

INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW AND THE INTERNALLY DISPLACED

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PREFACE

Nothing could be more flattering to this writer than being asked to contribute to a volume in honor of Thomas Buergenthal. No person in this hemisphere has made as many diverse contributions to advancing the cause and knowledge of human rights as has Tom.

He played an important unifying role as a judge and President of the Inter-American Court of Human Rights during the Court's crucial formative years. Those familiar with Tom's writings can readily detect his intellectual stamp on many of the Court's key opinions, especially its landmark decision in the Velásquez-Rodríguez case. He was also the driving force behind the creation of the Inter-American Institute of Human Rights. As the Institute's first President, he helped shape its programs which have made it such a creative and vibrant center for the study and dissemination of human rights and related issues.

Yet, perhaps his most enduring contribution to the field has been as a teacher for over thirty years. Together with Louis Sohn, he virtually

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pioneered the teaching of human rights law in the United States, and he has been a trusted mentor to countless students who, inspired by his example, have become dedicated human rights practitioners. Over the years, he has been a steadfast friend and source of wise counsel to this writer. I am pleased, therefore, to join the other contributors to this volume in celebrating Thomas Buergenthal's remarkable life and accomplishments.

I. INTRODUCTION

The U.N. Security Council's decision authorizing coalition forces to assist and protect displaced Kurds within Iraq after the Gulf War focused world attention on the desperate plight of this ethnic group. The well publicized situation of the Kurds is, however, symptomatic of a far larger, though less visible, global phenomenon. It is estimated that there are today over 24 million displaced persons world wide, and that number is increasing daily.¹

Whether because of civil strife, armed conflict, deliberate policy and/or natural disasters, the internally displaced are forced to flee their homes and seek refuge in other parts of national territory.² Frequently compelled by circumstance to assume a nomadic like

1 See Analytical Report of the Secretary General on Internally Displaced Persons, U.N. Doc. E/CN.4/1991/23; Comprehensive Study Prepared by Mr. Francis Deng, Representative of the Secretary General on the Human Rights Issue Related to Internally Displaced Persons, U.N. Doc. E/CN.4/1993/35; Report of the Representative of the Secretary General, Mr. Francis Deng, U.N. Doc. E/CN.4/1994/44. See also Report on Refugees, Displaced Persons and Returnees, prepared by Mr. Jacques Cuénod, Consultant, U.N. ESCOR, 2d Sess., Item 12 of the Provisional Agenda, U.N. Doc. E/1991/109/Add.1 [hereinafter Cuénod Report] (placing the number of internally displaced persons at 24 million with the vast majority of individuals located in either Asia, Latin America or Africa); see also Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission, Written Statement Submitted by Refugee Policy Group, a non-governmental organization in consultative status (category II), U.N. ESCOR, Hum. Rts. Comm., 48th Sess., Agenda Item 11, U.N. Doc. E/CN.4/1992/NGO/21 Annex I, at 1 [hereinafter Refugee Policy Group Report] (noting the findings of the Refugee Policy Group (RPG) which places an estimated 13 million internally displaced individuals in Africa, 5 million in Asia, 2 million in Europe, and 1 million in the Americas. *Id.*

2 *Id.*

existence or to settle in makeshift dwellings in urban and other population centers, the displaced—whose ranks generally include those requiring special assistance—are too often denied the economic, social, legal and other rights to which they otherwise are entitled as citizens under domestic and/or international law.³

This essay focuses, albeit not exhaustively, on the basic protections the internally displaced should be accorded under existing international human rights and humanitarian law, and how nongovernmental organizations (NGOs) concerned with this problem can utilize the law and appropriate supervisory organs in the event the displaced are denied these protections.

II. APPLICABLE HUMAN RIGHTS

Since existing human rights standards are phrased rather generally, they do not provide individuals with explicit protection against internal displacement. However, just as the freedom from forced or involuntary disappearance was initially recognized as inherent in the right to life,⁴ an individual right against forced displacement arguably inheres in the freedom of movement and residence proclaimed, *inter alia*, in Article 13 of the Universal Declaration of Human Rights,⁵ Article 12 of the Covenant on Civil and

3 U.N. ESCOR, Hum. Rts. Comm., 48th Sess., Agenda Item 11, U.N. Doc. E/CN.4/1992/23, at 2 (1992) [hereinafter Secretary-General's Report].

4 American Convention on Human Rights, Nov. 22, 1969, OEA/Ser. K/XVI/1.1, doc. 65, rev. 1, corr. 1, reprinted in 9 I.L.M. 673 (1970) [hereinafter American Convention]. See Claudio Grossman, "Disappearance in Honduras: The Need For Direct Victim Representation in Human Rights Litigation", 15 *Hastings Int'l & Comp. L. Rev.* 363, 369, 371 n. 46 (1992) (noting that in the Velásquez Rodríguez case, the Inter-American Court of Human Rights found Honduras in violation of Articles 4 (right to life), 5 (right to humane treatment), and 7 (right to personal liberty) of the American Convention for forced or involuntary disappearances).

5 G.A. Res. 216 (III), U.N. Doc. A/810, at 74 (1948) [hereinafter Universal Declaration]. Article 13 of the Universal Declaration of Human Rights states:

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Political Rights⁶ and Article 22 of the American Convention on Human Rights.⁷ But, this right, like most others, is not absolute and, thus, may be lawfully restricted or temporarily suspended under certain circumstances.⁸

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6. G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16), U.N. Doc. A/6316 (1966), reprinted in Theodor Meron, *Human Rights Law-Making in the United Nations: A Critique of Instruments and Process*, annex 1 (1986) [hereinafter *Covenant*]. The Covenant was first opened for signature on December 16, 1966 and entered into force on March 23, 1976 after the thirty-fifth nation had ratified the instrument. *Id.* Article 12 of the Covenant states:
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.
 2. Everyone shall be free to leave any country, including his own.
 3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.
 4. No one shall be arbitrarily deprived of the right to enter his own country.
- Id.* at art. 12.
7. American Convention, *supra* note 4, at art. 22. Article 22 (1)-(4) of the American Convention, entitled "Freedom of Movement and Residence" states:
1. Every person lawfully in the territory of a State Party has the right to move about in it, and to reside in it subject to the provisions of the law.
 2. Every person has the right to leave any country freely, including his own.
 3. The exercise of the foregoing rights may be restricted to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others.
 4. The exercise of the rights recognized in paragraph 1 may also be restricted by law in designated zones for reasons of public interest.
- Id.* at art. 22(1)-(4)
8. American Convention, *supra* note 4, at art. 22(3)-(4); *Covenant*, *supra* note 6, at art. 12(3). The American Convention on Human Rights provides that restrictions on an individual's right to freely move or reside within his own country may be restricted by law "to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others." American Convention, *supra* note 4, at art. 22(3)-(4). The American Convention also permits that right to be restricted "for reasons of public interest." *Id.* at art. 22(4). The International Covenant on Civil and Political Rights states that the freedom of residence and movement may be restricted by law in order to "protect national security, public order, public health, morals or the rights and freedoms of others." *Covenant*, *supra* note 6, at art. 12(3). Further, the Covenant also allows States to derogate from their obligations under the Covenant in times of public emergency which threaten the life of the nation, which are officially proclaimed, which do not discriminate on the basis of race, color, sex, language, religion or social origin and are not inconsistent with that State's other obligations as established by international

Once individuals become displaced, they, in theory, should continue to enjoy the same human rights as the rest of the population. However, experience has shown that such persons, in practice, rarely do because displacement, by its very nature, generally entails deprivations of multiple rights.⁹ Apart from its emotional cruelty, displacement often breaks up the nuclear family,¹⁰ cuts off important social and cultural community ties, terminates stable employment relationships, precludes or forecloses formal educational opportunities¹¹ and deprives those in need of special protection, such as infants, expectant mothers and the sick, of vital public/private sector services. Although the displaced frequently are forced to flee their homes for the same reasons as do refugees, the fact that they remain within national territory means that they cannot qualify as bona fide "refugees" and, hence, are not entitled to the special protective regime accorded to such persons under international law.¹² A lead-

law. Covenant, *supra* note 6, at art. 4(1-2). State parties are allowed to derogate from the provisions of Article 12 of the Covenant so long as other State parties to the Covenant are informed of the derogation by the Secretary-General of the United Nations. *Id.* at art. 4(3).

- 9 See Secretary-General's Report, *supra* note 3, at 11-19 (finding that displaced persons are an especially vulnerable group to human rights violations including: the denial of the right to food, the denial of the right to shelter and adequate living conditions, the denial of the right to health care, the denial of the right to life and personal integrity, the denial of the right to work, the denial of the right to an adequate wage, the denial of the freedom of residence and movement, the loss of family unity, the denial of the right to an education, the loss of legal identity and the denial of the right to freedom of thought, association, expression and assembly).
- 10 See *id.* at 17-18 (finding that the separation of family units deliberately occurs in situations of internal displacement). Africa Watch, in fact, noted an incident in which two hundred men were removed to a camp for displaced persons, yet were prohibited from taking their families. *Id.* at 18.
- 11 Children may fail to receive proper educations for a variety of reasons including outright deprival by the government, an inability of the local school system to handle a sudden influx of people, an inability by displaced parents to afford any incidental educational costs, or possibly, a fear by displaced parents that identification of their children in the school system will lead to further discrimination or repression. *Id.* at 18.
- 12 See Cuénod Report, *supra* note 1, at 20-21 (defining refugees, in the classic sense, as "persons who flee their country due to a 'well-founded fear of persecution' for reasons of race, religion, nationality or political opinion"). The preceding definition of refugees has been affirmed by the 1951 Convention Relating to the Status of

ing authority in the field has noted in this connection that “[i]nternally displaced persons must, therefore, look to the international community for protection because their own government is either unwilling or unable to protect them.”¹³

Large scale internal displacement, except in the case of natural disasters, almost certainly would never occur as official policy under a genuine functioning peacetime democracy. Such displacement, therefore, should be viewed as a barometer of something gone terribly wrong within a country. In fact, it is largely a byproduct of armed conflict and/or serious breakdown of democratic institutions, or, in the case of non-democratic regimes, of official policy.¹⁴ This phenomenon is also normally associated with a more generalized pattern of other serious human rights and, where applicable, humanitarian law violations.¹⁵

a. State Obligations under the UN Charter

It is indeed arguable that a government which is responsible for or condones large-scale internal displacement of its own citizens (except for legitimate reasons related to armed hostilities explained below) violates its obligations under the U.N. Charter. Specifically,

Refugees and the 1967 Protocol Relating to the Status of Refugees (which includes “membership of a particular group” as a ground for persecution). *Id.* at 20. Further, the “large displacement of persons... may be classified as refugees when they cross a national border or internally displaced persons when they remain within the boundaries of their country”. *Id.* at 7.

- 13 *Martin Macpherson, Quaker United Nations Office, Geneva, Internally Displaced Persons 2* (1991) (presentation given by Martin Macpherson to the UNHCR/NGO Meeting on Protection on June 21, 1991).
- 14 See e. g. *Middle East Watch, Human Rights in Iraq 85-91* (1990) (noting that the Iraqi government began an official policy of forced resettlement of Kurds in 1985, which gained in intensity prior to the Persian Gulf War, at which time an estimated 500,000 Kurds had been uprooted from their native villages to other parts of Iraq).
- 15 See Secretary-General’s Report, *supra* note 3, at 11-19 (finding that internally displaced persons frequently suffer additional human rights violations including: the denial of the right to food, the denial of the right to shelter, the denial of medical care or life, the denial of the right to work or move freely, the denial of an education and the breakup of family unity).

all U.N. member States are obliged under Articles 55 and 56 of the Charter to "promote universal respect for, and observance of, human rights and fundamental freedoms for all..."¹⁶ These clauses are the foundation of the international law of human rights, and their obligatory character has been authoritatively confirmed by the World Court.¹⁷ While these articles do not specify or define "human rights and fundamental freedoms," the Universal Declaration of Human Rights is today widely recognized as an authoritative interpretation and declaratory of a U.N. member State's obligations under the Charter.¹⁸ Judge Thomas Buergenthal writes in this regard: "UN practice...indicates agreement that governmental policies instituting or tolerating large scale denials of basic human rights violate the UN Charter because such measures are incompatible with the obligations to 'promote' human rights..."¹⁹

Insofar as official policies are designed to cause or condone internal displacement of entire families or parts thereof, such policies are incompatible with Articles 55 and 56 and with, *inter alia*, one or more of the following provisions of the Universal Declaration: Article 7 (equal protection of the law)²⁰, Article 13 (freedom of movement

16 U.N. Charter arts. 55 (c), 56.

17 See *Barcelona Traction, Light & Power Co., Ltd. (New Application) (Belg. v. Spain)*, 1970 I.C.J. 4 (Judgment of Feb. 5) (referring to the "basic rights of the human person"); *Legal Consequences for the States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276, 1971 I.C.J. 16, 57* (Advisory Opinion of June 21) (stating, in an advisory opinion of the Court, that the "denial [by South Africa] of fundamental human rights is a flagrant violation of the purposes and principles of the Charter").

18 See Universal Declaration, *supra* note 5, at 78 (advocating the promulgation and dissemination of the Universal Declaration by linking the document to a State's responsibility under Article 56 of the Charter).

19 T. Buergenthal, R. Norris & D. Shelton, *Protecting Human Rights in the Americas* 29 (2d. ed. 1986).

20 Article 7 of the Universal Declaration states that:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination. Universal Declaration, *supra* note 5, at 73.

and residence)²¹, Article 16 (state protection of the family as the natural and fundamental group unit of society)²², Article 17 (the right to property)²³; Article 23 (the right to work)²⁴ Article 25 (the right to an adequate standard of living, including health care, food, clothing, housing and necessary social services and special assistance for motherhood and childhood)²⁵, Article 26 (the right to educa-

21 Article 13 of the Universal Declaration states:

1. Everyone has the right to freedom of movement and residence within the borders of each state.
2. Everyone has the right to leave any country, including his own, and to return to his country.

Id. at 74.

22 Article 16(3) of the Universal Declaration states:

3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Id. at 74

23 Article 17 of the Universal Declaration states:

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Id. at 74.

24 Article 23 of the Universal Declaration states:

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
2. Everyone, without any discrimination, has the right to equal pay for equal work.
3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
4. Everyone has the right to form and to join trade unions for the protection of his interests.

Id. at 75.

25 Article 25 of the Universal Declaration states that:

1. 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.
2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Id. at 76.

tion)²⁶ and Article 27 (the right to participate in community cultural life)²⁷.

b. State Obligations under Human Rights Treaties

If the state is also a party to one or more of the principal universal or regional human rights treaties, such as the Covenant on Civil and Political Rights (Covenant) and the American Convention on Human Rights (American Convention), it has thereby assumed a solemn duty *viz a viz* other State parties and to its own citizens to respect and ensure the rights guaranteed in these instruments. For example, the duty "to respect" rights under Article 1(1) of the American Convention is simply fulfilled by the state's not violating any of the enumerated rights.²⁸ The obligation "to ensure the free and full enjoyment" of these rights under Article 1(1) is substantially broader.²⁹

The Inter-American Court stated in its opinion in the *Velázquez-Rodríguez* case³⁰ that this obligation "implies the duty of the State Parties to organize the governmental apparatus, and, in general, all the structures, through which public power is exercised, so that they are capable of judicially ensuring the free and full enjoyment of human rights."³¹ The Court also stated that whenever a state organ,

26 Article 26(1) of the Universal Declaration states:

1. Everyone has the right to an education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

Id. at 76.

27 Article 27(1) of the Universal Declaration states:

1. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.

Id. at 76.

28 See American Convention, *supra* note 4, at 675 (noting the provisions of Article 1 (1)).

29 *Velásquez Rodríguez Case*, Inter-Am. Ct.H.R., OAS/Ser. L/V/III.19, doc. 13 (1988), reprinted in 28 I.L.M. 291, 324 (1989) [hereinafter *Velásquez Rodríguez Case*].

30 *Id.* at 291.

31 *Id.* at 324.

agent or public entity violates a right protected by the Convention, the state is internationally responsible not only for the violation of the infringed right, but for a violation of its duty under Article 1(1) to respect and ensure that right. It found that by virtue of its dual obligations under Article 1(1)³² a state must "prevent, investigate and punish any violation of" guaranteed rights.³³ Accordingly, the government of a State party to the American Convention which, as a matter of policy and without valid cause, deliberately brings about the internal displacement of its citizens would violate many convention based rights similar to those enshrined in the Universal Declaration, as well as its basic obligations under Article 1(1).³⁴ Analogous reasoning should also apply to finding comparable violations of rights and obligations under the Covenant.³⁵

III. INTERNATIONAL HUMANITARIAN LAW STANDARDS

a. *Situations of Tensions and Disturbances*

One of the principal causes of displacement of civilian populations world wide is internal armed conflicts.³⁶ Indeed, it is during

32. *Id.* at 325.

33. *Id.* at 324.

34. See *id.* at 325 (noting that any exercise of public power which violates the American Convention is illegal, even if the agent has derogated from internal law or has overstepped his authority). See also American Convention, *supra* note 4, at 675, 681 (stating the provisions of Article 1 (1), which provides for a state's obligation to respect individual rights, and Article 22, which provides for an individual's right to freely move and reside in a state). Article 13 of the Universal Declaration of Human Rights also provides for a basic freedom of movement similar to the provisions of the American Convention. Universal Declaration, *supra* note 5, at 74.

35. See Covenant, *supra* note 6, at art. 12 (guaranteeing an individual's right to freely move within his own country and to freely choose his own residence).

36. Secretary-General's Report, *supra* note 3, at 5 (noting that countries which are the scenes of armed conflict or internal strife, such as Afghanistan, Ethiopia, Mozambique, Sri Lanka and Sudan, all produce tremendous numbers of displaced people). In fact, Afghanistan, Ethiopia, Mozambique, Sri Lanka and Sudan account for an estimated nine to ten million of the total 24 million internally displaced persons. *Id.*

such hostilities that the basic human rights of the displaced are generally most imperiled and least protected.³⁷ Before discussing legal rules applicable to the displaced during internal armed conflicts, it is useful to distinguish such conflicts from situations of internal tensions or disturbances, sometimes referred to as civil strife.³⁸

Examples of such situations are riots, such as demonstrations without a concerted plan from the outset³⁹; isolated sporadic acts of violence, as opposed to military operations carried out by armed forces or armed groups⁴⁰; other acts of a similar nature, including, in particular, large scale arrests of persons for their activities or opinions.⁴¹ Serious situations of internal tensions (which can be the

37 See *id.* at 11-18 (noting the human rights violations resulting from internal displacement including the denial of the right to food, denial of the right to shelter, denial of proper medical care, denial of the right to life, denial of the right to work, denial of the freedom of movement, the breakup of family unity and the denial of the right to an education).

38 See Theodor Meron, *Human Rights in Internal Strife: Their International Protection* 70-104 (1987) (describing the characteristics of internal strife and attempting to distinguish these factors from internal armed conflict); see also James E. Bond, *The Rules of Riot: Internal Conflict and the Law of War* 51-52 (1974) (finding that the intensity of armed conflicts may be arranged by the increasing scope and duration of the conflict ranging "from riots to insurrections through guerrilla movements to civil wars or even to mushroom into international conflicts").

39 Meron, *supra* note 38, at 89. Meron found that acts of riot should "extend to damage resulting from: '(1) an assembly of several individuals acting on their own authority with the intent of resisting those who might oppose them; and (2) the commission by some or all of these individuals of public acts of violence.'" *Id.* (quoting *Report Pursuant to Section 2349 (a) (4) of the Foreign Assistance Act of 1961, as Amended, on the Issuance of Civil Strife Insurance Coverage*, submitted to Congress by the Overseas Private Investment Corporation, Aug. 20, 1982, at 13). Further, the term "civil commotion" was defined by Meron as having all the features of a riot except that the incident was more widespread and more prolonged than a riot. *Id.*

40 *Id.* at 81. Although individual acts of violence are typically excluded from the definition of internal strife, the notion of collectivity, which is usually present in any definition of internal strife, does not specifically proscribe any level or organization or intent in the collective action. *Id.*

41 See *id.* at 78 (finding that in situations of internal disorder, large numbers of arrests occur, even though an individual's acts or political attitudes are non-violent, but are caused instead by internal tensions of political, racial or other nature).

sequels of armed conflict or internal disturbances) typically have one or more of the following characteristics: large scale arrests; a large number of political prisoners⁴²; probable existence of ill-treatment or inhuman conditions of detention⁴³; the suspension of fundamental judicial guarantees and allegations of disappearances.⁴⁴ Such a situation, for example, prevailed from time to time in Chile during the de facto Pinochet regime, except for a very brief period immediately following the 1973 coup when violent clashes occurred between the armed forces and various armed groups.⁴⁵

It is important to note that internal tensions and disturbances are *not* presently governed by international humanitarian law, but rather by human rights law.⁴⁶ Nevertheless, the International Committee of the Red Cross (ICRC) is empowered by its own statutes with a right of initiative to assist and protect the victims of such situations, which would include displaced persons.⁴⁷ However, since governments are

42 *Id.*

43 *Id.* at 95. Meron notes that internal strife frequently results from a close interrelationship between violent acts and human rights abuses. *Id.*

44 *Id.* at 99. The forced disappearance of individuals usually involves the violation of numerous human rights, many of which are non-derogable. *Id.* Frequently, when no state of emergency has been declared, summary or arbitrary executions occur in areas of high political tensions in order to target individuals who are perceived to be the leaders of opposition groups. *Id.* at 101.

45 During the Pinochet years, several thousand Chileans were arrested based exclusively on their political affiliations without charges every having been brought against them. *Chile: The Status of Human Rights and its Relationship to U.S. Economic Assistance Programs*, 94th Cong., 2nd Sess. 50-51 (1976) (statement of José Zalaquett, Defense Attorney for Political Prisoners). In March of 1976, for example, a total of 4,000 political prisoners were arrested pursuant to a state of siege declaration. *Id.* The status of 119 prisoners remained unknown, at that time, although most authorities presumed these individuals to be dead.

46 Meron, *supra* note 38, at 136. Although a State need not be bound by international humanitarian law, many states have avoided human rights law, as well, based on the belief that during a public emergency, a state is justified in derogating from legal provisions. *Id.*

47 *Id.* at 106-12 (noting the various resolutions and statutes of the ICRC, including Resolution XIV of 1921, Resolution VI of 1981, and Article VI (5)-(6) of the Statutes of the International Red Cross, which permit the organization to intervene in situations of internal strife).

not legally required to admit the ICRC in such situations, that organization may be precluded from undertaking humanitarian activities on behalf of the displaced.⁴⁸

Properly viewed, situation of tensions and disturbances should not entail suspension, i.e. derogations, of guaranteed rights since such situations rarely, if ever, constitute an emergency that genuinely threatens the existence of the state.⁴⁹ Most human rights treaties, however, do permit governments to lawfully restrict the free exercise of many rights during such situations in order to restore order and protect life and property.⁵⁰ Thus, for example, a government could impose a curfew within a riot torn area without violating the freedom of movement and residence.⁵¹ But, the mere existence of civil disorder, falling short of armed conflicts, should never justify an official policy of forcibly relocating or expelling some or all of the civilian

48 *Id.* at 132-33. See Jean Pictet, *Development and Principles of International Humanitarian Law* 48-49 (1985) [Hereinafter Pictet 1] (noting that neither Article 3 in the 1949 conventions nor Protocol II apply in simple internal disorders or political tensions, and therefore, the ICRC will be allowed to provide assistance to victims only when the state so permits in conjunction with human rights law).

49 See Subrata Roy Chowdhury, *Rule of Law in a State of Emergency* 24 (1989) (finding that in the definition of a public emergency, the crisis or danger must pose a threat to the life of the nation which is nationwide in scope and not merely a local crisis). For example, an invalid declaration of a state of emergency may be said to have been declared in Columbia in 1976 in response to a strike at the social security service. *Id.* at 25. The state of siege lasted in Columbia until 1982. *Id.*

50 See e.g., American Convention, *supra* note 4, at 9 (noting the provisions of Article 27 which permit a state party to derogate from certain provisions under the Convention for a limited period of time so long as the state's measures are not inconsistent with its obligations under international law and do not involve discrimination based on race, color, sex, language, religion or social origin); Covenant, *supra* note 6, at art. 4 (stating provisions similar to the American Convention); see also UNESCO, *International Dimensions of Humanitarian Law* 245 (1988) [hereinafter International Dimensions] (finding that even under a public emergency, certain rights, including the right to life, the prohibition against arbitrary or retroactive penalties and the right to freedom of thought, conscience and religion, may not be derogated from even under "the exigencies of the situation").

51 See *id.* at 247 (finding that in most cases of internal disturbances and tensions, the constraints on the government are most visible "during actions to maintain or restore control (breaking up riots, enforcing compliance with curfews, etc.); the treatment of detained prisoners [and] the treatment of the civilian population in areas where there is strong resistance to governmental directives").

population from affected areas.⁵² Such a policy would be utterly inconsistent with the express or implicit requirement in the human rights treaties that restrictions on rights must be "necessary in a democratic society."⁵³

b. Internal Armed Conflict Governed by Common Article 3

Unlike human rights law, international humanitarian law is designed to apply in situations of armed conflict and contains rules restricting means and methods of combat in order to spare the civilian population from the effects of hostilities.⁵⁴ Although human rights and humanitarian law share a common nucleus of non-derogable rights and a common purpose of protecting human life and dignity, the detailed provisions of humanitarian law afford victims of armed conflict far greater protection than do general human rights guarantees.⁵⁵ And, perhaps the area of greatest conver-

52 See Meron, *supra* note 38, at 88-89 (describing civil strife as low-intensity violence occurring more frequently than other forms of conflict and includes riots as an example).

53 See American Convention, *supra* note 4, at 684 (noting the basic provisions for restricting the application of human rights). Article 29 of the American Convention states that:

No provision of this Convention shall be interpreted as:

- a. Permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;
- c. Precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.

Id. at 684.

54 See Bond, *supra* note 38, at 45-79 (discussing the application of international humanitarian law to armed conflict and to internal conflict). See also Oscar Schiappa-Pietra Cubas, "Reflexiones sobre la Guerra Interna y el Desplazamiento Forzado de Poblaciones", 12 *Revista del Instituto Interamericano de Derechos Humanos* 63 (1990).

55 See Jean Pictet, *Humanitarian Law and the Protection of War Victims* 15 (1975) [hereinafter Pictet 2] (noting that while humanitarian law is valid only in the cases of armed conflict, human rights law is applicable in peacetime and contains express derogation clauses during times of conflict).

gence of these two branches of international law is in purely internal armed conflicts situations.⁵⁶

The principal source of humanitarian law governing *all* internal, i.e., non-international, armed conflicts is Article 3 common to the four 1949 Geneva Conventions (Article 3).⁵⁷ It should be noted that Article 3 simply refers to, but does not actually define, "an armed conflict of

56 Bond, *supra* note 38, at 63. Although the specific rules of armed conflict and human rights differ in certain respects, specific areas exist in which the substantive rules of both theoretical constructs overlap (i.e. detention, confinement, internal displacement). *Id.* Bond concludes, therefore, that "(i)t would seem logical... to deduce from the common theoretical rationale a set of specific rules for situations of internal strife, which is the one societal condition in which the present international humanitarian law does not protect human rights". *Id.*

57 Common Article 3 of the Geneva Conventions of 1949 reads as follows:

In the case of an armed conflict of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of the 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.

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

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

(b) Taking of hostages;

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

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

(2) The wounded and sick shall be collected and cared for.

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

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

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

Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, U.S.T., 3114, 3115, 75 U.N.T.S. 31; *Convention for the Amelioration of the Condition of the Wounded Sick and Shipwrecked Members of the Armed Forces at Sea*, Aug. 12, 1949, 6 U.S.T. 3217, 3220, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*; Aug. 12, 1949, 6 U.S.T. 3316, 3318-19, 75 U.N.T.S. 135; *Convention Relative to the Protection of Civilian Persons in Times of War*, Aug. 12, 1949, 6 U.S.T. 3516, 3518, 75 U.N.T.S. 287 [hereinafter Common Article 3].

a non-international character."⁵⁸ In fact and practice, it is applicable to low intensity open, armed confrontations between relatively organized armed forces or armed groups occurring exclusively within the territory of a particular state.⁵⁹ Article 3 typically applies to armed strife between governmental armed forces and organized armed insurgents.⁶⁰ It also applies to cases in which two or more armed factions within a country confront one another *without* the involvement of governmental forces when, for example, the established government has dissolved or is too weak to intervene.⁶¹

Article 3's nonderogable provisions are essentially pure human rights law.⁶² They prohibit without exception the following acts,

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- 58 See Tom Farer, "Humanitarian Law and Armed Conflicts: Toward the Definition of 'International Armed Conflict'", 71 *Colum. L. Rev.* 37, 43-35 (1971) (finding that the phrase "not of an international character" was given no precise meaning by the drafters of the Geneva Conventions and maintaining that the drafters did not intend to include all civil conflicts within the scope of Common Article 3).
- 59 Sylvie Junod, "Additional Protocol II: History and Scope", 33 *Am. U. L. Rev.* 29, 30 (1983). See Raymund T. Yingling & Robert W. Ginnane, "The Geneva Conventions of 1949", 46 *Am. J. Int'l.* 393, 394-96 (1952) (noting that when drafting Article 3, three general positions were espoused including (1) that the conventions should be applicable in all cases of internal armed conflicts; (2) that they should not be applicable in any such conflicts; and (3) that they should not be applicable only when the conflict had reached certain proportions and presented certain characteristics). Further, the United States position, at the time, argued that Article 3 was applicable only to insurgents, having an organization characteristic of a state, who have authority over a significant number of persons and act under the authority of an organized civil authority. *Id.* Since a compromise position was adopted which makes the provision relatively innocuous, Article 3's applicability has been largely invoked for low-intensity, open armed conflicts between organized opposing forces. *Id.*; Pictet 2, *supra* note 55, at 56-60.
- 60 See Pictet 1, *supra* note 48, at 47 (noting that Article 3 did not prevent those captured insurgents, fighting against an established government, from being charged and sentenced according to national legislation).
- 61 See Charles Lysaght, "The Scope of Protocol II and Its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments", 33 *Am. U. L. Rev.* 9, 12 (1983) (finding that although the juridical basis for imposing obligations on bodies other than governments is questionable, the position has been argued that when a state ratifies a convention then it does so on behalf of all citizens, including those nationals involved in armed hostilities within the territory of the state).
- 62 See *id.* at 14-15, 19-21 (noting that a number of human rights instruments including, the European Convention of Human Rights, the International Covenant on Civil and Political Rights and the American Convention on Human Rights, contain non-

among others: violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture; hostage taking; outrages against personal dignity, particularly, humiliating and degrading treatment.⁶³ It also stipulates that the wounded and sick be collected and cared for.⁶⁴

Unlike human rights law, which generally restrains violations inflicted only by a government and its agents, the obligatory provisions of Article 3 expressly bind both parties to the conflict, i.e., government and insurgent forces.⁶⁵ Moreover, the obligation to apply Article 3 is absolute for both parties and independent of the obligation of the other party.⁶⁶ Accordingly, individual civilians, including those forcibly or voluntarily displaced by virtue of the hostilities, are entitled to Article 3's absolute guarantees when they are captured by or subjected to the power of either government or dissident forces.⁶⁷ Moreover, the warring parties must accord civil-

derogable provisions including the right to life, the freedom from torture and other provisions which overlap with the explicit prohibitions of Common Article 3).

- 63 See *supra* note 61 (stating the provisions of Common Article 3 of the Geneva Conventions of 1949).
- 64 *Id.*
- 65 See Common Article 3, *supra* note 61, at 3116 (stating explicitly that "each Party to the conflict shall be bound to apply" the provisions of Common Article 3).
- 66 See Junod, *supra* note 59, at 30-31 (summarizing examples in which states have refused or been extremely reluctant to apply Common Article 3 including France in the last phase of the Algerian conflict); see also Pictet 2, *supra* note 55, at 58 (noting the difficulty in applying Common Article 3, which is applicable only for situations of armed conflict, since many states refuse to recognize increasing political turmoil and tensions as falling within the scope of the article).
- 67 See Final Report prepared by Mr. Leandro Despouy, Special Rapporteur, U.N. Commission on Human Rights, 43rd Sess., Agenda Item 12, U.N. Doc. E/CN.4/Sub.2/1991/31, at 30-31 (1991) (finding that as a result of increased number of internal conflicts, as well as the development of weapons with an enormous destructive capability, "the number of civilians affected by... violence is considerably greater than the number of combatants"); see also Robert Kogod Goldman, "International Humanitarian Law and the Armed Conflicts in El Salvador and Nicaragua", 2 *Am. U. J. Int'l L. & Pol'y* 539, 547 (1987) (finding that although Article 3 does not provide civilians with explicit protection from attacks, its prohibitions against "violence to life and person" and against "persons taking no active part in the hostilities" may be broad enough to cover attacks against civilians in territory held by a hostile party).

ians these protections *even if* they had fought for the opposing party or indirectly participated in hostilities by providing either party with food or other logistical support.⁶⁸

In addition, Article 3 inferentially and customary law⁶⁹ expressly prohibit displaced persons and other civilians living in combat zones or areas controlled by the enemy from being directly attacked.

c. *Additional Protocol II*

Apart from Article 3 and customary law, the 1977 Protocol Additional to the Geneva Conventions of 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) contains other detailed rules applicable to the displaced and other persons affected by hostilities.⁷⁰ This instrument's threshold of application is both different from and clearly above that of Article 3.⁷¹

68 *Id.*

69 Although Article 3 does not explicitly prohibit attacks against the civilian populations in non-international armed conflicts, such attacks are prohibited by customary law. "Respect for Human Rights in Armed Conflict" (United Nations Resolution 2444), adopted by unanimous vote on December 19, 1969, expressly recognized this customary principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times. G.A. Res. 2444, 23 U.N. GAOR Supp. (No. 18) at 164, U.N. Doc. A/7433 (1968). The preamble to this resolution clearly states that these fundamental humanitarian law principles apply "in all armed conflicts," meaning both international and internal armed conflicts. *Id.* at art. 1. Furthermore, the ICRC has long regarded these principles as basic rules of the laws of war that apply in all armed conflicts. *Id.*

70 "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)" adopted by the Conference on 8 June 1977, reprinted in 16 *I.L.M.* 1442 (hereinafter Protocol II).

71 Article 1, paragraph 1 of Protocol II limits that instrument's application to a non-international armed conflict, "which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." *Id.* See *Humanitarian Law of Armed Conflict: Challenges Ahead* 231 (Astrid J. M. Delissen & Gerard J. Tanja eds., 1991) [hereinafter Delissen] (finding that the original ICRC draft placed a lower threshold of application for Article 1 (1) in which the Protocol was applicable for internal disturbances and tensions (i.e. riots, sporadic violence), but was then raised during the Conference to the current standard).

Indeed, the objective conditions that must be satisfied to trigger its application contemplate a situation of civil war essentially comparable to a state of belligerency under customary international laws.⁷²

Although the Protocol, as such, is only directly applicable to hostilities within the territory of a State party to that instrument,⁷³ its provisions are, by no means, irrelevant to purely Article 3 armed conflicts.⁷⁴ Since Protocol II incorporates, clarifies and strengthens Article 3's customary law rules, its provisions should also be regarded as declaratory of customary law⁷⁵ and, thus, applied by the parties to *all* internal armed conflicts.⁷⁶

72 See *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* 1349 (Yves Sandoz et al. eds. 1987) [hereinafter *Commentary on the Additional Protocols*] (stating that the upper threshold of applicability for Protocol II in non-international armed conflict was marked by Common Article 2 of the Geneva Conventions, to include declared wars and cases of partial or total occupation, while the lower threshold was marked by the exclusion of situations of internal disturbances and tensions); see also Bond, *supra* note 52, at 34 (noting that the five classical tests of belligerency for rebel groups are: (1) the existence of general hostilities; (2) the rebels must be acting as an army; (3) the rebels have an effective government; (4) the rebels control substantial territory and (5) third states recognized the rebels as belligerents).

73 See Protocol II, *supra* note 70, at art. 1(1) (stating explicitly that the Protocol is applicable only for incidents between armed groups that take place on the territory of a "High Contracting Party").

74 See *id.* at 1350 (finding that although Common Article 3 was given an autonomous existence from Protocol II, nothing prohibits the two instruments from operating together, especially since the Protocol "develops and supplements the brief rules in Common Article 3."); see also Hilaire McCoubrey, *International Humanitarian Law: The Regulation of Armed Conflicts* 26 (1990) (stating that Common Article 3 established a "minimum safety net" for international armed conflicts" which was extended by Protocol II to add greater specificity in applying Common Article 3).

75 See Delissen, *supra* note 71, at 113 (finding that segments of Protocol II, especially those segments which appear to repeat or restate principles of Common Article 3, can be considered as customary law).

76 Although Article 1 (2) of Protocol II specifically excludes internal tensions or disturbances from the coverage of Protocol II as not consisting armed conflicts, such internal tensions have typically consisted of large scale arrests, the taking of political prisoners, the ill-treatment or inhumane conditions of detention, the suspension of judicial guarantees and allegations of disappearances. *Commentary on the Additional Protocols*, *supra* note 72, at 1354-55. As long as the situation is not classified as an internal disturbance or is symptomatic of internal tensions, then no express provisions of the Protocol prevent its application for internal armed conflicts. *Id.*

For example, Article 13 of Protocol II expressly accords civilians general protection against direct attacks and inferentially protects them and civilians objects from indiscriminate or disproportionate attacks.⁷⁷ By prohibiting starvation of civilians as a method of warfare, Article 14 enjoins a practice all too frequently used by government and/or insurgent forces world-wide, as was the case during the hostilities throughout the Horn of Africa.⁷⁸

The nonderogable fundamental guarantees of human treatment set forth in Article 4 of the Protocol⁷⁹ are also relevant to the internally

77 Article 13 of Protocol II, entitled the "Protection of the Civilian Population," states:

1. The civilian population and individual citizens shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
2. The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
3. Civilians shall enjoy the protection afforded by this part, unless and for such time they take a direct part in hostilities.
Protocol II, *supra* note 70, at art 13.

78 Article 14 of Protocol II, entitled the "Protection of Objects Indispensable to the Survival of the Civilian Population" states:

Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, remove or render useless, for that purpose objects indispensable to the survival of the civilian population such as food-stuffs, agricultural areas for the production of food-stuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Id. at art. 14; see Donatella Lorch, "Efforts to Get Food to the Hungry Thwarted by Somalia's Instability", *N.Y. Times*, Dec. 6, 1992, at A1 (reporting on the inability to provide relief aid due to a failure by local warlords to guarantee safe passage); see also Keith B. Richburg, "Donated Food Aid Finds its Way to Mogadishu's Marketplaces", *Wash. Post*, Dec. 30, 1992, at A15 (noting that 300,000 people have starved to death in Somalia, and that the number of individuals threatened by starvation is still high).

79 Article 4 of Protocol II, entitled "Fundamental guarantees" states:

1. All persons who do not take a direct part or who have ceased to take a 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.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:
 - (a) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

displaced and other victims of internal hostilities.⁸⁰ This article, which elaborates Article 3's minimum rules, absolutely prohibits under all circumstances, *inter alia*: collective and corporal punishment⁸¹, acts of terrorism⁸², rape and other kinds of indecent assault⁸³, pillage⁸⁴ and threats by the warring parties to commit any of these acts.⁸⁵

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- (b) collective punishments;
 - (c) taking of hostages;
 - (d) acts of terrorism;
 - (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;
 - (f) slavery and the slave trade in all their forms;
 - (g) pillage;
 - (h) threats to commit any of the foregoing acts.
3. Children shall be provided with the care and aid as they require, and in particular:
- (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;
 - (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;
 - (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;
 - (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;
 - (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Protocol II, *supra* note 70, at art. 4.

80 See *Commentary on the Additional Protocols*, *supra* note 72, at 1368 (stating that Article 4 largely "reiterates the essence" of Common Article 3, which applies to any non-international armed conflict, especially through provisions concerning the right to life, the prohibition against taking hostages and the prohibition against cruel or degrading treatment); see also Secretary-General's Report, *supra* note 3, at 15-16 (concluding that displaced persons often become the victims of violence in places sought for refuge, such as in Sudan where a government sponsored campaign against displaced persons from Khartoum resulted in rape and killings).

81 Protocol II, *supra* note 70, at art. 4 (2)(b)

82 *Id.* at art. 4 (2) (d)

83. *Id.* at art. 4 (2) (e)

84. *Id.* at art. 4 (2) (g)

85 *Id.* at art. 4 (2) (h).

Article 4 also contains special rules for protection of children, often the most vulnerable group within the displaced.⁸⁶ In addition to “the care and aid they require,” Article 4(3) imposes an affirmative duty on *all* parties to the conflict to ensure that children “shall receive an education, including religious and moral education,” in keeping with the wishes of their parents or those responsible for their care and that “all appropriate steps shall be taken to facilitate the reunion of families temporarily separated.”⁸⁷ The warring parties are similarly required, if necessary, and whenever possible, with parental or comparable consent, “to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.”⁸⁸ Further, children under the age of fifteen may neither be recruited by either side, nor allowed to take part in the hostilities.⁸⁹

Perhaps the provision in Protocol II most directly relevant to the question of displaced persons is Article 17.⁹⁰ Section 2 of this article

86 See *supra* note 79 (stating the provisions of Article 4(3) of Protocol II).

87 Protocol II, *supra* note 70, at art. 4(3) (a), (b). See *Commentary on the Additional Protocols*, *supra* note 77, at 1378-79 (concluding that the need for continued religious and moral education was aimed at removing the risk that children who are displaced from their families are not “initiated into a culture, religion or moral code which may not correspond with the wishes of their parents, (resulting in them becoming) political pawns”).

88 Protocol II, *supra* note 70, at art. 4(3) (e). See *Commentary on the Additional Protocols*, *supra* note 72, at 1381 (finding that the evacuation of children was an exceptional and temporary measure to be undertaken when “necessary”).

89 Protocol II, *supra* note 70, art. 72 4(3) (c). See *Commentary on the Additional Protocols*, *supra* note 72, at 1379-80 (noting that the prohibition of the use of children in military operations also prevented children from voluntarily enlisting).

90 Article 17 of Protocol II, entitled the “Prohibition of Forced Movement of Civilians” states:

1. 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

stipulates that "civilians shall not be compelled to leave their own territory for reasons connected with the conflict."⁹¹ Section 1 effectively prohibits the warring parties from ordering the displacement of the civilian population for reasons related to the conflict, "unless the security of the civilians involved or imperative military reasons so demand" (emphasis supplied).⁹² Moreover, in the event of such displacement, the responsible party must take "all possible measures ... in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition."⁹³ The negative phraseology of Article 17 clearly evinces an intention to prohibit, as a general rule, the forced movement or displacement of civilians during internal hostilities.⁹⁴ Accordingly, the burden is squarely on the party initiating such action to justify it under the narrow exceptions to this rule.⁹⁵ Article 17, therefore, prohibits a deliberate policy, such as that in Guatemala since the late 1970s, of forcibly moving most or all of the civilian population from a certain area and resettling them in "strategic hamlets" as part of

may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.
Protocol II, *supra* note 70, at art. 17.

91 *Id.*

92 *Id.*

93 *Id.*

94 See *Commentary on the Additional Protocols*, *supra* note 72, at 1471-74 (finding that the reason for Article 17 was the absence of protection for situations of non-international armed conflict in which "forced movement of ethnic groups and groups and national groups opposed to the central government have occurred). See also *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions* 529-543 (Howard S. Levie ed. 1987) [hereinafter Levie] (Noting the comments of several state representatives on the proposed Article 17 in the proceedings leading up to the adoption of Protocol II).

95 See *Commentary on the Additional Protocols*, *supra* note 72, at 1472-73 (finding that the forced displacement of civilians is prohibited unless the government may show that (a) the security of the population so demands or (b) a meticulous assessment of the military circumstances so demands displacement of the internal population).

counter-insurgency strategy designed to deny dissident forces a perceived social base and/or logistical support.⁹⁶

While containing no explicit reference to the ICRC, Protocol II in no way affects that organization's right under Article 3 to offer its humanitarian services to the warring parties.⁹⁷ Unlike Article 3, however, Article 18 of Protocol II expressly provides that national relief societies, such as the Red Cross and Red Crescent, may offer their services for the performance of their traditional functions on behalf of victims of the armed conflict.⁹⁸

d. Problems of ICRC Access

Although Article 3 and Protocol II automatically apply when situations meeting their respective thresholds of application objectively exist, the ICRC is not empowered to compel the warring parties to acknowledge their applicability, much less respect their manda-

96 See *Lawyers Committee for Human Rights, Abandoning the Victims: The UN advisory Services Program in Guatemala* 50-52 (1990) (finding almost a quarter of a million internally displaced Guatemalans throughout the country since the early 1980s, in which almost 100,000 have either fled to remote mountain regions or been forcibly relocated to "development poles" and "strategic hamlet villages," another 100,000 have fled to urban areas such as Guatemala City, and another 250,000 have experienced "horizontal displacement" by moving to different rural communities occupied by the same ethnic group).

97 See *Commentary on the Additional Protocols*, *supra* note 72, at 1345-46 (finding that despite reaffirmation in Protocol II, the right of initiative given to the ICRC continues to exist in situations of non-international armed conflict).

98 Article 18 of Protocol II, entitled "Relief Societies and Relief Actions" states:

1. Relief societies located in the territory of the High Contracting Party such as Red Cross (Red Crescent, Red Lion and Sun) organizations may offer their services for the performance of their traditional functions in relation to the victims of armed conflict. The civilian population may, even on its own initiative, offer to collect and care for the wounded, sick and shipwrecked.

2. If the civilian population is suffering undue hardship owing to a lack of supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Protocol II, *supra* note 70, at art. 18.

tory rules.⁹⁹ For example, despite the fact that both the Salvadoran and Nicaraguan governments permitted the ICRC to establish permanent delegations in their territories during their respective armed conflict,¹⁰⁰ neither government publicly recognized the existence of internal hostilities as defined in Article 3.¹⁰¹ Moreover, since Article 3 is the *sole* provision of the Geneva Conventions governing internal conflicts, the parties therefore have *no* legal obligation to comply with the Convention's other highly developed provisions for the implementation and enforcement of their norms.¹⁰² These provisions, applicable only to international or interstate armed conflict, provide for *mandatory* access and supervision by protecting powers or an impartial body, such as the ICRC.¹⁰³

99 David P. Forsythe, "Human Rights and the International Committee of the Red Cross", 12 *Hum. Rts. Q.* 265, 271 (1990).

100 See *International Committee of the Red Cross, Annual Report 1989*, at 40, 43 (1990) (noting the establishment of several Red Cross delegations or sub-delegations/offices throughout both El Salvador and Nicaragua in 1989).

101 See Meron, *supra* note 38, at 48 (stating that the Government of El Salvador never formally recognized the applicability of either Common Article 3 or Protocol II); *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 103 (June 27) (finding that Nicaragua avoided making any reference to the four Geneva Conventions of 1949, including Common Article 3, when presenting its case against the United States at the International Court of Justice).

102 See Theodor Meron, "Draft Model Declaration on Internal Strife", 28 *Int'l Rev. Red Cross* 59, 64 (1988) (recognizing the inherent difficulties of UN bodies, governmental agencies, non-governmental organizations and the International Committee of the Red Cross in being permitted to enforce basic human rights norms in situations of internal strife). Meron also offers a "Draft Model Declaration on Internal Strife" which finds in Article 6, in a section entitled, "Prohibition of Forced Movement of the Population" that:

1. The displacement of the population shall not be ordered for reasons related to the internal strife unless the safety of the population involved or imperative security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. Persons thus displaced shall be transferred back to their homes as soon as the conditions which made their displacement imperative have ceased.
 2. Civilians shall not be compelled to leave their own territory for reasons connected with internal strife.
- Id.* at 70.

103 See *Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Aug. 12, 1949, 6 U.S.T. 3114, 3120, 75 U.N.T.S. 31; *Convention for the*

In contrast, the parties, most particularly the government, to Article 3 and Protocol II conflicts are *not* legally required to accept the ICRC's offer to provide humanitarian relief and protective services to the conflict's victims.¹⁰⁴ Governments may block ICRC access for various reasons. Sometimes access is denied because the government believes that ICRC's presence and contact with dissident forces might somehow constitute recognition of the dissidents and "legitimate" their cause.¹⁰⁵ Such fears, however, are totally unfounded since Article 3 unequivocally states that application of its provisions does not affect the legal status of the parties to the conflict.¹⁰⁶ Governments in the past have also rebuffed ICRC overtures as unwarranted intrusions into their domestic affairs¹⁰⁷ or by ignoring reality and simply denying the existence of an armed conflict within

Amelioration of the Condition of the Wounded Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 3225-26, 75 U.N.T.S. 85; *Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3317, 3326, 75 U.N.T.S. 135; *Convention Relative to the Protection of Civilian Persons in Times of War*, Aug. 12, 1949, 6 U.S.T. 3516, 3524, 75 U.N.T.S. 287 (finding that when sick, wounded, prisoners of war or civilians cease to benefit from the activities of a Protecting Power then the detaining Party must request the assistance of some neutral state or, in the event that such assistance proves impossible, then from some humanitarian organization such as the ICRC).

- 104 See Delisse, *supra* note 71, at 229 (noting that while the parties to a conflict are under no obligation to accept the ICRC's assistance under Common Article 3, the ICRC rarely bases its decision of offering assistance on the "legal character of the conflict"); *Commentary on the Additional Protocols*, *supra* note 72, at 1478 (stating that under Article 18 of Protocol II, which authorizes Red Cross organizations to offer their services in non-international armed conflicts, the authorities may decline the offer of assistance); see also Peter Macalister-Smith, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization* 55-56 (1985) (noting that respect for state sovereignty is essential to the operation of relief programs since governments are given the choice between requesting international assistance or of choosing to deal with the disaster in their own way).
- 105 See Bond, *supra* note 38, at 58-59 (stating that during the Greek civil war between 1946 and 1949, the Greek government permitted the ICRC to perform limited humanitarian activities, although it denied that it was ever involved in a civil war).
- 106 Common Article 3, *supra* note 57 at 3118, 3220, 3318-19, 3518.
- 107 See David P. Forsythe, *The Internationalization of Human Rights* 148 (1991) (stating that when the ICRC demanded to be able to control humanitarian assistance to Ethiopia in 1988, by seeing to it that food and aid were distributed without regard to political affiliation, the Ethiopian government refused to agree to the ICRC's terms and the ICRC was forced to withdraw its presence and assistance).

their territory.¹⁰⁸ At other times, governments, such as those in Guatemala from the late 1970s to mid 1980s, have found an ICRC presence "inconvenient" since they had little interest in subjecting their brutal military tactics and treatment of victims to scrutiny by this humanitarian organization.¹⁰⁹

Even if the ICRC is permitted entry to a war-torn nation, it may be unable to provide effective relief and protection to the internally displaced. For instance, government and/or dissident forces might prevent it from undertaking such activities in conflictive zones or areas under enemy control with large concentrations of displaced persons.¹¹⁰ And, assuming that access is not a problem, the ICRC may nonetheless be unable to reach large numbers of these persons when they are widely dispersed in the countryside or continuously on the run. If, for whatever reason, the ICRC cannot perform such humanitarian services, it is unrealistic to expect that local relief societies, such as the Red Cross or Red Crescent, could or would do so.¹¹¹ These societies' expertise generally is disaster relief during peacetime, and,

108 See *The International Law of Civil War 195-97* (Richard A. Falk, ed. 1971) (finding that during the early stages of the Algerian crises in the late 1950s, France refused to recognize the struggle as an internal conflict, which was covered by Common Article 3, and stated that a provisional government set up on the territory of another state could not be referred to as a state or a power).

109 See Paul Albert, "The Undermining of the Legal Standards for Human Rights Violations in United States Foreign Policy: The Case of "Improvement" in Guatemala", 14 *Colum. Hum. Rts. L. Rev.* 231, 254-58 (1982) (describing the human rights abuses led by the Guatemalan military, including mass executions, torture, "disappearances"); see also Report of the Independent Expert, Mr. Christian Tomuschat, on the situation of human rights in Guatemala, prepared in accordance with paragraph 14 of Commission resolution 1990/80, U.N. ESCOR, 47th Sess., Item 3 of the Provisional Agenda, U.N. Doc. E/CN.4/1991/5, at 26-29 (1991) (describing the human rights abuses practiced by the Guatemalan military, including the internal displacement of its population).

110 See Forsythe *supra* note 107, at 151-52 (detailing the situation in Sudan in the late 1980s which prohibited food relief to be distributed to civilians in territory held by the Sudanese Peoples Liberation Army since such international assistance was perceived as aid to the rebels).

111 See Richard Perruchoud, *International Responsibilities of National Red Cross and Red Crescent Societies* 93-94 (finding that national Red Cross organizations frequently do not play an activist role in the belief that they already fulfill their international responsibilities).

all too often, they are not sufficiently independent of government influence to undertake truly impartial activities on behalf of all victims of the armed conflict.¹¹²

As previously noted, the ICRC has no power to enforce compliance by the warring parties with the law governing internal armed conflicts.¹¹³ Although it ordinarily eschews publicizing violations of the law, the ICRC has occasionally made public appeals to one or both parties to the conflict to cease its/their abuses and, as a last resort, has pulled out of counties where governmental forces, in particular, ignore such appeals and continue committing atrocious violations.¹¹⁴ Responsibility for enforcing compliance, including sanctioning perpetrators of violations, ultimately rests with the warring parties. Unless both parties take adequate measures to prevent and punish cruelties and excesses, the displaced and other victims of armed conflict will find ICRC protection and relief services to be of little avail.

CONCLUSION: THE NGO ROLE

The foregoing discussion indicates that there is an urgent need to improve existing machinery to protect the human rights of the internally displaced, especially during armed conflict, and to begin

112 See *id.* at 91-92 (finding that national societies have a strong awareness of their national character and frequently forget their international mission).

113 See *supra* note 111-112 and accompanying text (stating that the parties have no legal obligation to comply with the Convention's other provisions for the implementation and enforcement of humanitarian standards); see also Gérard Niyungeko, "The Implementation of International Humanitarian Law and the Principle of State Sovereignty", 31 *Int'l Rev. Red Cross* 105, 128 (1991) [hereinafter *State Sovereignty*] (noting that the protecting power is responsible for checking whether the state of residence is complying with the rules of humanitarian law concerning the power of origin and its nationals)."

114 See Forsythe, *supra* note 99, at 275 (finding that for a time the ICRC has curtailed its activities in South Vietnam in light of the deplorable conditions, has suspended its activities in Portuguese Mozambique in response to human rights abuses, and threatened to withdraw from El Salvador in reaction to death squad activity).

developing new legal standards tailored to their particular needs. Various NGOs have been spearheading such efforts on the international level.¹¹⁵ But, since law reform is, at best, a slow, incremental process, the NGO community as a whole must begin pursuing shorter term strategies aimed at ameliorating the conditions and dangers currently faced by the displaced.¹¹⁶

In this regard, NGOs are in a unique position to gather and publicize information concerning the plight of and abuses inflicted on the displaced, to bring pressures to bear on offending parties and to utilize creatively existing human rights organs to clarify and enlarge the rights of these persons.¹¹⁷ This will require many prominent NGOs to broaden their respective mandates to include scrutiny of non-governmental actors and to treat internal displacement as a discrete kind of human rights issue.

For example, one of the distinctive features of the five committees comprising Human Rights Watch,¹¹⁸ the New York based NGO, is

115 See David Weissbrodt, "The Contribution of International Nongovernmental Organizations to the Protection of Human Rights", in 2 *Human Rights In International Law* 403, 405-06 (Theodor Meron ed., 1984) (finding that some of the most prominent international human rights NGOs include: Amnesty International, the Anti-Slavery Society, the Commission of the Churches on International Affairs, the International Association of Democratic Lawyers, the International Commission of Jurists, the ICRC, the International Defense and Aid Fund, the International Federation of Human Rights, the International League for Human Rights, the Minority Rights Group, Survival International and the World Peace Council).

116 See Laurie S. Wiseberg, *Human Rights NGOs, in the Role of Non-Governmental Organizations in the Promotion and Protection of Human Rights* 23, 38 (Alex Geert Castermans et al. eds., 1989) (Symposium organized on the occasion of the award of the Premium Erasmianum to the International Commission of Jurists) [hereinafter Wiseberg] (stating that the strategies and tactics used by NGOs in confronting governments guilty of human rights abuses may no longer be practical).

117 See *id.* at 31 (stating that the seven functions of human rights NGOs include: "(1) information and/or monitoring; (2) legislation; (3) stopping abuses, securing redress and/or humanitarian assistance to victims - in effect, implementation; (4) education/ conscientization; (5) solidarity; (6) delivery of services, especially - but not exclusively in the area of economic and social rights; and (7) keeping open the political system").

118 The five regional committees of Human Rights Watch include: Africa Watch, Americas Watch, Asia Watch, Helsinki Watch and Middle East Watch.

that they routinely monitor violations of the laws of war in internal armed conflicts. Many of their reports have focused on abuses committed by government and guerilla forces against the internally displaced, such as indiscriminate attacks by bombings, strafings, shellings, use of land-mines and booby traps, starvation, and denial of medical supplies.¹¹⁹ By exposing and publicizing the abusive practices of both sides, these reports seek to influence world public opinion and other states, on whom the parties to the particular conflict are generally dependent for military and/or economic assistance, against the offending party.¹²⁰ At times, the criticism in these reports have led the warring parties to curb or eliminate certain abusive practices.¹²¹

NGOs can also help shape the development of new laws and sensitize decision makers to the grim reality of displacement by innovative use of petition procedures before international and regional inter-governmental bodies. For instance, in the case of countries with official policies that sanction or condone large-scale internal displacement, NGOs can file 1503 petitions with the UN's Secretary General denouncing such policies as evincing a pattern of gross human rights violations.¹²² Such petitions provide an opportunity to focus on the root causes and pathology of internal displacement in particular situations.¹²³ Such petitions could also complement the

119 See Human Rights Watch, *Human Rights Watch World Report 1992*, at 22-23 (discussing some of the guerilla wars which Human Rights Watch monitored in 1991).

120 *Id.*

121 *Id.*

122 See Howard Tolley Jr., *The U.N. Commission on Human Rights 70-82 (1987)* (detailing the procedures required to filing a 1503 petition and the significance of NGOs in this process); see also *Refugee Policy Group, Human Rights and Humanitarian Emergencies: New Roles for U.N. Human Rights Bodies 5 (1992)* (finding that under the 1503 procedures, the Commission on Human Rights may act upon reports of NGOs that are first raised before the Sub-Commission, although the Commission's response has often been weak).

123 See *id.* at 71-72 (stating that communications may originate from organizations with second hand knowledge of the violations "to establish a consistent pattern or situation" through detailed aggregations of numerous individual cases).

efforts of those NGOs that presently are working to keep the question of internal displacement on the agenda of the UN Commission on Human Rights.¹²⁴

To date, NGOs have not adequately exploited the enforcement machinery for the protection of human rights within the inter-American system. The Inter-American Commission on Human Rights (Commission) has itself addressed internal displacement in published reports on Nicaragua and Guatemala and alluded to the overall question in several annual reports.¹²⁵ As previously explained, unjustified governmental policies that cause or condone internal displacement, whether during peacetime or internal hostilities, are appropriate subject matter of complaints before the Commission.¹²⁶ Acts constituting homicide and torture, if perpetrated by governmental forces during internal armed conflicts, entail the legal responsibility of the state and are actionable before the Commission as violations of nonderogable rights in the American Convention.¹²⁷ In contrast, under existing human rights law, comparable acts committed by guerrillas and other non-governmental actors, while violating humanitarian law rules, are not human rights violations subject to the Commission's jurisdiction, but rather are treated as infractions of domestic criminal laws.¹²⁸

124 See Cuénod Report, *supra* note 1, at 6 (noting that in the preparation of this report, which deals with assorted classifications of displaced persons, Cuénod held meetings with several NGOs).

125 See Annual Report of the Inter-American Commission on Human Rights 1991, OEA/Ser. L/V/II.81 rev. 1, doc. 6, at 212-13 (1992) (discussing the plight of refugees from Guatemala, including people not specifically classified as refugees, but who were displaced by political violence and poor economic conditions).

126 See American Convention, *supra* note 4, at 686 (stating in Article 41 of the Convention that the Commission functions, in part, to make "recommendations to the governments of member states, when it considers such actions advisable, for the adoption of progressive measures in favor of human rights").

127 See *id.* at 676, 683 (stating that Articles 4 (right to life) and 5 (right to humane treatment) are classified as non-derogable rights under Article 27(2) of the American Convention even when the questionable incidents take place during an internal armed conflict, public emergency or war).

128 See Goldman, *supra* note 71, at 576-77 (finding that human rights abuses by the FMLN rebels in El Salvador and the contras in Nicaragua are not human rights violations under the American Convention, but merely violations of that state's domestic laws).

In those situations where the internally displaced appear to be at imminent risk at the hands of government agents, NGOs should request the Commission to secure immediately from the Inter-American Court of Human Rights (Court) such provisional measures that are necessary to restrain governmental action and protect the displaced.¹²⁹ NGOs should also consult with the Commission in devising streamlined emergency procedures applicable to the internally displaced modeled on those regularly used in situations of presumed disappearances.¹³⁰ In addition to filing contentious cases with the Commission for ultimate decision by the Court, NGOs could work with the Commission and friendly OAS member states to seek advisory opinions from the Court posing general questions about the rights of the internally displaced and corresponding duties of state under the American Convention and other relevant treaties.¹³¹ Such suggested steps could result in better protection for the internally displaced under existing law, while complementary efforts are undertaken to expand over time the mandates of humanitarian organizations and to progressively develop new legal standards to provide better access, relief and protection to the internally displaced.

129 See Cecilia Medina Quiroga, "The Battle of Human Rights: Gross, Systematic Violations and the Inter-American System" 171 (1988) (finding that under Article 63(2) of the American Convention, the Inter-American Commission may request some provisional measure be taken in cases of extreme gravity or urgency).

130 See Dinah Shelton, "Improving Human Rights Protections: Recommendations for Enhancing the Effectiveness of the Inter-American Commission and the Inter-American Court of Human Rights", 5 *Am. U. J. Int'l L. & Pol'y* 323, 326, 330 (1988) (stating that the Statute of the Commission allows the Commission to request permission to conduct on-site investigations which, assisted by the typically quick response time of Commission representatives, has discovered torture chambers and disappeared persons ahead of other international organizations).

131 See *American Convention*, *supra* note 4, at 692 (stating, in Article 64 of the Convention, that the Court may give advisory opinions when requested by any OAS member state or by any OAS organ on issues regarding the interpretation of the Convention or on treaties concerning the protection of human rights in the Americas).