or to relocate within their country of origin. Reintegration can be hindered by time; the longer ethnic groups live apart, the more difficult it will be to live together as a community again. Individuals will also begin to lose their ties to the place of origin, if they live for a long time somewhere else.²⁸⁸

5.3.1 *The right to return – Chechnya*

The primary domestic laws in the Russian Federation related to internal displacement are the Law on the right of citizens of the Russian Federation to freedom of movement, choice of place to stay and residence within the territory of the Russian Federation and the Law on Forced Migrants. The law on freedom of movement distinguishes between places of stay and places of residence and introduces registration of Russian citizens.²⁸⁹ According to the law on freedom of movement, this right may be restricted on grounds of state security, as in border areas and in

²⁸⁵ Rogge and Lippman 2004, *supra* (note 282), p.5.

²⁸⁶ Rogge and Lippman 2004, *supra* (note 282), p.5.

²⁸⁷ Juan E. Méndez & Francisco Cox 2002, Solutions: human rights verification and accountability in Bayefsky & Fitzpatrick, *Human rights and forced displacement*, p.176-177.

²⁸⁸ Marcus Cox 1998, *supra* (note 30), p.627.

²⁸⁹ The law as reprinted in English in Helton & Voronina 2000, *supra* (note 73), p. 128. Places of stay include hotels, hospitals, camping areas etc while places of residence refer to apartments, dwelling houses etc.

closed military cities, in territories where a state of emergency or martial law has been declared or in order to protect the health of citizens.²⁹⁰

The Russian Federation Law on Forced Migrants, even though it does not explicitly mention an internally displaced persons, includes in the category of forced migrants all those displaced persons who have Russia citizenship and are residing on the territory of the Federation and those persons who come from other former Soviet republics and are of the same ethnic origin of peoples/nationalities of the Federation, thus being mainly Russians but also Tatars, Bashkirs and others.²⁹¹ This status is granted only the person is subject to persecution or discrimination for reasons of race, nationality, religion, language or membership in a social group or political opinion.²⁹²

Forced migration status will not be granted if leaving one's permanent place of residence is due to economic reasons or if it results from famine, epidemic, natural or man-made disasters.²⁹³ Another impediment for obtaining the status is the strict time limit to apply for it within 12 months of the date of flight.²⁹⁴ The status of forced migrant has not been granted to the majority of the IDPs, Chechens and Ingush persons, on the grounds that they are not victims of ethnic, confessional or political discrimination. The status does not apply to persons whose displacement is due to the operations of the federal security forces. Therefore, the ethnic

²⁹⁰ Ibid., p.129.

²⁹¹ The law of the Russian Federation on Forced Migrants, published in *Rossiskaya Gazeta*, 28 December 1995, article 1 defines the categories of persons who qualify for the status as follows:” a) a citizen of the Russian Federation who was forced to leave the place of his/her permanent residence on the territory of a foreign state and came to the Russian Federation; b) a citizen of the Russian Federation who was forced to leave the place of his/her permanent residence on the territory of a subject of the Russian Federation and came to the territory of another subject of the Russian Federation”. Article 1.3. extends the recognition to “ a foreign citizen or a stateless person, permanently staying on legal grounds on the territory of the Russian Federation, who left the place of his/her permanent residence on the territory of the Russian Federation for reasons set forth in point 1 of the present article” see below. Article 1.4. extends the recognition to “citizens of the former USSR, who used to reside on the territory of a former constituent republic of the USSR, who received refugee status in the Russian Federation and lost it, as had acquired the Russian citizenship, upon availability of factors which prevented him/her from settling down on the territory of the Russian Federation during the time when his/her refugee status was in force”.

²⁹² The law of the Russian Federation on Forced Migrants, published in *Rossiskaya Gazeta*, 28 December 1995, article 1.1 states the grounds on which a person can be granted the status: “A forced migrant shall be a citizen of the Russian Federation who was forced to leave his/her place of permanent residence due to violence committed against him/her or members of his/her family or persecution in other forms, or due to a real danger of being subjected to persecution for reasons of race, nationality, religion, language or membership of some particular social group or political opinion following hostile campaigns with regard to individual persons or groups of persons, mass violations of public order”.

²⁹³ The law of the Russian Federation on Forced Migrants, published in *Rossiskaya Gazeta*, 28 December 1995, article 2.3.

²⁹⁴ Helton & Voronina 2000, *supra* (note 73),p. 131.

Russians benefit from the social assistance linked to the forced migrant status whereas the other IDPs must rely on the international humanitarian assistance.²⁹⁵ The status of a forced migrant is primarily meant to facilitate integration in new places of residence; it will help in the allocation of special allowances, assistance with housing, job placement, loans and related forms of support.²⁹⁶

Russian NGOs have reported that the application of the forced migrant status is one of the most important problems for IDPs leaving Chechnya. As the status is the only means for getting financial support from the state and for qualifying for social rights, it is crucial for people who flee from their homes.²⁹⁷ This is because a Russian citizen who comes from one region of the Federation to another without residence or sojourn registration is in a similar situation as an illegal immigrant in a foreign state. However, reports argue that Chechens are in fact being denied the status of a forced migrant on the grounds that they are not fleeing ethnic, confessional or political discrimination. From October 1999 until late 2001, only around 12 000 persons who had left Chechnya received the status while over 500 000 persons were registered under the so called “Form no.7”, which is a form used by the migration services to register people who have left their place of residence in a situation of emergency.²⁹⁸ One figure to be noted is that only 89 persons received forced migrant status in the Republic of Ingushetia, although the number of IDPs there outnumbers the amount of original inhabitants.²⁹⁹

It has been argued that the law responded to the idea that Russia was responsible for persons who had lived on the territory of the USSR and who wanted to return to Russia from one of the former Soviet republics, as well as for those Russian citizens who were displaced within Russia. Forced migrant-status was made broad enough to cover both circumstances. In this sense one could argue that the Russian legislation to some extent blurs the distinction between what has traditionally been seen as a refugee, that is crossing international borders, and an IDP. Although

²⁹⁵ Council of Europe, Parliamentary Assembly, 25 March 2004, Doc.10118 Situation of refugees and displaced persons in the Russian Federation and some other CIS countries, p. 22-23.

²⁹⁶ Profiles in displacement: Russian Federation, UN Doc. E/CN.4/2004/77/Add.2, 24 February 2004, par.14.

²⁹⁷ For further accounts of what problems lack of registration and status has, see the report of a Russian NGO Memorial on the Compliance of the Russian Federation with the Convention on the elimination of all forms of racial discrimination, available at: www.memo.ru/eng/hr/dscr0212e/add4.htm, visited 1.1.2005.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

the motivation behind this law might have been humanitarian in nature, the law has not always been equally applied in practice.³⁰⁰

The Human Rights Committee made note of the statement of the Russian delegation, according to which all those IDPs who had returned, have done so voluntarily. The Committee contrasted this with the reports of undue pressure being exerted on IDPs living in camps in Ingushetia with the intention of persuading them to leave the camps and concluded that such pressure is not acceptable, nor is the threat to close the tent camps; the State should provide alternative shelter if the tent camps are to be closed in order to prevent coerced return.³⁰¹ There has been a tendency to favour IDP return to Chechnya although the IDPs still fear going back. The last tent camps in Ingushetia were closed in 2004 with reports of pressure exerted on IDPs to return and failure to do so would lead to being removed from lists for humanitarian aid.³⁰² It has been noted in several reports that the main obstacles for Chechens to return are the unsafe security conditions and the level of destruction of housing.³⁰³ Only when a person is provided with such adequate and reliable information, can he be expected to make a voluntary decision regarding return.

5.3.2 *The right to return - Liberia*

The prolonged conflict has caused the displacement of around 500 000 Liberians and another 300 000 are refugees in the neighbouring states. Forced displacement has been massive, as a third of the whole population has been forced to flee for their lives from the continuous fighting. The registration of IDPs has been organised by the UNHCR.³⁰⁴

As regards the number of persons in internal displacement, the estimated figure is around 490 000. A large number of persons have fled the conflict to the neighbouring states and some refugees from those states reside currently in Liberia. This demonstrates the intertwined nature

³⁰⁰ Profiles in displacement: Russian Federation, *supra* (note 32), par.16.

³⁰¹ Human Rights Committee, Concluding observations: Russian Federation. UN Doc. CCPR/CO/79/RUS, par.16.

³⁰² Global IDP Project, 'Russian Federation: government ignores its responsibilities towards IDPs', 14 March 2005, available at www.idpproject.org.

³⁰³ Report on the International Conference on internal displacement in the Russian Federation, E/CN.4/2003/86/Add.5, 27 November 2002, par.13-14.

³⁰⁴ UNHCR organised a mass registration of thousands of IDPs living in SKD Stadium, 15 km from Monrovia. After IDPs were registered, they were transported from the Stadium to official IDP camps; Mount Barclay, Seigbeh, Fendel, Unification, Ricks and Blamasee on the outskirts of the capital. UNHCR Briefing Notes, 16 December 2003.

of armed conflict in West Africa, which should be seen not only as regards one specific state but also from a regional perspective. The interconnected nature of the conflicts in West Africa is visible also from the fact that there are civil wars in Liberia's neighbouring states, the LURD movement is supported by Guinea and the MODEL is a militia group in the Côte d'Ivoire, loyal to that government.³⁰⁵ MODEL has attacked IDP camps on the border since 2003. Sierra Leone is also involved in Liberia's civil war because its rebels have traded weapons for diamonds. Relief agencies estimated that at the end of 2004, more than 300 000 IDPs still remained in camps, settlements and communities throughout the country due to the civil war.³⁰⁶ What makes their situation acute are the poor living conditions in the camps; they suffer from severe shortages in food, sanitation and overall security.³⁰⁷

Civilians have been deliberately targeted during the conflict. The living conditions in Liberia were already bad before the conflict but they have deteriorated even further as the fighting continued. Liberia is one of the world's poorest countries, with high illiteracy and unemployment rates. Over one fourth of the population lives below the poverty line. Before IDPs can return to their home areas, all 15 counties of the state have to be made safe for return. This includes disarming combatants, rebuilding infrastructure, establishing civil authorities and basic services etc. The return has to be safe and dignified and the IDPs need to make a voluntary decision, just like the IDPs in Chechnya or anywhere else.

As the IDPs eventually begin to return to their homes, the shift will move from ensuring safe return to rehabilitation, resettlement and reintegration efforts. Reconciliation will be a crucial element of a successful solution to the IDP problem, because the solution will only be durable if the root causes of the conflict are properly addressed. The Liberian Transitional Government has stated that it will proceed in accordance with the Guiding Principles in relation to the return of IDPs.³⁰⁸ The return process is already underway and the National Assessment Committee for

³⁰⁵ Global IDP Database: Liberia, available at: www.db.idpproject.org.

³⁰⁶ U.S. Department of State, country reports on human rights practices: Liberia 2004, released by the Bureau of Democracy, human rights and labour, 28 February 2005, section 2 d): Freedom of movement within the country, foreign travel, emigration and repatriation.

³⁰⁷ Ibid.

³⁰⁸ Liberia government: National community resettlement and reintegration strategy, 2 June 2004, p. 7. The Guiding Principles state, principle 28: "Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the

Resettlement³⁰⁹ has declared 14 out of the 15 counties in Liberia safe for return.³¹⁰ The benchmarks for declaring a county safe include completion of disarmament, presence of civil authorities, substantial levels of spontaneous returns of IDPs and refugees, and unhindered access for relief and development agencies. It is worth noting that the security conditions are not necessarily 100% perfect after 15 years of constant fighting and instability in the country.

5.4 *The right to housing and property restitution*

Property restitution is essential for the successful return of the displaced. If states wish to uphold the core principle that persons have the right to return in safety and in dignity, they need to make sure that property and housing restitution takes place. In fact, property restitution touches upon various aspects related to the successful return of IDPs; protection, law and order, reconciliation and peace building, restoration of livelihoods, strengthening of local institutional capacity and, ultimately, the chance to bury past conflicts and work towards a peaceful future.³¹¹

The right to housing is explicitly mentioned in various international and regional human rights instruments although not all instruments have included it. The legal nature of the following instruments varies somewhat; but all of these sources are relevant to ensuring the right to housing to everyone. However, it should be noted that it is not an absolute right. The Universal Declaration of Human Rights³¹² states that everyone has the right to an adequate standard of living, which includes several components, one of them being housing.³¹³ Another important

country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons”.

³⁰⁹ The National Assessment Committee for Resettlement was set up in June 2004 following the Liberian government’s national community resettlement and reintegration strategy. The Committee is responsible for determining that the security situation in the resettlement areas is satisfactory before any organised resettlement movement begins.

³¹⁰ UNHCR news stories, 23 February 2005, available from www.unhcr.ch; only the southern county of Grand Kru remains unsafe. The northern county of Lofa was the preferred area of return in August 2004 according to the Humanitarian info survey on Liberia 18 August 2004, maps available at: http://www.humanitarianinfo.org/liberia/mapcentre/thematic/idps/pdf/LIB109_IDP_Refugee_ExC_Return_20042008_A4.pdf.

³¹¹ Anne Davies 2004, Restitution of land and property rights, *Forced migration review* 21, p. 12.

³¹² Universal Declaration of Human Rights, GA Res 217A (III), UN Doc A/810 at 71 (1948). Hereinafter UDHR.

³¹³ UDHR art.25:” Everyone has the right to a *standard of living adequate* for the health and well-being of himself and of his family, including food, clothing, *housing* and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.”

codification is in article 11(1) of the ICESCR, which further elaborates the provision of the UDHR by adding that the state parties should recognise the right to an adequate standard of living as implying also a continuous improvement of living conditions instead of only upholding a minimum standard.³¹⁴

The right to housing is enshrined in the Convention on the Elimination of all forms of Racial Discrimination, in article 5(e) (iii), whereby states parties undertake to prohibit and eliminate racial discrimination and to guarantee the right, in particular, to housing.³¹⁵ The special protection afforded to women is visible also as regards housing rights, which are protected in article 14(2)(h) of the CEDAW. This article declares that states shall ensure that women have the right to enjoy adequate living conditions, particularly in relation to housing.³¹⁶ The European Convention on Human Rights has a similar provision on prohibiting unlawful interference with one's home as the ICCPR.³¹⁷ Furthermore, Protocol 1 to the European Convention includes the right to property.³¹⁸

Restitution refers to a remedy, or a form of restorative justice through which the person who has suffered loss or injury is returned, to the extent possible, to the position he had prior to the loss or injury.³¹⁹ Such a remedy can include the return of a person's property or housing. The term compensation refers to a legal remedy through which a person receives money for the loss he has suffered.³²⁰ Compensation can be used for example when it is impossible to return the person's property or his housing. Pinheiro correctly notes that compensation should not be seen

³¹⁴ CSECR art 11.1: "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. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent."

³¹⁵ CERD, art.5 (e) (iii) and art.5 (d) (v) guarantee the right to own property alone or in association with others.

³¹⁶ CEDAW Convention art 14.2.h: "To enjoy *adequate living conditions, particularly in relation to housing*, sanitation, electricity and water supply, transport and communications."

³¹⁷ European Convention on Human Rights, art. 8: "Everyone has the *right to respect for his private and family life, his home and his correspondence*. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others". (Emphasis added).

³¹⁸ European Convention on Human Rights, Protocol 1 on the Enforcement of certain rights and freedoms not included in Section I of the Convention, art.1: "Every *natural or legal person is entitled to the peaceful enjoyment of his possessions*. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law". (Emphasis added).

³¹⁹ Paulo Sérgio Pinheiro, The return of refugees' or displaced persons' property, UN Doc E/CN.4/Sub.2/2002/17, 12 June 2002, par. 11.

³²⁰ *Ibid.*, par.12.

as an alternative to restitution; instead, it should be used only when restitution is not factually possible.³²¹ Compensation should be offered in case the person voluntarily and knowingly decides not to return. Because restitution as a concept can refer to many different things, the concept of housing and property restitution is a proper choice for the context of this report.³²²

The question of private ownerships and property rights has its interpretations in most societies. Yet the definition or the actual proving of such rights is not really feasible in countries like Iraq or Afghanistan for instance, where so called ‘property grabs’ have become more or less the norm and where the nature of property rights and other rights related to land and housing are rather arbitrary. In such contexts, the local institutions are too weak to define the boundaries of property or to provide definitive, non-controversial proof of ownership or of rights holding.³²³ It applies also for states that have endured prolonged civil conflicts, such as Liberia and other West African states, for instance.

IDPs, as well as refugees, are especially affected because the loss of rights, including property rights, can be either the cause why they had to leave their homes or the main reason why they are not able to return home. In order to end displacement, it is thus essential to tackle the question of losing property, housing and land rights.³²⁴

Committee on the Elimination of Racial Discrimination has in its General Recommendation 22 addressed return and subsequent restitution and compensation issues.³²⁵ The Committee emphasizes the right of refugees and those displaced, upon their voluntary return, to restitution of property and in case that is not possible, their right to compensation.³²⁶ The various forms of reparation to be afforded to victims of violations of international human rights law and humanitarian law include restitution, compensation, rehabilitation and satisfaction and

³²¹ Ibid., par.57.

³²² Scott Leckie 2003, (ed.), *Returning home: housing and property restitution rights of refugees and displaced persons*, New York: Transnational publishers 2003, p. 3 points to the fact that merely calling it property restitution leaves out those who do not own their home. He refers to two categories of actors in the restitution process; the owners (property) and the non-owners (housing).

³²³ Anne Davies, 2004, *supra* (note 312), p.12.

³²⁴ Davies 2004, *supra* (note 312), p.12.

³²⁵ CERD General Recommendation No 22: Article 5 and refugees and displaced persons, 24 August 1996.

³²⁶ Ibid., par. 2a) – c).

guarantees of non-repetition.³²⁷ Restitution would entail, according to the report, among other aspects, return to one's place of residence and the return of property, whereas compensation would be provided for material damages.³²⁸ Based on these international developments, it is safe to argue that the right to restitution and compensation does exist, in theory at least, for those who have been internally displaced.

Compensation may be a favourable alternative to restitution in some cases, but it is not without problems. For instance, how to measure what is an equitable sum for compensating the loss of a house?

Giving cash instead of housing or a piece of farmland can serve to compound the situation of IDPs. Bagshaw argues that giving money to IDPs whose livelihood is traditionally based on access to land, such as farmers, does not solve their problems in the same way as allocation of land would.³²⁹ Same type of arguing is present in the Guiding Principles, article 29.2:

“Competent authorities have the duty and responsibility to assist returned and /or resettled internally displaced persons to recover, to the extent possible, their property and possessions which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining *appropriate compensation or another form of just reparation.*”

This article suggests that giving cash might not be the only possible way to compensate for the loss of property and instead, authorities should consider the circumstances of the displaced in terms of how they would best be assisted.

There have been arguments that compensation can have a negative downside. One obstacle may be the definition of what would constitute a sufficient amount of compensation.³³⁰ By introducing the concept of financial compensation from states to victims may even be seen as a means to legitimise ethnic cleansing and other human rights violations.³³¹

³²⁷ Basic principles and guidelines on the right to remedy and reparation for victims of violations of international human rights and humanitarian law, annex to the final report of the Special Rapporteur, Mr. Cherif Bassiouni, UN Doc. E/CN.4/2000/62, 18 January 2000, par. 21.

³²⁸ UN Doc. E/CN.4/2000/62, paras. 22 and 23 c).

³²⁹ Simon Bagshaw 2003, Property restitution for internally displaced persons: developments in the normative framework, p. 381, in *Returning home: housing and property restitution rights of refugees and displaced persons*, Leckie (ed.).

³³⁰ Bagshaw 2003, *supra* (note 330), p. 381.

³³¹ Guy S. Goodwin-Gill 1996, *Refugee in international law*, p. 269. However, contrary arguments have been proposed by Luke T. Lee, according to whom stressing the right to compensation (of refugees in that context) may

Special focus with regard to property rights restitution should be placed on women and on ensuring their equal rights. The continuous existence of discriminatory practices concerning women's property and inheritance rights can have negative bearings on those internally displaced women wanting to return, both in terms of establishing their legal rights to the property in the first place as well as in terms of them gaining access to restitution procedures. Women as heads of households often lack the standing and authority that men have. In order to enhance women's rights in this respect, Guiding Principles 29 and 4 should in fact be read in conjunction with each other, as principle 4 explicitly mentions "female heads of households".

5.4.1 Grounds for property restitution

Legally, the right to post-conflict property restitution can be derived from two independent rationales. One is the rationale of the right to return, whereby IDPs and refugees alike are entitled to return voluntarily, not only to their country, but also to their actual homes. Another, rights-based, rationale is derived from the necessity of providing adequate remedies to victims of human rights violations.³³² This latter approach has been noted by the UN Special Rapporteur on property restitution, Paulo Sérgio Pinheiro as a right in itself as he stated that: "restitution as a remedy for actual or de facto forced evictions resulting from forced displacement is itself a free-standing, autonomous right".³³³

These two rationales behind the right to property restitution are not mutually exclusive but practice has shown, in the case of former Yugoslavia, that the relative emphasis on the return vis-à-vis the human rights rationale for property restitution can affect implementation to a large degree.³³⁴ First, it can have a significant influence on the choices about the inclusion, or exclusion for that matter, of various categories of property; for instance in former Yugoslavia, this was an important issue in cases where properties that clearly constituted pre-war homes of the displaced were held under forms of tenure that fell short of out-right ownership. Second, the

well induce the state in question to create more favourable conditions for those who choose to return and by doing so, the state would in fact be treating the causes of displacement. See further, Luke T. Lee 1986, The right to compensation: refugees and countries of asylum, *The American Journal of International Law*, vol.80, No. 3, pp.532-567, p. 566.

³³² Rhodri C. Williams, 2004, Post-conflict property restitution, *Forced migration review* 21, p. 15.

³³³ Paulo Sérgio Pinheiro, "The return of refugees' or displaced persons' property", UN Doc. E/CN.4/Sub.2/2002/17, par.32.

³³⁴ Williams 2004, *supra* (note 333), p. 15.

rationale that is chosen for property restitution programmes can have an impact on the procedural fairness with which property claims are handled.³³⁵ If property restitution is based only on the concept of return, it can turn into a situation where the actual return becomes the pre-condition for restitution.³³⁶ Furthermore, when emphasising return, authorities may seek to identify groups that are more likely to return and subsequently offer them restitution and encouraging return and thus undermining equality and voluntary decision-making of the IDPs.

Realising restitution rights is a difficult task but it is so fundamental that Leckie argues that conditions for a safe and dignified return cannot exist without appropriate laws, procedures and mechanisms in place in the areas of return.³³⁷ Some promising attempts have already been made through the establishment of such institutions as the Commission on Real Property Claims in Bosnia³³⁸ and the Housing and Property Directorate in Kosovo³³⁹.

An inter-state conflict, especially when fought on the territory of a State party to human rights treaties, could possibly justify derogation from the right to property. During such conflicts, customary laws of war, like the Hague Regulations, Fourth Geneva Convention and Additional Protocol I can be used to protect property through the guarantees that are afforded to those persons, including IDPs, who own property. Hague Regulations contain, in article 23, a general prohibition against the destruction or seizure of the enemy's property, unless imperative military reasons so require.³⁴⁰ Further protection is in article 25 and article 59 of Protocol I.³⁴¹ Fourth Geneva Convention, article 33, prohibits pillage and reprisals against property of

³³⁵ Williams 2004, *supra* (note 333), p.15.

³³⁶ *Ibid.*, p.16.

³³⁷ Scott Leckie, Introduction, *Forced migration review* 7, p.4.

³³⁸ The issue of property restitution is addressed in the Dayton peace agreement art.1 which states that displaced persons have the right to return freely to their homes and they "shall have the right to have restored to them their property..and to be compensated for any property which cannot be restored to them.". General Framework Agreement for peace in Bosnia and Herzegovina, Annex 7, Agreement on refugees and displaced persons, chapter two, article xii provides for the mandate of the Commission. See also Catherine Phuong, At the heart of the return process: solving property issues in Bosnia and Herzegovina, *Forced migration review* 7, p.5.

³³⁹ UNMIK regulation no 1999/23, 15 November 1999, par.1.1 available at:

<http://www.hpdkosovo.org/Laws%20and%20regulations/01%20RE%201999-23.pdf>

³⁴⁰ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, article 23: "Besides the prohibitions provided by special Conventions, it is especially prohibited.. To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."

³⁴¹ Compilation and analysis of legal norms part I, par. 279- 280.

protected persons and that could, in some cases, be interpreted to include IDPs, as it applies in inter-state armed conflicts.³⁴²

5.4.2 Right to housing and property restitution - Chechnya

One of the key issues for IDPs is the compensation for lost or destroyed property. The Russian legislation provides that persons whose property has been completely destroyed in Chechnya and who, following displacement, have returned to Chechnya, are entitled to a compensation of \$ 10 000. However, only those IDPs who have actually returned, can apply for the compensation.³⁴³ Such treatment could be seen as constituting discrimination, whereas compensation should be provided regardless of whether a person has actually returned or not. This is linked to the issue of voluntary return, people cannot be categorised based on their decisions of return.

As a party to the CESCR, the respective Committee examined the report of the Russian Federation in 2003. A special point of concern were the poor housing and living conditions and the reported problems in obtaining basic services, this was valid for the State in general but also to Chechnya.³⁴⁴ The Committee pointed out that the lack of residence permits, registration of place of residence, or other identification documents has in practice hindered the enjoyment of the economic, social and cultural rights such as right to employment, social security, health care and education for instance, which are all provided for in the Covenant.³⁴⁵ Such practices hindering the enjoyment of those rights are in violation of the Covenant. Lack of registration should not be an obstacle for the enjoyment of human rights. The Committee was concerned about the delays in compensation payments for houses destroyed during military operations in Chechnya; state should guarantee rapid and adequate compensation for those whose property was destroyed and to provide for temporary housing for those who fear that return to Chechnya

³⁴² Compilation and analysis of legal norms, part I par.281. According to the Fourth Geneva Convention, article 33, reprisals against protected persons and their property are prohibited. This raises the question again, whether IDPs are to be considered protected persons in terms of this Convention. IDPs fall under the protection of article 33 because article 13 defines that provisions of part II of the Convention apply to whole of the population in the countries of conflict, which is a broader scope than the definition of protected persons.

³⁴³ Profiles in displacement: Russian Federation, *supra* (note 32), par.39.

³⁴⁴ Committee on economic, social and cultural rights, concluding observations: Russian Federation. UN Doc. E/C.12/1/Add.94, 12 December 2003, par. 10

³⁴⁵ *Ibid.*, par.12.

is still unsafe.³⁴⁶ Adequate standard of living should be provided for everyone within the Russian Federation, as stated in article 11 of the Covenant. According to NGO report, the Russian government set up a Commission in Chechnya to evaluate the claims for compensation and to compile a list of houses that had been destroyed and that were not fit for reconstruction.³⁴⁷ The owners of such houses were then to be compensated. However, the NGO report claims that no such list of housing was ever compiled and an arbitrary decision to compensate 39 000 families out of 55 000 applications was made in 2004.³⁴⁸ This report raises serious concerns regarding the efficiency of the compensation system in place in Chechnya.

5.4.3 Right to housing and property restitution - Liberia

The prolonged armed conflict has left villages and towns empty when the people have fled from the violence. War tactics have included burning villages and slaughter of inhabitants. Article 53 of the Fourth Geneva Convention prohibits the destruction of property unless it is militarily absolutely necessary. This article should be interpreted in a very wide sense and thus it includes the destruction of all property, real or personal, whether it is *private property of protected persons* or state property etc. Once again, this provision directly applies only to the category of protected persons and therefore excludes IDPs.

As regards housing and property restitution, the Liberian transitional government has boldly stated that disputes over land and property ownership will be resolved.³⁴⁹ That will require local mechanisms, courts or other structures to be established. Special focus will need to be given to informing women of their legal right to inherit property from deceased relatives, husbands for instance.³⁵⁰ The communities where displaced persons return should be aware of the rights of returnees, particularly women's rights in relation to land and property. However, women who have married under traditional law are not able to inherit land or property of their deceased husband because women are considered to be the property of their husbands.³⁵¹ Traditional

³⁴⁶ Committee on economic, social and cultural rights, concluding observations: Russian Federation. UN Doc. E/C.12/1/Add.94, 12 December 2003, paras. 56, 58.

³⁴⁷ Report on the situation of Chechnya residents in the Russian Federation June 2003- May 2004, p. 12-13.

³⁴⁸ Ibid., p.13.

³⁴⁹ Liberia government: National community resettlement and reintegration strategy, 2 June 2004, p.37.

³⁵⁰ Ibid.

³⁵¹ U.S. Department of State, Country reports on human rights practices: Liberia 2004, released by the Bureau of Democracy, human rights and labour, 28 February 2005, section 5:Women. According to the report, women are not entitled to retain custody of their children if the husband dies and they have been married under traditional laws. See also UNIFEM, *Women's land and property rights in situations of conflict and reconstruction*, a reader

structures still tend to hinder women from achieving equal rights and there should thus be effective means to address property rights violations. After the civil war, the amount of women headed households is bound to increase and therefore the importance of equal rights in land and property issues is of paramount importance.

So far, the spontaneous return of IDPs and refugees has led to land disputes, particularly in Nimba County, due to the lack of assistance with shelter and property restitution.³⁵² In order to avoid further escalation of such disputes, funding and support to re-establish county administrations is urgently required. There have also been instances when the original owners/occupiers return to find their homes occupied by other displaced persons or by soldiers, ex-combatants.³⁵³ In such cases, the civil authorities have encouraged the returnees to allow ex-combatants to stay until the beginning of the disarmament process when they can move to barracks. The challenges for post-conflict reconstruction in terms of shelter and housing are vast. Around 80% of the pre-war housing has been affected by the conflict, such communities lack infrastructure and social services and the community institutions do not have capacities to provide shelter and housing for those who return.³⁵⁴ The situation is at its worst in the capital Monrovia, where the population has doubled and therefore the infrastructure and other facilities are already stretched to their very limits.³⁵⁵ Although the housing issue is acute, it is not an impossible problem; the provision of basic shelter for IDPs is a good starting point.

Those Liberian IDPs who choose to return, are enrolled in a resettlement programme through which they are entitled to receive food and non-food items to help their task of rebuilding homes and households. Non-food items include basic necessities such as blankets, sleeping mats, cans, kitchen sets and sanitary kits; those living in rural areas will in addition receive agricultural tools. Shelter kits, including zinc roofing material and nails, are also distributed to those families that have constructed initial sub-structure (wall constructed from ground to roof) within two months of their return.³⁵⁶

based on the February 1998 Inter-regional consultation in Kigali, Rwanda, p. 86. See also Afrol gender profiles: Liberia, available at http://www.afrol.com/Categories/Women/profiles/liberia_women.htm

³⁵² Global IDP database, Profile on Internal Displacement: Liberia 2004, p.79.

³⁵³ Ibid.

³⁵⁴ National transitional government of Liberia: joint needs assessment, February 2004, par.201-202.

³⁵⁵ Ibid., par.202.

³⁵⁶ Liberia government: National Community resettlement and reintegration strategy, 2 June 2004, pp.19-20.

5.4.4 Forced eviction

Forced evictions can be linked with forced displacement because even though evictions often occur in heavily urbanised surroundings, they can also take place in connection with forced population transfers, internal displacement, forced relocations in the context of armed conflicts, during mass exoduses and refugee movements. In all of these circumstances, the right to adequate housing and the right not to be subjected to forced eviction may be violated through a wide range of acts or omissions by the State.³⁵⁷

The Committee on Economic, Social and Cultural Rights has in its General Comment No.2 addressed the issue of forced displacement and evictions. The Committee states that international agencies should avoid being involved in projects concerning large-scale evictions or displacement of persons without the provision of all appropriate protection and compensation.³⁵⁸ In addition, the Committee notes that in many instances, forced evictions are associated with violence resulting from international or internal armed conflicts, internal strife or communal or ethnic violence.

The Committee has also made a remark about the negative impact of development cooperation activities as they do not necessarily contribute to the promotion of respect for economic, social and cultural rights; instead, some activities taken under the auspices of development have in fact been perceived as ill conceived and even counter-productive in terms of human rights.³⁵⁹ The Committee associates forced evictions with the negative side of development. Forced evictions may take place due to land right conflicts, development and infrastructure projects such as the constructions of dams for instance.³⁶⁰ Furthermore, the Vienna Declaration and Programme of Action states, “while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgment of internationally recognised human rights”.³⁶¹ In other words, developmental goals do not justify human rights violations.

In its General Comment No 7 on the right to adequate housing, the Committee emphasises the need for security of tenure as an element of protection against forced evictions, which are prima

³⁵⁷ Ibid., par.5.

³⁵⁸ CESCR General Comment 2, on article 22 of the Covenant, February 2 1990, par.6.

³⁵⁹ CESCR General Comment 2, on article 22 of the Covenant, February 2 1990, par.7.

³⁶⁰ Ibid., par.7.

³⁶¹ Vienna Declaration and Programme of Action, part I, par.10.

facie incompatible with the Covenant.³⁶² Even though the practice of forced evictions is a violation of human rights *per se*, it may violate other rights at the same time, such as the right to life, right to security of the person, right to peaceful enjoyment of possessions and other civil and political rights.³⁶³

State obligations related to forced evictions are found in CESCER article 11.1, which is to be read in conjunction with other articles. For example, article 2.1 obliges States Parties to take all appropriate means to promote the right to adequate housing. The State itself has to refrain from executing forced evictions and to ensure that the law is enforced against its agents or third parties who carry out forced evictions. This same approach is included in the ICCPR, article 17.1, which adds to the right not to be forcefully evicted without adequate protection.³⁶⁴ This article refers to the right to be protected against interference with one's home. The CESCER Committee notes at this point that the state obligation to ensure respect for that right is not qualified by considerations relating to its available resources.³⁶⁵ The Committee notes that forced evictions and displacement are not to be carried out as forms of punitive action. In addition, the obligations of the Geneva Conventions, which prohibit displacement of civilian population and the destruction of private property, have to be taken into consideration because they relate to the practice of forced evictions.³⁶⁶

5.4.5 Secondary occupiers – an unresolved problem for restitution

The Special Representative on Internally Displaced Persons, during his field mission to Rwanda in 1994, observed that secondary occupation of homes was one of the obstacles for the return of the IDPs.³⁶⁷ What legal guarantees are there for the right to return to one's home and have the right to restitution and furthermore, to compensation if the house has been destroyed? What are the rights of the secondary occupiers when the primary owners return? Although the importance of creating property restitution mechanisms in order to facilitate a safe and dignified return process may seem to be self-evident, it does not automatically translate into national or

³⁶² CESCER General Comment 7, on article 11 of the Covenant, May 20 1997, par.1.

³⁶³ *Ibid.*, par.4.

³⁶⁴ ICCPR art.17.1: "No one shall be subjected to *arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation*". (Emphasis added).

³⁶⁵ CESCER General Comment 7, on article 11 of the Covenant, May 20 1997, par.8.

³⁶⁶ CESCER General Comment 7, on article 11 of the Covenant, May 20 1997, par. 12.

³⁶⁷ Report of the Special Representative on Internally Displaced Persons, UN Doc. E/CN.4/1995/50/Add.4, Addendum: Note on the mission to Rwanda, paras. 13, 19, 21.

international legal provisions that would clearly state the right to property restitution. On the contrary, property restitution still remains a rather grey area in terms of law.

The issue of secondary occupiers is acknowledged as a problem that poses difficulties for return. A state's national laws regarding private property rights may legally oblige the state to protect such property from third party interference and to restore property to its lawful owners following a period of de facto dispossession.³⁶⁸ However, national protection can prove to be insufficient. Although the right to property of the IDPs is mainly protected in regional human rights treaties and humanitarian law, neither *the right to restitution* of property that has been lost as a consequence of displacement nor *compensation for loss of property* are not fully recognised and should, therefore, be explicitly addressed.³⁶⁹

As for restitution, it should not result in rendering secondary occupiers homeless or in violating their human rights. According to Leckie, forcible removal of secondary occupiers can result in political volatility and security problems.³⁷⁰ Furthermore, when justified evictions are undertaken, they are bound to increase tensions unless appropriate means are taken to protect the rights of secondary occupiers.³⁷¹

Guiding Principle 29 addresses the issue of property in connection with return and states that those who return should be assisted in recovering their property or compensated. Guiding Principles 7 and 8 could in fact be read in this connection, although the idea behind them is not property restitution.³⁷² They could be deemed applicable when secondary occupiers are internally displaced as well and they have occupied the property due to humanitarian reasons. However, the dilemma persists; how to decide between the duty to return the property of primary owner and the duty to provide proper housing for the secondary occupier? The notion of choosing between return and relocation is very troublesome in an environment where the

³⁶⁸ Compilation and analysis of legal norms part I, par.274.

³⁶⁹ Ibid., par.284.

³⁷⁰ Leckie, Scott 2003, supra (note 323), p.47.

³⁷¹ Ibid.

³⁷² Principle 7 refers to the duty of authorities to provide proper accommodation to IDPs, and how all measures should be taken to minimize the adverse effects of displacement. Principle 8 states the fundamental principle that displacement shall not be carried out in a way that interferes with the right to life, dignity liberty and security of those displaced; these rules could be considered as fundamental and they should apply to the secondary occupiers if they are IDPs as well.

lack of freedom of movement, persecution of minorities and widespread ethnic discrimination are the norm of the society. The principle of having the right to choose one's own residence cannot provide a justification in principle for a constitutional system based upon ethnic separation.³⁷³

6. Women as a special category of internally displaced persons

Women and children represent around 80 % of the worlds displaced and they have increasingly become not only the victims but also the targets of war, including being victims of rape, torture and abuse. Faced with armed conflict, women seldom have a true choice on where and how to flee since they often lack essentials like documentation, literacy, money and access to accurate information.³⁷⁴ In addition, social norms or restrictive policies on women's freedom of movement, such as access to exit permits and requirement of male escorts, can also further restrict women's options.³⁷⁵ General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict was introduced in 1974.³⁷⁶ The aim of the Declaration is to eliminate all forms of repression and cruel and inhuman treatment of women and children, including forced evictions committed by belligerents, which are to be considered as criminal activity. In addition to the basic rights to protection and physical safety, women have the right to basic human necessities, which are guaranteed by international instruments. These rights include food, water, sanitary facilities, cooking and heating fuel, shelter and blankets and clothing; other basic necessities are health care, education and the promotion of women's self-determination and independence as well as the opportunity to be included into assistance programmes and the chance to participate in social life.³⁷⁷

The effects of displacement are various and of course depend on its duration. Some of the immediate effects include family separations, exposure to gender violence, trauma relating to death of family members, health problems and the loss of property and housing. Displacement

³⁷³ Marcus Cox 1998, *supra* (note 30), p.611.

³⁷⁴ Ramina Johal 2004, Key issues for refugee, internally displaced and returnee populations, UN Doc. CM/MMW/2003/EP.3, p.3.

³⁷⁵ Johal 2004, p.4.

³⁷⁶ General Assembly resolution 3318 (xxix) 14 December 1974.

³⁷⁷ Womens' Commission on Refugee Women and Children: The gender dimensions of internal displacement, p. 4.

has a large impact on women's property and housing rights, and their ability to inherit land and property as well. Over time, the impact of displacement can result in depression and in post-traumatic stress syndrome. Long-term displacement can cause social and cultural ties to break up, even permanently, and women may lose all opportunities for education and employment. Personal life also suffers under displacement, and children may not be able to go to school etc.³⁷⁸

Why do women have to leave their homes and become internally displaced in the first place? To some extent at least, the answer is in poverty. Poverty is a strong and often a cyclical push factor for mobility of the IDPs especially in post-conflict situations, as women try to escape continuous violence and to avoid being labelled and to find work to provide for their dependants. Finding work is essential since internally displaced women are the poorest in conflict and post-conflict situations, where they often end up working as undocumented labourers in unregulated or illegal jobs, such as domestic jobs or prostitution.³⁷⁹ Even when the war or armed conflict is over, women are not always able to leave the shantytowns or camps because they don't have access to land or shelter of their own. Instead of returning to their families or communities of origin, women and girls often become the actual breadwinners and they need to remain where the work is. In case they return to their origins, they often find it hard to make a living there since they lack access to land and have no resources of their own after having been displaced.³⁸⁰

What are the special issues of concern to displaced women? A gender perspective, the appreciation of fundamental differences between men and women's roles in societies, is not difficult to apply if it is approached from the basic principles of human rights determined by a person's gender.³⁸¹ Gender concerns related to displacement are linked to two issues; *protection* on the one hand, which entails protecting women and girls from rape, murder, abduction, torture, genital mutilation and forced sexual slavery and *upholding their rights* to equal access and full participation in assistance programmes.³⁸² With regard to women, they are considered

³⁷⁸ Ibid., p. 13.

³⁷⁹ Johal 2004, *supra* (note 378), p.5.s

³⁸⁰ Johal 2004, *supra* (note 378), p.5.

³⁸¹ Womens' Commission on Refugee Women and Children: The gender dimensions of internal displacement, concept paper, pp. 2-3.

³⁸² Ibid.,p. 3.

to be a vulnerable group, or a group requiring special attention, to which special protection should be afforded since they suffer from discrimination and various hardships during eviction and displacement and they are especially vulnerable to sexual abuse and acts of violence.³⁸³

6.1 Gender-specific problems - Shift in gender roles

Even though the experience of displacement is very difficult, not to mention traumatic, for everyone concerned, it has been claimed that women are still the worst off as displaced. One of the reasons for this being so is the change in gender roles that often occurs during displacement; women are forced to take up such responsibilities that were previously taken care of by men. It is a general trend for women to take on more and different roles as providers and protectors of families, and for them to gain confidence and determination from the experience, which in all can have a positive impact on such women.³⁸⁴ However, for men the situation can be quite the opposite as they may be unable to establish themselves as respected decision makers.³⁸⁵ This shift in gender roles can have an impact on the balance between men and women as women and children often represent the majority of IDP population. Reconstruction in post conflict periods may even provide opportunities to build on the capacities of women that may have been extended by the IDP crisis.³⁸⁶ One could argue that women should not be categorised as victims only. Extending the notion of victim does not address the underlying causes of women's position but rather treats women as a category of dependants ignoring the potential underneath. One example of how to treat women without victimization is to include them in the management of the IDP-camps, but in such a way that men are not marginalized either.

The impact displacement has on women is severe; women are not only uprooted from familiar surroundings and even family, but they are also experiencing a loss of identity since women's land, house, community, friendships, family and traditional roles in relation to them are gone.³⁸⁷ The same gender roles and the same patterns of discrimination continue in camps where women are forced to live under conflict situations. This causes a reaction to the shock and stress of displacement; persons living in camps try to normalize their lives by reviving the same patters

³⁸³ CESCR General Comment 7, on article 11 of the Covenant, May 20 1997, par.10.

³⁸⁴ Judy El-Bushra, Gender and forced migration, *Forced migration review* 9, p.5.

³⁸⁵ El-Bushra, p.5.

³⁸⁶ Womens' Commission on Refugee Women and Children: The gender dimensions of internal displacement, concept paper, p. 12.

³⁸⁷ *Ibid.*, p.33.

of conduct they had before they came to the camp. However, camp life can also have a positive aspect as both men and women will find themselves in a situation that requires them to take on new tasks, and the division of labour is not so clear. In some instances, camp life has even proven to be positive as regards women's participation and involvement in decision-making and organising.³⁸⁸ When the gender dimension of displacement is examined, it should include a wide range of effects resulting from armed conflicts, which comprise of effects on power relations between men and women, their rights and their access to services and benefits from them.³⁸⁹ One of the issues of special importance for women and girls is protection from rape and other forms of sexual assault.³⁹⁰

6.2 Sexual abuse

Women are a major group of victims in situation of armed conflict. This is related to the specific vulnerability of women, which intensifies when a violent conflict occurs. It stems partly from the inequality that exists in various forms in all societies and which culminates in war. The fact that around 70% of women live in poverty makes them also disadvantaged in terms of education and they tend to be less mobile because of their traditional role as caretakers.³⁹¹ Moreover, women are traditionally denied access to the decision-making processes and power structures in general and their accounts of women's needs and difficulties are not heard.³⁹² The most obvious way in which women experience the horrors of armed conflict is most often in the context of sexual violence.³⁹³ Women and children are subjected to rape and other gender-based violence not only during an armed conflict but also when they flee from the fighting.³⁹⁴

³⁸⁸ Women's right to land, housing and property in post-conflict situations and during reconstruction: a global overview, p. 33.

³⁸⁹ Srilakshmi Gururaja, Gender dimensions of displacement, *Forced migration review* 9, p.13.

³⁹⁰ Womens' Commission on Refugee Women and Children: The gender dimensions of internal displacement, concept paper.

³⁹¹ This trend of 'feminisation of poverty' leaves women without possibilities to educate themselves as they need to take care of the family and have no means to go to schools.

³⁹² Judith Gardam 1998; Women, human rights and international humanitarian law, *International review of the Red Cross* no 324, p. 421.

³⁹³ Gardam 1998, p. 424. Gardam explains the history regarding the evolution of criminalizing sexual violence and recognising rape as a war crime. She states that the appalling silence related to sexual violence finally came to an end with the events that occurred in the former Yugoslavia.

³⁹⁴ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45, Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000) UN Doc. E/CN.4/2001/73, 23 January, par.54. The Special Rapporteur points to the fact that the majority of IDPs are women and children and that as IDPs, they are particularly vulnerable to acts of sexual violence.

Women's traumatic experiences during displacement are often connected with the fact that they are very vulnerable for sexual abuse, such as rape and enforced prostitution, for example. During the conflict and ethnic cleansing in the former Yugoslavia, the crime of rape was committed on such a large scale that it can be argued to be a war crime. Enforced prostitution is widespread and it is a severe violation of women's human rights, since they are forced to practice it in return for food and other basic necessities. It violates not only the right to physical integrity but also the right to equal access to aid. There are several factors that increase the risk for sexual violence in armed conflicts; women are seldom accompanied and thus they travel alone and women tend to be unarmed, which reduces their possibilities of resistance.³⁹⁵ In addition, women are often seen as symbolic representatives of a certain ethnic or national identity and thus attacking them equals an assault on the whole community.³⁹⁶ Sexual assault of women is a means of demoralizing the society, a way of sending a message to intimidate the population.

The CEDAW Committee has in its General Recommendation 19 declared that violence against women is a breach against the rights guaranteed under international law and human rights treaties.³⁹⁷ In addition, gender-based violence is rooted in gender discrimination, which violates well-established principles of international law, such as the prohibition of discrimination on several grounds, one of those being sex. Gender-based violence is a form of gender discrimination that hinders women from the full enjoyment of their rights and freedoms. CEDAW has interpreted the prohibition of gender discrimination, which in turn underlies many of the obligations under the treaty, to forbid various forms of violence against women. Such forms of violence include violence directed against women on the basis of their gender and violence that affects women in a disproportionate way. The CEDAW Committee has rarely addressed the issue of women in internal displacement; but it has raised its concern for the plight of women in displacement.³⁹⁸

³⁹⁵ International Committee of the Red Cross, *Addressing the needs of women affected by armed conflict – an ICRC guidance document*, March 2004, p. 25.

³⁹⁶ *Ibid.*

³⁹⁷ CEDAW Committee 1992, General Recommendation 19, par.7.

³⁹⁸ CEDAW Committee, examination of state reports by Peru and Croatia et al., 14th session 31 May, UN Doc. A/50/38, paras. 439 and 585.

Rape is a form of torture when committed by state agents; both the former and the current UN Special Rapporteur on torture have stated. The Human Rights Committee has not included rape as such as a form of torture, but it has stated that torture can be caused by physical pain but also by inflicting mental suffering.³⁹⁹ Unfortunately, rape has become a common weapon of war in internal and international conflicts. The ICCPR, ECHR and the American Convention fail to explicitly state the right to be free from sexual attacks; Moir argues that this right should be contained in the category of inhuman and degrading treatment provisions, which are non-derogable.⁴⁰⁰ The ICTY has stated that no international human rights instrument explicitly prohibits rape or other forms of serious sexual abuses; nevertheless, provisions regarding physical integrity implicitly prohibit such acts.⁴⁰¹ Rape may amount to being a grave breach of the Geneva Conventions, a violation of the laws and customs of war or even an act of genocide, if the required elements are met.⁴⁰² Moir argues that the trend seems to be to find rape as amounting to torture⁴⁰³; the European Court of Human Rights has found that rape can amount to torture⁴⁰⁴ and the Inter-American Commission has reached a similar conclusion.⁴⁰⁵ The Human Rights Committee has interpreted article 7 of the ICCPR on the prohibition of torture. Although the Covenant does not contain a list of acts prohibited as torture, the Committee chooses not to elaborate on which acts fall under this article.⁴⁰⁶

The role of non-state actors in violations of human rights and humanitarian law surfaces in internal armed conflicts. Although the government forces are often the ones who commit crimes

³⁹⁹ Human Rights Committee 1992, General Comment 20, UN Doc. HRI/GEN/Rev.1. at 30, par.7.

⁴⁰⁰ Lindsay Moir 2002, *supra* (note 134), p. 216.

⁴⁰¹ Physical integrity is covered in various human rights instruments such as the ICCPR article 7 prohibiting cruel and inhuman or degrading treatment; similarly, ECHR article 3 has been evoked by the European Court in cases *Cyprus v. Turkey* where it found that Turkey had violated its obligations under article 3 as a result of the rapes committed by Turkish troops against Cypriot women. In *Aydin v. Turkey* the Court found similar violation as a result of an official of the state raping a detainee. The African Charter protects the right to integrity of the person in article 4 and cruel, inhuman and degrading treatment is prohibited in article 5.

⁴⁰² International Criminal Tribunal for former Yugoslavia, Prosecutor v. Anto Furundzija (1998) ICTY 3 (10 December 1998), par.172.

⁴⁰³ Moir 2002, *supra* (note 134), p. 218.

⁴⁰⁴ ECHR, case of *Aydin v. Turkey*, (57/1996/676/866), judgment of 15 September 1997, par.86:” ... the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention. Indeed the Court would have reached this conclusion on either of these grounds taken separately.”

⁴⁰⁵ Inter-American Commission on Human Rights, report No. 5/96, case 10.970 Raquel Martin de Mejia v. Peru, 1 March 1996, par. 2.3.a):” The repeated sexual abuse to which Raquel Mejia was subjected constitutes a violation of Article 5 and Article 11 of the American Convention on Human Rights”.

⁴⁰⁶ Human Rights Committee, General Comment 20, article 7, fourth-fourth session, 1992, UN Doc. HRI/GEN/1/Rev.1 at 30 (1994), par.4. the Committee states that the distinctions between different kinds of punishment or treatment depend on the nature, purpose and severity of the treatment applied.

of rape and sexual abuse, also non-state actors commit similar acts against the civilian population, especially against women and girls as a tactic of war.⁴⁰⁷ The provisions of common article 3 regulate the conduct of all parties to an armed conflict, thus including the conduct of non-state actors. Subsequently, even non-state actors can be held accountable for violations of international humanitarian law and be subject to the jurisdiction of the International Criminal Court.

Internally displaced women have often been coerced into providing sexual acts in return for essential food, shelter and security. Women's rights are been ignored also when they are being forced into prostitution as the only economic means of survival.⁴⁰⁸ To the extent that gender specific violence amounts to torture, cruel, inhuman and degrading treatment, the right to be free from gender-based violence is in itself a non-derogable right. Accordingly, freedom from forms of gender-specific violence that breach non-derogable rights must be guaranteed for all displaced persons under all circumstances, including during non-international armed conflicts.

During non-international armed conflicts, common article 3 prohibits "any adverse distinction founded on...sex..." in its guarantee for humane treatment under all circumstances. Protocol II, article 2.1 includes the same prohibition and it also clearly prohibits rape, enforced prostitution and any other form of 'indecent assault' in art.4.2 e). Because Protocol II elaborates and clarifies the meaning of common article 3, the parties to all internal armed conflicts should respect its explicit proscription of rape and other kinds of sexual and physical violence.

During an international armed conflict, the Fourth Geneva Convention applies and its art.27 on equal treatment without prejudice because of sex. Protocol I, art.75.1 accords to non-protected persons the enjoyment of fundamental guarantees without adverse distinction based on sex, too. This is stated in its guarantee of humane treatment under all conditions of international armed conflict, which are subject to the provisions of Protocol I. Such provisions encompass all forms

⁴⁰⁷ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45, Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000) UN Doc. E/CN.4/2001/73, 23 January 2001, par.47. The Special Rapporteur wishes to raise discussion on the impunity of non-state actors and expresses her concern over the fact that the enforcement of international standards on non-State actors encounters various difficulties.

⁴⁰⁸ CEDAW Committee 1992, General Recommendation 19, par.24 h) and g) give recommendations on how states should improve the situation.

of gender-specific violence. The Fourth Geneva Conventions art.27 relates to protected persons and thus may not always apply to the internally displaced. It explicitly prohibits rape, forced prostitution and other forms of gender-specific assaults. Protocol I, art.76.1 applies to all women in the power of a state party to the conflict, including state party's own nationals and it gives the same kind of guarantees as art.27. This provision is especially important for IDPs as they are included explicitly within the scope of protection afforded.

As for conclusions, there seem to be a wide range of guarantees for women's rights and freedoms from being subjected to gender-specific violence. However, the special circumstances of internally displaced women do merit explicit recognition of their situation. They are so vulnerable to sexual abuse as they are not in their familiar surroundings or with their families. Camp conditions should be better accommodated for women; for instance, not having to get water from the far edges of the camp, adequate lightning in the camp area, no threats from the camp officers, would help women to go on with their lives. Living under constant fear of being assaulted adds to the severe mental harm that displaced persons encounter.

6.2.1 Chechnya and violations against internally displaced women

Although the Russian Constitution protects against acts of torture, violence and cruel or inhuman treatment or punishment, it is not clear whether this provision includes also rape as a form of torture as the concept of torture is not defined.⁴⁰⁹ The women in Chechnya have faced various human rights violations and there has been emerging a pattern of rape of detained Chechen women.⁴¹⁰ The crime of rape affects women in more ways than physical, it is still considered as being a shame on the victim's family in the Chechen region, according to the Special Rapporteur.⁴¹¹ There was a case where a colonel of the Russian army, Yuri Bodanov, was in fact tried for the rape and murder of an 18-year old Chechen girl.⁴¹² The accusation for rape was later dropped and the colonel was acquitted on grounds of being temporarily insane at

⁴⁰⁹ Constitution of the Russian Federation 1993, article 21: "The dignity of the person shall be protected by the State. No circumstance may be used to belittle it. No one may be subjected to torture, violence or any other harsh or humiliating treatment or punishment...".

⁴¹⁰ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2003/75/Add.1, 27 February 2003, par. 2084.

⁴¹¹ *Ibid.*, par.2085.

⁴¹² Kheda (Elza) Kungaeva was abducted from her home on the night of 26 March 2000 and taken for interrogation because she was suspected of having information on Chechen fighters. During the interrogation, she was raped and killed. See Amnesty International, press release 11 April 2003: Russian Federation, justice must be done.

the time of the murder.⁴¹³ However, the Supreme Court later dismissed the verdict and ordered a new trial. This time, the colonel was found guilty of kidnapping and murder and he was sentenced to 10 years' imprisonment.⁴¹⁴ This case was a landmark in the sense that it was the first time when such a case of human rights violations committed in the context of Chechnya by Russian military personnel was taken to court, despite various similar reported cases.

As for the gender-based violations during the Chechen wars, there have been reports of torture and rape of women committed by both parties to the conflict, Russian military troops and Chechen rebels.⁴¹⁵ Sexual violence has been described as having been particularly prevalent during the so-called mop up-operations, when Russian military entered villages and towns for the first time after the rebels had fled.⁴¹⁶ Even though evidence of rape and sexual violence committed by Russian soldiers exists, the Russian Government had so far failed to properly investigate and prosecute the perpetrators. Also common article 3 applies to such alleged crimes as the Russian Federation has ratified the Geneva Conventions and their Additional Protocols. Common article 3 explicitly mentions rape and it applies as treaty law. The Committee against Torture noted with concern that allegations of brutal sexual violence were unusually common in Chechnya.⁴¹⁷

The ICTY states that the prohibition of rape and serious sexual assault during an armed conflict has gradually evolved into customary international law.⁴¹⁸ This prohibition has evolved from the Lieber code and its express prohibition and the general provisions of the Hague Convention

⁴¹³ The military court at Rostov-on-Don found the colonel not criminally responsible for the murder and transferred him to a psychiatric hospital. For more information, see Amnesty International, press release 23 June 2004.

⁴¹⁴ Amnesty International, Human rights in the Russian Federation, 9 November 2004.

⁴¹⁵ Human Rights Watch, World Report 2001, p.316 describes the acts of Russian soldiers to have been committed with impunity. Furthermore, Human Rights Watch report on Russian Federation, April 2000, offers eyewitness testimonies to several instances of sexual violence, including rape.

⁴¹⁶ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, submitted in accordance with Commission on Human Rights resolution 2000/45, Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997-2000) UN Doc. E/CN.4/2001/73, 23 January, par.100. Special Rapporteur refers to reports which accuse Russian soldiers of brutal rape and torture of women and some men in areas under their control. The mop up-operations and subsequent sexual violence has been reported to have occurred in the villages of Alkhan Yurt, Novye Aldy, Shali and Tagi Chu.

⁴¹⁷ Committee Against Torture, Conclusions and recommendations: Russian Federation, UN Doc. CAT/C/CR/28/4, 28 May 2002, par.7a.

⁴¹⁸ International Criminal Tribunal for former Yugoslavia, Prosecutor v. Anto Furundzija (1998) ICTY 3 (10 December 1998), par. 168.

IV, read in conjunction with the Martens clause in the preamble to the Hague Convention.⁴¹⁹ Furthermore, the Tribunal states that these norms apply in *any armed conflict*⁴²⁰, which can be interpreted to include both internal and international armed conflicts.

6.2.2 Liberia and violations against internally displaced women

As for the various human rights violations that have occurred during the conflict, particularly rape and sexual abuse have been widespread practice in Liberia. Several hundreds, probably even thousands, of women and girls of all ages have been raped and subjected to other forms of sexual violence. The widespread nature of these crimes indicates that rape has been used a weapon of war in order to create fear and terror among the population.⁴²¹ Such practice has become an increasingly common element of armed conflicts.⁴²² Although rape is illegal in Liberia, the government has not enforced the law sufficiently and rape is still common, especially in IDP settlements. Another negative point is the lack of justice in the sense that perpetrators have not been prosecuted so far.⁴²³

Liberia acceded to the CEDAW in 1984 but it has unfortunately so far failed to submit its initial or subsequent reports.⁴²⁴ Therefore there is no information on the part of the authorities in Liberia regarding the widespread crimes of sexual abuse, nor has there been any implication that a criminal tribunal similar to the ones in Rwanda and Yugoslavia would be established to

⁴¹⁹ Ibid. The Tribunal also refers to the decisions by the Tokyo International Military Tribunal and the United States Military Commission's decision and argues that all these events together have contributed to the evolution of universally accepted norms of international law, which prohibit rape and serious sexual assault.

⁴²⁰ International Criminal Tribunal for former Yugoslavia, Prosecutor v. Anto Furundzija (1998) ICTY 3 (10 December 1998), par. 168. The Court states that rape and other forms of sexual abuse in armed conflicts entail the criminal responsibility of the perpetrator.

⁴²¹ Report of United Nations High Commissioner for human rights and follow-up to the World Conference on Human Rights, UN Doc. E/CN.4/2004/5, 12 August 2003, par. 13. Various NGOs have reported rape and other forms of sexual violence in Liberia as having been endemic; see for instance report by Amnesty International: Liberia, one year after Accra – immense human rights challenges remain, available on-line at: <http://web.amnesty.org/library/Index/ENGAFR340122004?open&of=ENG-LBR> (visited 1.1.2005) and Human Rights Watch report: Liberia, available at: <http://hrw.org/english/docs/2005/01/13/liberi9879.htm> (visited 15.1.2005) and the briefing paper “The guns are in the bushes”, January 2003. See also European Parliament resolution on participation of women in peaceful conflict resolution A5-0308/2000, 30 November 2000, par. F and H.

⁴²² Specific groups and individuals, mass exoduses and displaced persons – Report of the representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, 31 December 2004, UN Doc. E/CN.4/2005/84, par. 66.

⁴²³ U.S. Department of State, country reports on human rights practices: Liberia 2004, released by the Bureau of Democracy, human rights and labour, 28 February 2005, section 5: Women.

⁴²⁴ Liberia's reports to the CEDAW Committee are due from 1985 through 1997. Liberia has in fact only reported to the Committee on the rights of the child. The CERD Committee has considered the situation in Liberia in its review procedures due to Liberia's neglect for submitting reports.

prosecute those guilty of such acts. The Geneva Conventions and Additional Protocols do not define rape or acts of sexual violence as ‘grave breach crimes’.⁴²⁵ This makes it somewhat ambiguous whether sexual violence during an armed conflict is always a war crime. However, the Rome Statute formally recognises rape, forced impregnation, sexual slavery and other forms of sexual abuse as crimes against humanity and war crimes.⁴²⁶ Based on this, the violations that occurred in Liberia would clearly qualify as crimes against humanity; they have been so widespread practice during the conflict. Liberia has also failed to submit its reports to other treaty bodies as well, most likely due to the constant instability in the state.⁴²⁷

Many Liberian women face sexual abuse by camp officers and other camp residents due to poor planning of the camp security structure.⁴²⁸

In addition to the common article 3, Protocol II explicitly prohibits rape, enforced prostitution and other forms of indecent assault; this can be considered as a major improvement for the protection of women’s rights. When Protocol II was drafted, the protection of women was considered to require strengthening and this was done through prohibiting rape, enforced prostitution and indecent assaults.⁴²⁹ Women are protected against rape, forced prostitution and indecent assaults also the Fourth Geneva Convention’s article 27. The only difference is that it covers only women who are among the category of protected persons. Same guarantees are also found in Protocol I, article 76, which extends protection to *all women* in the territories involved

⁴²⁵ Fourth Geneva Convention, art.147 defines ‘grave breaches’ of the Geneva Conventions: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health, unlawful deportation or transfer, unlawful confinement of a protected person, taking of hostages and extensive destruction of property. Sexual violence could probably fall under the concept of inhumane treatment or the causing of great suffering.

⁴²⁶ Rome Statute of the International Criminal Court. Art. 7 defines crimes against humanity as acts committed as part of a widespread or systematic attack directed at any civilian population and art.7.(g) includes rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other form of sexual violence of comparable gravity. War crimes are defined in art. 8.2(e)(vi) during internal armed conflicts as including the above mentioned acts that also constitute a serious violation of common article 4 of the Geneva Conventions.

⁴²⁷ Liberia has acceded to the Convention Against Torture and other cruel, inhuman or degrading treatment or punishment on 22 October 2004; accession to CEDAW 16 August 1984 and accession to CERD 5 December 1976.

⁴²⁸ Specific groups and individuals, mass exoduses and displaced persons – Report of the representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, 31 December 2004, UN Doc. E/CN.4/2005/84, par. 66. Kälin points out how it is not uncommon for the forces that are in charge of protection and enforcement of the law and order to abuse their power and rape displaced women who are most vulnerable when they have been forced to leave their homes and familiar community protection structures behind. Women and girls face high threats of rape particularly in camp settings, where also incidents of domestic violence tend to increase.

⁴²⁹ Commentary to the Additional Protocols to the Geneva Conventions, M. Bossuyt (ed.), p. 1375.

in conflict.⁴³⁰ This guarantee in Protocol I widens the circle of beneficiaries as it applies to women protected under the Fourth Convention and those not protected. It also widens the protection for fundamental guarantees by adding rape in the list of prohibited acts.⁴³¹

According to the Guiding Principles, IDPs shall be protected against rape and other acts of gender-specific violence⁴³² Gender-specific violence in this context means acts which result in physical, sexual or psychological suffering or harm due to one's gender.⁴³³ There still seems to prevail a certain climate of impunity for sexual abuse and rape committed during the armed conflict, although NGOs have called for trials of the perpetrators. Rape victims are often left outside the community because they are stigmatised by the crime and some victims are even too afraid to tell about what happened because they are ashamed. Women who have been victims of sexual violence may be afraid of the consequences when their family finds out; they may be subjected to physical harm, even death, if they are perceived as having contravened the community's socio-cultural norms related to honour.⁴³⁴ This should be taken into account when preparing the community to receive returnees.

7. IDPs in Chechnya and Liberia – what lies ahead?

The Russian Federation has obligations to uphold human rights both under its own Constitution and under its international treaty obligations. The Russian Federation ratified the Geneva Conventions in 1954 and Additional Protocol II in 1989; the provisions of international humanitarian law thus apply, if the hostilities are recognised as meeting the relevant threshold. Moir argues, as many experts do, that there can be no doubt to the question whether common article 3 was and still is applicable.⁴³⁵ As for what the Chechen fighters are bound by one could

⁴³⁰ Commentary to the Additional Protocols to the Geneva Conventions, M. Bossuyt (ed.), p. 893. The background to adding an article on protecting women in article 27 of the Fourth Geneva Convention was the abuses committed against women during the Second World War.

⁴³¹ Protocol I, article 75 entitled fundamental guarantees spells out prohibited acts.

⁴³² Guiding Principle 11.2(a).

⁴³³ Kälin 2000, *supra* (note 11), p. 29. Guiding Principles expands the notion of gender-specific to cover both sexes.

⁴³⁴ International Committee of the Red Cross, *Addressing the needs of women affected by armed conflict - an ICRC guidance document*, March 2004, p.25.

⁴³⁵ Lindsay Moir 2002, *supra* (note 134), p.128. Accordingly, Bassiouni and Turns are clearly of the view that article 3 applies together with Protocol II; what the Chechens fighters are bound by remains unclear. Nevertheless, Bassiouni states that it is completely irrelevant for the application of the Geneva Conventions whether the actions of Chechen fighters are characterised as terrorist acts or not, as there can be no justification for violating common

argue from the perspective of reciprocity that they are to apply as minimum standards of humanity the provisions of common article 3 and basic human rights norms. The first Chechen war of 1994-1996 has been acknowledged, even in Russia, to be an internal armed conflict. This can be seen from the decision of the Russian Constitutional Court whereby it declared that Protocol II was applicable, but as it had not been adequately implemented into domestic legislation, it had not been respected either. Despite of whether Protocol II was in fact applicable in addition to common article 3, the uprising of hostilities in 1999 saw widespread violations of humanitarian and human rights law, and a large number of civilian casualties. Deng argues that Russia, as a world's major power, needs to address its domestic problems of internal displacement, which occur also outside Chechnya. In addition, Russia has a role to play in the international community and its response to internal displacement as a global crisis.⁴³⁶ Although a state may have a certain right to respond to threats of terrorism, national sovereignty entails that a state has the responsibility to first and foremost protect its citizens.

The situation in Chechnya has not showed signs of significant improvement and the death of Aslan Maskhadov, the only Chechen warlord willing to negotiate with Russia, is hardly likely to end the violence and the fighting. Russia still sees the conflict as an internal fight against terrorists, where no international interference is necessary. Russia has not accepted the claims of independence by Chechnya and sees the territory as one of its subjects as described in the Russian Constitution. Human rights violations committed by both the insurgents and the military troops continue in Chechnya. There seems to be a climate of impunity as regards the human rights violations; although the violations are widespread, the perpetrators are not brought to justice. This is true for violations such as arbitrary killings, kidnappings and rape, for instance.

All parties to the conflict in Liberia are bound by common article 3 of the Geneva Conventions, which Liberia ratified in 1954. Common article 3 is applicable to situations of non-international armed conflict. It expressly binds all parties, even insurgent groups that have not signed the

article 3 or Protocol II and the laws and customs of war. See Crimes of war project, expert analysis on Chechnya, available at www.crimesofwar.org/expert/chechnya-print.html (visited 15.1.2005).

⁴³⁶ Profiles in displacement: Russian Federation, *supra* (note 32), par.25.

Geneva Conventions.⁴³⁷ According to the article, all parties must treat civilians and the sick, wounded, detained and others humanely without discrimination. Violence to life, cruel treatment and torture, hostage-taking, outrages upon personal dignity and imposing sentences without a court meeting that corresponds to international standards are explicitly prohibited by this article. Therefore, the various human rights violations committed by the Liberian rebel forces against civilians would probably fall under these categories of prohibited acts, and are thus in breach of common Article 3.

The Second Additional Protocol to the Geneva Conventions is also applicable to Liberia, which ratified it in 1988. Protocol II applies to internal armed conflicts, where armed groups are organised to a greater or lesser degree and there exists a situation of open hostilities between the State authority and these groups.⁴³⁸ In the case of the intense and violent civil war in Liberia between the government forces and the various rebellious groups, it would probably be safe to argue that such conditions indeed did exist that allow Protocol II to apply. There has been complete lack of respect for the provisions of human rights and humanitarian law during the armed conflict in Liberia. Civilians have been deliberately targeted; one of the aims in the war seems to have been spreading terror into the civilian population through gross violence, which has not spared women or children. The fact that civilians have been deliberately targeted during the Liberian civil war is a breach of article 13 of the Protocol II, which explicitly prohibits such acts.⁴³⁹ Acts or threats aimed to terrorise the population, as defined in the article, are considered particularly reprehensible since they cause cruel suffering on the civilian population. One example of such acts are air raids; another act, which spreads terror is the systematic use of rape

⁴³⁷ The Commentary to the IV Geneva Convention argues that the insurgent party is also bound due to the fact that it claims to represent the state, or at least part of the state. Furthermore, the commitment made by a State not only applies to the government but also to any other established authorities and private individuals within the territory of that state and thus certain obligations follow. Commentary to the Additional Protocols, M. Bossuyt (ed.) p. 1345. For more reflections on this, see Commentary to the IV Geneva Convention, Jean S. Pictet (ed.), 1958, p. 37.

⁴³⁸ Commentary to the additional protocols to the Four Geneva Conventions, M. Bossuyt (ed.), p. 1320-1321.

Internal armed conflict could further be characterised by the fact that the insurgents who fight the established order are seeking to overthrow the current regime or are looking to bring about secession in order to create a new state. Protocol II supplements common article 3 but does not change its conditions of application; these two instruments are in this sense intertwined.

⁴³⁹ Second Additional Protocol to the Geneva Conventions, article 13.2: "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited".

as a weapon of war, as has been the case in Liberia. This prohibition is absolute and applies at all times.⁴⁴⁰

The violent civil war in Liberia reached its end with the 2003 Peace Agreement and the return and resettlement of the huge amount of IDPs to their original residences has begun. The transitional government has made elaborate plans on how the return and reintegration process will be handled, it remains to be seen how the plan is fulfilled. One of the worse violations committed during the conflict have been the widespread rapes and other forms of sexual abuse against women and girls of all ages. Those wounds will take a long time to heal. It would be necessary to make the community more sensitive to the traumas that rape and abuse victims have and not to burden them with stigmatisation or shame. Women may even be afraid to tell of their experiences if they feel that they will not be believed or that the perpetrators will anyway go unpunished. These crimes also pose a challenge to the reintegration process; how does one live peacefully with ex-combatants? Disarmament of former combatants is essential for the creation of a safe and secure environment. Guaranteeing peace and security in the future depends on how well the underlying causes of the civil war are addressed and how those guilty of violations are treated; whether impunity prevails or the perpetrators are duly prosecuted. As the amount of women headed households is bound to increase as a result of the war and casualties, it is crucial to include women in the decision-making processes already in the planning stages in order to mainstream a gender perspective. A gender perspective should also be reinforced when addressing housing and property restitution, as traditional laws do not grant women the possibility to inherit or to own land in their own names. Even though the Comprehensive Peace Agreement provides for the establishment of a Truth and Reconciliation Commission⁴⁴¹ to address issues of impunity, and to facilitate reconciliation of the community, its work was not deemed effective.⁴⁴²

⁴⁴⁰ Commentary to the Additional Protocols to the Geneva Conventions, M. Bossuyt (ed.), p. 1451.

⁴⁴¹ Comprehensive Peace Agreement, 18 August 2003, art. xii

⁴⁴² U.S. Department of State, country reports on human rights practices: Liberia 2004, released by the Bureau of Democracy, human rights and labour, 28 February 2005, section 4: Governmental attitude regarding international and non-governmental investigation of alleged violations of human rights. The Commission is said to have taken few initiatives during 2004 and to have been ineffective.

8. Conclusions

The aim of this study has been to clarify firstly what an IDP, an internally displaced person, means and secondly, what is the legal protection available for them. The widely accepted definition of an internally displaced person is the one in the Guiding Principles. Although the current human rights and humanitarian law offer protection for IDPs, there are still significant shortcomings regarding some of the essential needs and rights of IDPs. These essential rights include safe return, right to housing and property restitution or compensation. Furthermore, the situation of women in displacement has been another focus point in this study, because women and children represent the majority of internally displaced persons in the world and they are most vulnerable to abuse. Women evidently suffer from various types of sexual abuse and the climate of impunity regarding the investigation and prosecution of perpetrators still seems to prevail.

The phenomenon of internal displacement is an acute problem on the international agenda. The amount of IDPs already largely surmounts the number of refugees and although these two categories of persons do not have a similar status under international law, these persons suffer from similar problems and need to be protected and assisted. The response of the international community so far has been *ad hoc* since there is no one designated UN agency responsible for providing protection and assistance for IDPs.

It can well be argued in conclusion that internally displaced persons do need a specific instrument dealing with their rights that recognises them as a special category of people in need of protection. Such an instrument already exists in the form of the Guiding Principles on Internal Displacement. However, IDPs do not need to have particular status under international law. This is because they have not crossed international borders and thus their own country has the responsibility over their well-being. On the other hand, the home country of the IDPs may well be the driving force behind displacement and thus it provides no protection of human rights. If the state refuses international aid, the IDPs are left on their own to survive. The frequent violations of the rights of IDPs are not the result of a lack of legal norms, but result more from shortcomings in the way in which those norms are implemented. Therefore the answer is in the more effective implementation of international law whereby also the special

needs of IDPs could be better fulfilled. For example, the right to restitution of property that has been lost as a consequence of displacement or the compensation for the loss of property is not adequately recognised under international law and yet it is critical for IDPs; therefore, this right among others should be addressed. Another right that merits more explicit recognition is the right to a safe return, which is essential to the solution of the IDP problem. Inspiration for guaranteeing the safe return can be drawn from the principle of non-refoulement relating to refugees.

Although a majority of countries have already ratified the Geneva Conventions, the ratification of the Additional Protocols is not so thorough; especially ratification of Additional Protocol II relating to the protection of civilians under internal armed conflicts would be vital for the protection of IDPs. Naturally, not only the ratification but even more the subsequent implementation into national legislation and enforcement in practice would help in guarding the human rights of those displaced that otherwise are not sufficiently protected. Also the armed forces should be educated on the principles of international humanitarian law.

One of the crucial elements to be taken into account when addressing internal displacement and subsequent human rights violations is the situation of women in displacement. They suffer from grave sexual violence under conflict situations. Although there are several international instruments prohibiting rape, women are subjected to rape and other forms of sexual violence and internally displaced women are specifically vulnerable to such abuse. Also the lack of institutional mechanisms to protect internally displaced women makes them more vulnerable to abuse. The stigmatisation resulting from rape is still unfortunately common; women may be reluctant to report rape because they fear the responses of family/ community members. Women may be scared for revenge from the perpetrators if they tell. Understanding the impact that displacement has on women is a necessary starting point for further assistance. Women should also be included in every step of the reintegration and rebuilding activities in order to ensure that their views are heard. Including women in the rebuilding activities may help to bring forward the capacities women have acquired during displacement and to provide opportunities to continue to build on those capacities.

Both of the states studied in this report have a prolonged IDP situation, resulting from internal armed conflict where government forces have fought against armed rebel movements. In Liberia, rebels sought to overthrow the president while in Chechnya, the aim is independence from the Russian Federation. In both cases, displacement has been massive and there have been gross violations of human rights of IDPs, documented by various NGOs. Civilians have been arbitrarily targeted and one of the aims of war has been to spread terror among the civilian population. This has been most visible in the horrendous plight of women, as they have been subjected to wide spread sexual abuse amounting to a war strategy, especially in Liberia. The conduct of the government in Chechnya could be characterised with massive use of force through air raids and heavy bombings. It is safe to argue that the basic human rights of IDPs have not been efficiently protected by the states in question; rights such as right to life, freedom from discrimination and the right to return and subsequent right to housing and property restitution. Both states are parties to major human rights treaties, but Liberia has not fulfilled its reporting obligations and has only recently deposited its ratification instruments of the ICCPR and the IESCR. Similarly, Russian Federation and Liberia are parties to the Geneva Conventions and their Additional Protocols, yet the protection of civilians has not been implemented accordingly. Russia has been criticised on the international forum, such as the Council of Europe for instance, for the events in Chechnya and Liberia has suffered from the sanctions imposed by the UN Security Council; however this has had no impact on the hostilities in either state, unfortunately.

Any solution to the IDP problem should aim at facilitating return to their original areas of residence. Likewise, prior to return, all possible efforts should be made to create conditions for a safe and desirable return, which in turn could help to prevent eventual future displacement. It is essential to confront the original causes of displacement and to look for them in social and political conflicts. There is need to deal with relatively proximate causes, which will almost always refer to the lack of enjoyment of fundamental rights or at least to the perception that life or physical integrity are under threat and traditional mechanisms of protection are ineffective.

Both states face serious challenges with the return of IDPs as the number is considerable in both Liberia and Chechnya. The security situation in Liberia improved with the deployment of the United Nations peacekeeping forces. Such an intervention in the Russian Federation is hardly

likely because the government still sees the conflict as an internal fight against terrorism, and believes it thus to be justified. One common problem for both states is the issue of impunity; whether the state will investigate and prosecute alleged human rights violations thus restoring a credible human rights regime in the country. The European Court of Human Rights has already judged Russia to be responsible in three cases for human rights violations in Chechnya, regarding the protection of the right to life, right to property and the right to an effective remedy. There have been reports that Chechens who wish to appeal to the ECHR have been intimidated in order to prevent them from lodging a complaint with the Court. It remains to be seen what the effects of the Court's judgments will be. The conflict in Chechnya and its possible expansion to other areas poses currently the gravest threat to human rights protection in the Russian Federation. The situation is somewhat different in Liberia, as the court system and the whole human rights protection has been severely damaged during the civil war. The society will have to be rebuilt with a view to guaranteeing human rights and respecting the international obligations of the state; as the ICCPR and the ICESCR have finally entered into force in Liberia. The future state reports to respective treaty bodies will be significant in determining how the state has managed the complex process of reconstruction and the reintegration of IDPs into the society.

Although the Guiding Principles are an important tool in recognising the rights of IDPs, they are not binding as such even if they reflect the principles of international law. However, one could argue that this is where the eventual shortcoming of the Guiding Principles exists; Guiding Principles do not create new norms but merely restate and interpret the existing principles. Nevertheless, by compiling the most useful principles of human rights and humanitarian law in relation to the needs of IDPs, the Guiding Principles succeed in combining these instruments without distracting attention from any of the existing norms. The international community has a crucial role to play in filling in the gaps of individual governments' inadequate response to the plight of IDPs and this could be done through adopting and implementing the Guiding Principles in practice when addressing internal displacement.

8. RECOMMENDATIONS

Recommendations for the international community:

1. The response of the international community to IDP situations should be rapid and effective and based on most recent information; therefore a *specific reporting system should be developed*, whereby countries with IDP situations would be under an obligation to give detailed reports on the current developments. These reports should include analysis on the causes of displacement, statistics, information on the protection measures available for IDPs etc. The reporting system would in turn facilitate the *establishment of an early warning mechanism* based on the analysis of country reports. The international community's response could then be more focused and coordinated as regards the distribution of humanitarian aid. Quick response could also help to prevent further escalation of the conflict and ease the plight of IDPs.
2. *Sovereignty equals responsibility*; this has to be the starting point for addressing internal displacement. Countries have to first and foremost respect, guarantee and enforce the rules of human rights and humanitarian law. *The Guiding Principles should be implemented and taken into account in practice* when protecting IDPs as the international legal framework does not cover all the essential rights of IDPs. National legislations should adapt to the requirements of 'new conflicts' and allow for the prosecution of war criminals, for instance.
3. *IDPs need to be protected in all phases of displacement*; during the flight, during displacement and when they return or resettle. Their *protection should not be dependent on definitions and legal status*; IDPs are entitled to same protection as any other citizens.
4. There are special groups among IDPs that need more attention to their particular needs; such as women, children, the disabled and elderly. The *gender aspect of displacement has to be integrated into all phases of displacement* because women are especially vulnerable to sexual abuse. This should be taken into account when designing camp conditions, among other things; there has to be adequate lighting, the water and food distribution posts should have central location instead of being in remote corners, camp personnel should be educated etc. This would help to eliminate gender based sexual abuse, which is all the more important in conflict

situations where violence takes on cruel forms and often has a deterring motive, like rapes on massive scale. Especially the prevailing impunity for sexual crimes should be addressed properly, as victims of sexual violence often felt ashamed or intimidated to tell of their sufferings. Collecting info on sexual violence whilst creating a culturally acceptable environment for victims to tell about their experiences. Such information is required in order to prosecute the perpetrators in the future.

5. IDPs should not, in any circumstances, be forced to return. Therefore, *the return process must be monitored by independent experts* in order to make sure the return is safe, dignified and without coercion. In addition, the monitors should examine how the community reacts to the returnees. The receiving community should also be ‘prepared’ in advance for the returnees, sensitive to their traumatic experiences.

6. A crucial element in guaranteeing safe and dignified return is *housing and property restitution*. If restitution is not possible, reasonable compensation has to be provided. It is recommendable that a specific local organ that is competent to deal with housing and property claims is established, as has already been done in Kosovo and Bosnia Herzegovina. Compensation should not be linked to actual return, but should be provided without discrimination.

7. The reintegration process is crucial for returning persons in terms of making them a part of the community again. *IDPs need help with rebuilding their lives after traumatic experiences*; there is urgent need for health care, trauma help and counselling for victims of rape and sexual abuse. Establish Stable security conditions need to be established before people can return and the disarmament of ex-combatants is an integral part. Reconciliation is the key to sustainable peace after armed conflicts. *IDPs themselves should be involved in the planning of the return and reintegration processes*, as they are the experts on what they need

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