CAUGHT IN THE CROSSFIRE: STRENGTHENING INTERNATIONAL PROTECTION FOR INTERNALLY DISPLACED PERSONS DUE TO INTERNAL ARMED CONFLICT

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In recent decades, the displacement of people within national borders has become a worldwide phenomenon. Social and political forces motivated by an unsettling disregard for fundamental human rights have been largely the cause of these massive involuntary movement of peoples.

There are various causes of displacement, but one that seems to have caused so much suffering and loss of human life is the existence of internal armed conflict. Often caught in the crossfire between government troops and rebel forces, families and entire communities are forced to abandon their homes and to live under subhuman conditions.

The Philippines is no stranger to this phenomenon of displacement due to internal armed conflicts, largely owing to the ongoing communist insurgency and the Muslim secessionist movement. The problem has persisted despite attempts to resolve it in the municipal and international levels. It may be said to be a sad case of good intentions being overtaken by the brutal realities of the conflict.

In this thesis, the author formulates a more durable source of protection for internally displaced persons.

INTRODUCTION

A. Background of the Study

The conclusion of the Cold War has focused global attention on a wide range of internal conflicts in which the stakes, in terms of respect for and safeguard of human rights, have had an exponential increase. Although enormous progress has been made in setting the standards for human rights, instances of gross human rights abuses and breaches of humanitarian law continue to occur during times of internal armed conflict. These struggles, often violent and vicious to

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a degree at times unparalleled, have exacted their greatest toll among the civilian population. Caught in the crossfire of a war they neither want nor understand, these people are forced to flee their homes and communities, virtually becoming exiles in their own land.

Attempts have been made at different levels to address the needs of these displaced persons for protection. Provisions upholding the fundamental rights of a person have been incorporated into the national constitutions and legislative enactments of several States. In line with the declared State policy, guidelines for a more humane conduct of the hostilities have been included in the issuances of the executive and military arms of various States. Finally, a number of human rights and humanitarian agreements have also been concluded among States to exact international compliance. Unfortunately, the measure of these efforts have been largely unmatched by the level of actual observance as one would expect?

B. Plan and Objective of the Study

This paper explores the possibility of arriving at a more durable legal system of international protection for the internally displaced persons in situations of internal armed conflict. In the process, Chapter I will attempt to analyze the problems generally encountered in this regard using the Philippine experience as a starting point. This will pave the way for a discussion in Chapter II of the inadequacy of international human rights and humanitarian laws, as well as the inherent flaws in existing international agreements, more particularly the Geneva Conventions of 1949 and Protocol II, which account for the continuing widespread abuses and violations in times of internal strife. Chapter III follows with a exposition of the nature of human rights as customary law and obligations *erga omnes*. Finally, Chapter IV presents the culmination of the major points discussed in the previous two chapters by way of formulating certain legal and institutional strategies. In this wise, the author hopes that this paper can serve as a catalyst in the search for an improved international machinery that can adequately respond to the long-standing protection needs of the internally displaced.

C. Delimitation of the Study

The author will limit himself to a discussion of internal armed conflict (also called "non-international armed conflict") as a cause of displacement. The term has come to have a restricted meaning, i.e., to refer to those instances covered by Common Article 3 of the Geneva Conventions and Protocol II. For purposes of this study, however, the author has opted not to follow the same usage. Unless otherwise expressly stated or apparent from the context, "internal armed conflict" will also cover other forms of collective armed conflict occurring within the territory of a State (e.g., internal disturbances and tensions) which do not fall within the scope of the two humanitarian instruments.

In like manner, the term "internal strife" will be used in its general sense and interchangeably with "internal armed conflict". Some legal scholars tend to give "internal strife" a technical definition to refer to those instances of domestic hostilities not attaining to the level contemplated by Common Article 3 and Protocol II. Such usage shall not be observed here; nonetheless, the sense in which the term is used will be made apparent from the context.

Furthermore, in treating of the customary and *erga omnes* nature of human rights norms, no independent analysis will be attempted to identify which of the fundamental rights have attained this status. This subject in itself presents a number of issues which can be the topic of a separate study. Rather, reliance will be made on the pronouncements of the International Court of Justice and other pertinent instruments.

Finally, in setting forth the proposals for a future instrument, only the major substantive contents thereof will be treated. Except for the discussion on a possible mandate over internally displaced persons granted to an international body, equally important remedial and enforcement mechanisms, will not be discussed.

I. THE PHILIPPINE EXPERIENCE

Displacement is commonly defined as the voluntary or involuntary transfer or movement of persons and whole communities from their permanent areas of residence to other areas.[1] Causes of displacement vary from the natural to the man-made.[2] Of those falling in the

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[1] ECDFC, PRIMER: DISPLACEMENT IN THE PHILIPPINES – NATURE, CAUSES, EFFECTS, EXTENT, LIMITS, REMEDIES AND VICTIMS' RIGHTS 5 (1987) [hereinafter referred to as PRIMER].

[2] Aside from internal armed conflict which is the focus of this study, multinational corporations' intrusions and developmental and infrastructure projects have also been cited as major causes of displacement.

latter category, the existence of internal armed conflict has accounted for nearly 81% of the total number of internal displacement cases documented in the Philippines.[3] There are two forms of displacement — forced evacuation and strategic hamletting. In the former, massive counter-insurgency operations, unexplained disappearances and killings of civilians, abductions and other forms of harassment from both sides compel people to flee their homes.[4] Usually, these evacuations occur with hardly a moment's notice at the height of fighting, causing substantial civilian casualties.

On the other hand, strategic hamletting actually forms part of military strategy wherein certain areas or localities are identified beforehand as "hamlets" or "population centers". Thereafter, civilians in barangays or villages suspected as bases of the enemy's operations are herded into these "hamlets" in the hope of isolating the insurgents from their mass-base support.[5]

Displacement may be permanent or temporary, depending on the prospects of return. But whatever may be the nature and duration of this exile, the tragedy of these displaced individuals, families or communities is that they have come to take on the status of refugees, in their own country.

A. A History of Displacement in the Philippines

1. THE COLONIAL PERIOD

Contrary to popular belief, displacement in the country is not a recent phenomenon, having its origins only during the Marcos Administration.[6] History would reveal that "hamletting" had been practiced as far back as the Spanish era. When the Philippine War of Independence broke out in 1896, the Spanish insular government

[3] Policy Research Service, Office of the Peace Commissioner, *Discussion on the Internal Refugees Problem and Other Related Issues*, Gaston Z. Ortigas Peace Institute, Social Development Index, Ateneo de Manila University. [The figure indicated in the above text is based on the study made by the Ecumenical Commission for Displaced Families and Communities (ECDFC) on the 1989 displacement cases. This includes cases arising from military offensives, NPA field operations, and armed encounter between the military and the rebels.]

[4] ECDFC, REFUGEES IN THEIR OWN LAND: READINGS ON THE PROBLEM OF INTERNAL REFUGEES 2 (1991).

[5] *Id.*

[6] The earliest record of displacement under the Marcos Government occurred in the small town of San Vicente, Davao del Norte in October 1981.

sanctioned this practice in order to contain the swelling popular support for the *insurrectos*. Thus, for instance, on December 23, 1896, Governor-General Polavieja issued a directive which covered the provinces of Bataan, Bulacan, Manila, Cavite, Morong, Laguna and Batangas, and which ordered the "transfer and incorporation into their respective towns, of all the barrios at present situated more than two kilometers from the parish church."[7]

The United States, on the other hand, adopted a policy of "reconcentration" whereby all persons living in a specified area must, at a given time, leave their homes and settle within a particular zone. All persons found outside the said zone were considered as enemies. To regulate the entry and exit of civilians into and from these zones of "reconcentration", a written pass was required to be obtained and presented to the American military authorities of the locality. This was adopted, among others, by Gen. J.M. Bell in Batangas, by Gen. Jacob Smith in Samar[8], and by Captain Draper preparatory to the American occupation of Subic and Olongapo.[9]

2. THE MARCOS YEARS

The long-standing social inequality in Philippine society finally gave rise to the peasant-led, Communist-inspired agrarian unrest in the late 1940s and 1950s. Although the rebellion suffered numerous setbacks, the problem was not thoroughly addressed. Succeeding years witnessed more pronounced levels of inequality, unequal access to justice and the preponderance of what was perceived as inimical foreign (largely US) interest.

The decade of the seventies was ushered in by massive protests spearheaded by the youth. And when President Marcos reponded by imposing martial rule, this signalled the advent of an era of repression and unparalleled militarization, as well as the rise of the communist insurgency and the Muslim secessionist movement.

According to the 1973-75 Department od Social Welfare Annual Report, there were 1.9 million internal refugees or evacuees as a result

[7] PRIMER, *supra* note 1, at 5-6, *citing* 1 TAYLOR, THE PHILIPPINE INSURRECTION AGAINST THE UNITED STATES 274.

[8] PRIMER, *supra* note 1, at 5-6, *citing* BLOUNT, AMERICAN OCCUPATION OF THE PHILIPPINES 388-389.

[9] Fr. Shay Cullen, CSC, *Subic Bay: A Part of History*, Philippine Daily Inquirer, September 12, 1993, at 4.

of military operations. And again from 1981 to 1985, 56,972 families (or 332,624 individuals) were displaced due to forced evacuations and strategic hamletting. Sixty per cent of the evacuees was comprised of children below the age of fifteen.[10]

B. The 1987 Constitution and Displacement

1. A DETERRENT TO DISPLACEMENT?

One of the first tasks assumed by the Aquino Administration in 1986 was the drafting of a new Constitution. Ratified on February 2, 1987, the Charter incorporates additional provisions that reflect a conscious repudiation of the excesses of the previous regime. It showcases a separate section on human rights and provides for the creation of the Commission on Human Rights (CHR) as an independent body tasked to investigate all forms of human rights violations.[11]

A review of the records of the Commission's deliberations reveals the intent of the framers to address the issue of displacement and other cognate offenses. Although Article III, Section 6 does not contain any specific reference to this matter, the phrase "within the limits prescribed by law" is said to pertain principally to the prohibition against hamletting.

> MR. TADEO: Tungkol po ito sa Section 5, page 2, line 18 "The liberty of abode and of changing the same and travel, within the limits prescribed by law, shall not be impaired except upon lawful order of the court, or when necessary in the interest of national security, public safety or public health."
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> FR. BERNAS: Certainly, the intention of the Committee in putting in "within the limits prescribed by law" was precisely against "hamletting" but if the perception is that it is not clear enough, we will entertain amendments to make sure that "hamletting" is banned.[12]

[10] PRIMER, *supra* note 1, at. 8. Of the three major causes of displacement under the Marcos Administration, cases of military campaigns head the list. Logging and land-grabbing operations by TNCs in collaboration with government cronies ranked second, and finally, massive infrastructure projects funded by foreign banks.

[11] PHILIPPINE CONST., art. XIII, secs. 1, 2, and 17.

[12] 1 RECORD OF THE CONSTITUTIONAL COMMISSION 715 (1986).

Although it is undisputed that "hamletting" has been proscribed, the question remains as to its extent. The text of Article III, Section 6 is clear and categorical – the prohibition is not absolute; displacement may be allowed "upon a lawful order of the court."

Unfortunately, this creates some serious practical difficulties. The nature of military action does not always leave much time for an application to a regular court for the proper order to evacuate a civilian population. Moreover, it is usually difficult, if not altogether impossible, to predict and anticipate the course which an armed encounter can take. Thus, in most instances, the fighting spills inevitably (if not by design) into a community which serves as a convenient cover for the combatants evading pursuit.

At any rate, whether or not the 1987 Constitution has been effective in serving as a deterrent to displacement must be measured by what has transpired since then.

2. A LITANY OF VIOLATIONS

As early as 1986, instances of displacement have been observed. In Aklan, thirty-four families were "hamletted" and forcibly transferred to Sitio Liwagao, Barrio San Jose after their former sitio was declared a "free-fire zone" by the military. The transfer was made without ensuring provisions for livelihood and other basic necessities.[13] And then on February 18, 1987, Barrio Namulandayan, Lupao, Nueva Ecija became the scene of the infamous "Lupao massacre" involving twenty-three Army soldiers.[14]

In 1988, one of the largest coordinated anti-insurgency drives was initiated. Air and ground firepower were trained on the rebel strongholds in the mountains of Ormoc, Leyte. At the height of the airstrikes, Brig. Gen. Jesus Hermosa (VISCOM Chief) said that he would not hesitate to bomb suspected rebel-infested areas even at the risk of losing civilian lives. [15]

[13] ED GARCIA, A DISTANT PEACE: HUMAN RIGHTS AND PEOPLE'S PARTICIPATION IN CONFLICT RESOLUTION 9 (1991) [hereinafter referred to as DISTANT PEACE].

[14] *The Displaced Families: How are they now?*, ECDFC MONITOR, First Quarter 1987. [As a postcript to this tragedy, the 23 soldiers were later acquitted by a military tribunal on the ground that they did not have the intent to kill. *See* DISTANT PEACE, *supra* note 13, at 22].

[15] Ambo Manaligod, *Ormoc Air Strikes, Mission Accomplished or Mission Bungled*, ECDFC MONITOR, Last Quarter 1988.

The country reports on Human Rights Practices for 1989 prepared by the US Department of State recorded an increased adverse impact on civilian populations of the government's counter-communist insurgency. Cases of widespread displacement were reported to have occurred in Negros and Mindanao. Military restriction on food shipments based on the number of family members were enforced in the "hamlets" in order to starve the NPAs, and military-issued residence certificates were circulated for purposes of identifying local citizens.[16]

The ever-growing scenario of human suffering continued on to 1990. The AFP launched OPLAN SALIDUMAY in Marag Valley, Isabela, rendering thousands homeless. Families were compelled to erect makeshift huts in the middle of the forest, unprotected from the heat, storm, and wild animals. These people even dared not to cook food for fear that smoke would give away their hiding place. On the other hand, relief goods and medical assistance were denied entry by Brig. Gen. Homer Macapulong (1501st Infantry Brigade) after receiving intelligence reports that communist rebels were waiting for some much-needed supplies coming in from Manila.[17]

The big story in 1991 was Operation Rolling Thunder conducted in Surigao del Sur to flush out communist rebels led by former Catholic priest, Fr. Frank Navarro. Of the total number of the displaced population, only about 30% were able to make it to the lowlands; the great majority retreated further into the forest areas.[18]

In the meantime, rebel-related activities conducted separately by the NPAs and the Muslims secessionists had likewise taken their toll. Accounting only for less than 10% of the total number of documented displacement cases, nonetheless the effects were nowhere less deplorable. Most significant of these was the massacre of thirty-seven villagers in Sitio Rano, Digos, Davao del Sur in June 1989. The victims, who were then conducting religious services, were mowed down by automatic fire after being mistaken as members of the Ituman, an anti-communist fanatic cult. The apologetic National Democratic Front

[16] U.S. DEPARTMENT OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 989, *at* 1959 (1988).

[17] Julieta Gallos, *Marag Valley Heaves in Pain*, NASSA NEWS, July-August, 1991. *See also* Robin Porlaje, *Save the Children of Marag*, ECDFC MONITOR, First Quarter 1991.

[18] People's Multi-Sectoral Organization, *Fact-Finding Mission Report on Surigao del Sur*, June 13, 1991. *See also* Cris Diaz, *Operation Thunder' rolls on in SurSur*, San Pedro Express, March 8, 1991, at 1, 7; Araceli Cahading, *War in South Surigao*, NASSA News, September-October 1992.

(NDF) leadership pledged to conduct an investigation of the incident. To this date, nothing further has ever been heard.[19]

In another incident, scores of Subanon tribesmen were killed in August 1989 as communist rebels indiscriminately fired upon their houses. As with the Digos infamy which took place only a few months before, the NPAs allegedly mistook the natives for members of the Citizens Armed Forces Geographical Units (CAFGU). Embittered by the loss of relatives and friends, some 100 Subanons joined the military operation to hunt down the perpetrators.[20]

In sum, data gathered covering the period of January 1987 to September 1991 dispel any illusion that the situation has changed for the better. Despite the avowed commitment of the new government to the cause of human rights, nearly 90,000 families have been displaced during this period, a substantial portion coming from Mindanao.

SUMMARY OF DISPLACED COMMUNITIES[21]
(January 1987 to September 1991)

	1987	1988	1989	1990	1991	TOTAL
Luzon	4,239	1,213	1,424	1,900	1,180	9,956
Visayas	3,733	3,061	6,267	1,285	5,467	19,813
Mindanao	9,399	11,235	10,618	19,376	8,341	58,969
TOTAL	17,371	15,509	18,309	22,561	14,988	88,738

[19] Josie Petilla, *Every Filipino a Potential Victim of Displacement*, REFUGEES IN THEIR OWN LAND: READINGS ON THE PROBLEM OF INTERNAL REFUGEES 11 (1991).

[20] *Id.* at 12.

[21] ED GARCIA, A FUTURE WITHOUT REFUGEES: DISPLACED PERSONS IN THE PHILIPPINES 15 (1992)[hercinafter cited as FUTURE].

3. ATTEMPTS TO ARRIVE AT A SOLUTION

Government aid to these victims of internal armed conflict has been largely limited to relief assistance.[22] Although necessary to ensure the day-to-day survival of these people, this form of assistance is seriously inadequate and cannot be maintained for a prolonged period of time. More importantly, such assistance does not sufficiently address the human rights concerns behind the issue of displacement. Hence, any government assistance, to be comprehensively effective, necessitates the establishment of a program or mechanism by which the rights of these people may be adequately protected and guaranteed before, during, and after evacuation.

On July 15, 1988, then AFP Chief of Staff Gen. Renato De Villa issued a letter addressed to the various area commanders regarding the protection and rehabilitation of civilians affected by the conflict.[23] Noticeably, it stressed the need for a greater degree of foresight in conducting operations in order to determine whether or not an evacuation of the civilians would be required. Likewise, emphasis was laid on briefing all military personnel actually taking part in combat on the proper conduct and behavior towards the population. On September 22, 1990, the Department of National Defense (DND) came out with a directive providing for the unhampered delivery of basic commodities to affected communities in an effort to alleviate and minimize the social cost of the conflict.[24]

Of some significance was the twelve-point guideline on the proper conduct of civilian evacuations adopted in May 1991 by the Presidential Human Rights Committee (PHRC), an inter-agency committee headed by Justice Secretary Franklin M. Drilon and participated in by various cause-oriented groups and non-governmental offices (NGOs).[25] Far

[22] Several non-governmental offices (NGOs) have also figured prominently in conducting relief work among the internal refugees. These efforts, however, have been greatly hampered by shortage of funds and resources, lack of security and even outright military harassment. For more details, *see* Elen Padilla, *NGOs' Response to the Internal Refugee Situation*, ECDFC MONITOR, First Quarter 1991. Advocacy work has also been started to address this problem. *See* Rene Sarmiento, *Advocacy and Internal Refugees*, ECDFC MONITOR, First Quarter 1991.

[23] Department of National Defense, *Letter on Protection and Rehabilitation of Innocent Civilians Affected by AFP Counter-insurgency Operations*, July 15, 1988.

[24] Department of National Defense, *Letter on Facilitating Delivery of Goods and Services to the Countryside*, September 22, 1990.

[25] FUTURE, *supra* note 21, at 29.

from merely being a redundance of previous DND issuances regarding the same subject, this PCHR guideline actually represented a serious attempt to articulate what are considered as the basic rights of internal refugees caught in the crossfire of internal armed conflict.[26] Lamentably, said guideline never become more than a piece of paper.

C. A Re-statement of the Problem

1. THE LIMITS AT THE MUNICIPAL LEVEL

Thus far, this study has chronicled the origins and extent of the problem of internal displacement due to internal armed conflict in the Philippines. What seems to be disconcerting is that the problem seems to resist efforts in arriving at a solution despite government and non-governmental attempts. It is not a case of a lack of policy, as the preceding portion of this study has revealed; rather it is the inadequacy of the political will to enforce what has been laid down. In other words, the crux of the matter lies in implementation and not formulation of policy.[27]

The sad and tragic irony of the entire scenario is that it is the very same government adopting these rules that violates them. Invoking national security and the promotion of peace and order, the military arm of the government has repeatedly succeeded in taking exception to these measures. In this context, the great temptation is that of arbitrariness, and one can eventually wind up with a situation where enforcement falls within the purview of the absolute discretion of the government depending on whether or not it is convenient to do so. And since the government reigns supreme within its own territory, one is inevitably faced with the question of who shall ensure government observance of and respect for the human rights of its own displaced nationals.

[26] Most notably, hamletting was unqualifiedly prohibited. It likewise sought to prohibit the military to attack, destroy, or remove objects indispensable for the survival of the civilians. Likewise upheld were the right of the people to be indemnified by the government for injuries sustained or damages to property; and the right of the evacuees to be returned to their communities at government expense.

[27] Mainly disregarded, these government instructions and pronouncements on the protection of internally displaced persons may be taken as commitments and thus, are not totally devoid of relevance. As will be seen in Part II, military orders may constitute state practice.

2. FAILURE AND HOPE AT THE INTERNATIONAL LEVEL

On December 11, 1986, the Philippines acceded to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). In brief, Protocol II sought to address the resultant problems which the increasing proliferation of non-international or internal armed conflict have brought about, particularly the adverse effects thereof on the civilian populations. Unfortunately, the application of Protocol II to the Philippine situation is not very clear, nor the prospects thereof encouraging.[28] In the first place, there is some uncertainty whether or not the communist insurgents or the Muslim secessionists have attained that level of responsible command and that extent of territorial control over a portion of the country as to enable these groups to carry out sustained and concerted military operations. Secondly, the ability by these groups to abide by and to implement Protocol II is at best doubtful.[29]

Aside from Protocol II, the country is also a signatory of the Universal Declaration on Human Rights and the International Convention on Civil and Political Rights which both guarantee the individual's freedom of residence and movement within a State's borders.[30] Designed primarily to guarantee respect for human rights in times of peace, these international conventions and declarations, however, have limited, if no, applicability in times of domestic armed conflict when specific rules on warfare should govern.

Finally, mention should be made of the Declaration of the Basic Duties of ASEAN Peoples and Governments convened in 1983 by the late Senator Jose W. Diokno.[31] Among others, it provides that governments shall not, under any circumstances, resort to or authorize the mass transfer or evacuation of civilians except when civilian safety or military reasons justify the same.[32] For some reasons, however, this Declaration was never signed by the participants; nonetheless, it remains

[28] Asiawatch Committee, *The Philippines: Violations of the Laws of War by Both Sides*, August 1990, at 14.

[29] In particular, the NPA's ability to observe due process as provided in Article 6 of the Protocol is put in great doubt in view of its "kangaroo trials".

[30] *See* Article 13 of the Universal Declaration of Human Rights and Article 12 (1) of the International Covenant on Civil and Political Rights.

[31] FUTURE, *supra* note 21, at 23.

[32] Declaration of the Basic Duties of ASEAN Peoples and Governments, art. XI (4) (e).

an important cooperative step towards resolving a problem which has burdened the region for quite a good number of years.

Admittedly, there is a marked absence of any positive tangible impact of these international and regional declarations on the situation of the displaced Filipinos. In this regard, it should be mentioned that there is always the inherent difficulty of meshing and harmonizing international commitments with municipal law. On the one hand, a government's primary concern, when faced with threatened or actual internal disorder, is its own security; on the other, international law, particularly humanitarian law, is mainly interested in ensuring human treatment for individuals especially in times of national emergency and crisis.[33] Clearly, these two positions reflect opposing values which are oftentimes irreconcilable.

It is also true, however, that in recent years, there has been an increased awareness at the international level of the magnitude and multiplicity of the problems posed by displacement.[34] An international consensus is gradually forming towards the development of a more effective response to address the need for protection of internally displaced persons. The second part of this article will therefore consider the problem of internal displacement due to internal armed conflict along the lines of existing trends in international law, and which, in turn, will determine the need for a new instrument that can be the basis of an improved the system of protection for the displaced victims of internal armed conflict.

II. THE STATUS OF THE INTERNALLY DISPLACED IN INTERNATIONAL LAW

A. The "New" Refugees

Internally displaced persons are often referred to as the "new" breed of refugees. Not that they have only of late come into being, but rather it is only recently that global interest has been generated over the plight of these persons.

[33] David Forsythe, *Legal Management of Internal War: The 1977 Protocols on Non-International Armed Conflict*, 72 AJIL 272, at 289 (1978) [hereinafter referred to as Legal Management.]

[34] Recent developments in Somalia, Iraq and the former Yugoslavia (to name a few) been largely responsible for this.

Traditional understanding of who a refugee is was shaped by the 1951 Convention relating to the Status of Refugees. The Second World War and its aftermath saw the phenomenon of large-scale movements of people across national borders, and there was great uncertainty on the prospects for the future of those who have sought refuge in an alien country. The 1951 Convention sought to respond to this pressing problem by setting guidelines for the treatment of these refugees, identifying their basic rights, establishing their juridical status vis-a-vis the host countries, and other related concerns on resettlement.[35] Under Article 1, a "refugee" refers to one who

> as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country, or who, having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The drafters of the 1951 Convention worked under the assumption that the refugee movement was a temporary phenomenon endemic to the recently-concluded world war. However, the events after 1951 proved them wrong. The cold war in Europe and the upheavals in Asia and Africa gave birth to an alarming increase in transborder refugee flow, a situation over which the 1951 Convention had no application because of its limited time frame. Hence, the 1967 Protocol relating to the Status of Refugees was formulated in order to govern those cases which would have been otherwise covered by the earlier Convention but for the delimited period.

All this time, intra-border displacements were already occurring. As post-world war Asia and Africa witnessed the fall of old colonial power structures and the birth of new ones, the rekindling of historic hatreds and the widening chasm between the rich and the poor, the phenomenon of internal displacement came to take on frightening proportions. Increasingly, what was initially perceived as a mere domestic concern by States came to be seen as a source of regional instability and a potential threat to international peace.

[35] UNITED NATIONS, HUMAN RIGHTS AND REFUGEES, FACT SHEET NO. 20, at 5-6.

There are a number of observable parallels between transborder refugees and internally displaced persons. Firstly, both groups are deprived of the protection of their respective governments. Secondly, the factors that give rise to both are often the same.[36] Thus, for instance, the reigning anarchy and the presence of self-appointed revolutionary leaders (actually no more than mere warlords) in Somalia has resulted in substantial internal displacement and refugee movement.

Despite these similarities, there is a significant difference in the protection afforded between the two groups. Refugees who have crossed borders are under the mandate of the United Nations High Commissioner for Refugees and have the benefit of a specific body of laws which address their needs.[37] Meanwhile, the needs of the internally displaced remain to be addressed only, in general, by human rights and humanitarian laws, and through *ad hoc* measures and mechanisms. Unfortunately, international refugee law is not directly applicable to cases of internal displacement, although the UN High Commissioner for Refugees has suggested the possibility of applying some of its principles by analogy to the victims of internal displacement.

As intimated earlier towards the end of Part One of this thesis, a primary reason for this disparity lies in the fact that internally displaced persons remain under the jurisdiction of their own national governments. As such, the protection of their human rights rests primarily on the respective States by virtue of State responsibility. Consequently, the notion of state sovereignty hardly leaves any room for the operation of international jurisdiction.[38] However, there is a perceivable trend of growing international concern over the human rights of internally displaced persons, and this creates more opportunities for an increased role by international bodies (e.g., UNHCR, ICRC) in monitoring the plight of the internally displaced than was previously considered possible.[39]

[36] Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees, at the Roundtable Discussion on United Nations Human Rights Protection of Internally Displaced Persons (Nyon, Switzerland, 5 February 1993) at 2.

[37] Aside from the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, there is also the Statute of the Office of the UN High Commissioner for Refugees (1950), the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), and the Cartagena Declaration on Refugee (1984).

[38] As will be seen later, this was a major bone of contention during the drafting of Protocol II.

[39] Examples are the deployment of UNHCR staff in northern Iraq and in Bosnia-Herzegovina to monitor the protection condition of the internally displaced.

B. *Sources of Protection for the Internally Displaced*

1. INTERNATIONAL HUMAN RIGHTS AND HUMANITARIAN LAW

Human rights law and humanitarian law are two branches of the international legal system which have the same historical and philosophical origins, a common humanitarian inspiration – the protection of the human person from forces hostile to his well-being and survival. Owing mainly to the lessons of history, this effort branched out into two: one sought to limit the evils of war, while the other attempted to defend the individual from arbitrary treatment by the State.[40] The former comprised the rules of what is now known as international humanitarian law, and the latter made up the corpus of international human rights law. Inevitably, the two developed along separate but parallel lines.

A major difference between the two regimes lies in what may be said to be its period of applicability. Whereas international humanitarian law is specially designed for implementation in cases of extended and organized armed clashes, international human rights law, in turn, has its practical application during times of peace. In other words, whereas the former regulates the relation between the State and its enemy, the latter governs the relation between the State and those subject to its jurisdiction.[41]

Therefore, the two systems complement each other. As soon as a situation in a country deteriorates through armed conflict either between the government and the insurgents, or even between non-governmental forces, the authorities become subject to a number of obligations provided under humanitarian law. This shall remain in force until the conflict abates and human rights law governs once more. In this context, there runs a continuum of norms and guidelines that guarantee respect for human rights in all national situations.

Ideally, both human rights and humanitarian law should apply concurrently during such periods of public emergency. Unfortunately, this is not case. The effectivity of international human rights instruments are seriously impaired during such times in view of the derogations by States from these rights.[42] The availability of derogation by States from human rights instruments is, in turn, dictated by significant differences in the rights available during times of conflict and peace. Thus, for example, the International Covenant on Civil and Political Rights fails to incorporate certain rights vital to the protection of human rights in internal conflict situations.[43] Such critical deficiencies include restrictions on massive deportation and the right to due process. In other words, it is the exigencies and conditions of the times that determine the rights which are available and those which are not.

In contrast, humanitarian intruments, as a rule, are not subject to derogations. This emphasizes the fact that it is during times of domestic armed strife that the basic rights of the human person are grossly violated and thus, need the most protection. There are, nevertheless, exceptions to this rule. For instance, for reasons of imperative military necessity or national security, States may limit the exercise of certain rights.[44] Sadly enough, these exceptions are frequently invoked by States to justify the impairment or outright violation of human rights. When this happens, there results a number of lacunae in the area of protection which are not addressed by both human rights and humanitarian laws, thereby creating room for the arbitrary and abusive exercise of State power.

Aside from derogating from certain provisions of humanitarian instruments, States have also been known to outrightly declare the inapplicability of humanitarian law to situations of internal armed conflict. In these instances, States either deny altogether the existence of armed conflict within their territories or argue that domestic

[40] JEAN PICTET, DEVELOPMENT AND PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW 3 [hereinafter DEVELOPMENT].

[41] *Id.*

[42] Theodor Meron, *On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument*, 77 AJIL 589 at 602 (1983) [hereinafter *Inadequate*]. There are, however, certain human rights which cannot be suspended and derogated from even in times of public emergency, including internal armed conflict, such as the inherent right to life.

[43] The only non-derogable rights under Article 4 of the Political Covenant are: the right to life (Article 6), the prohibition against torture (Article 7), slavery (Article 8), and imprisonment for inability to fulfill contractual obligation (Article 11), freedom from *ex post facto* laws (Article 15), the right to be recognized as a person before the law (Article 17) and the freedom of thought, conscience and religion (Article 18). Although other human rights instruments like the American Convention on Human Rights contains a longer catalogue of non-derogable rights, a certain number of these rights have no application to conflict situations. In the same manner, the Universal Declaration on Human Rights, which arguably has come to take on a widespread normative significance as customary law, is not well suited for this purpose.

[44] *Id.* at 37.

situations do not meet the conditions required by humanitarian law for its application.[45] All told, the combined derogation from human rights law and the inapplicability of humanitarian law pave the way for the denial of elementary safeguards to the inhabitants.

2. THE GENEVA CONVENTIONS OF 12 AUGUST 1949

a. General Background

Concern for the tims of internal armed conflict did not begin with the four Geneva Conventions of 1949. As early as the turn of the century, the International Committee of the Red Cross (ICRC) had already been extending aid to those who had been adversely affected by social or revolutionary disturbances at home but not without much difficulty and opposition presented by national policies of States. It had been the case that during civil wars and similar disturbances, States tended to regard their enemies as common criminals and thus, penalized them accordingly. Offers by the ICRC to render aid had been met with stiff resistance by States who viewed the gesture as an unwelcome interference in domestic affairs.[46]

This hostility notwithstanding, it was, to a large extent, inevitable for the ICRC to take on an increasing role in carrying out humanitarian assistance in civil wars and domestic armed conflicts, considering that these conflicts had been characterized by unmitigated barbarity and atrocity. And thus, in 1912, a draft Convention was drawn up which outlined the role of the Red Cross in cases of non-international armed conflicts. Although this matter was never taken up mainly due to the cold reception of participant States, the draft Convention marked the first time that an effort had been made to introduce international concern in connection with internal affairs of a State.[47]

This was subsequently followed by the Xth International Red Cross Conference in 1921 where a resolution was passed recognizing the rights of the victims of internal armed conflict. Significantly, this

[45] *Inadequate, supra* note 42, at 603. The nature of these conditions will be explored more extensively in the succeeding portions of the paper.

[46] OSCAR UHLER, HENRI COURSIER, ET. AL., COMMENTARY IV GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 27 (Jean Pictet ed.; Major Ronald Griffin and C.W. Dumbleton trans., 1958).

[47] *Id.*

resolution, although not partaking of the force and effect of a Convention, managed to have some positive application in the civil wars that broke out in Spain and Upper Silesia.[48]

b. A Discussion of Common Article 3

The Geneva Conventions of 12 August 1949 were drawn up during the Diplomatic Conference for the Establishment of International Conventions for the Protection of Victims of War. The Diplomatic Conference, convened by the Swiss Federal Council, met from April 4 to August 12, 1949 and drafted four Conventions which entered into force on October 4, 1950.[49]

The four Conventions have the so-called "common articles", notable of which is Common Article 3 pertaining to the treatment of civilians in armed conflict situations whether international or non-international in character. It is from this regard that Common Article 3 derives a large degree of its significance, i.e., that it "submits a national phenomenon to international law"[50] and is the "most firmly established source of international law on internal war".[51]

Common Article 3 may be divided into four sections. The first one establishes its field of application, i.e., to "armed conflict not of an international character", while enumerating the minimum obligations which a Contracting Party is required to observe. The second section provides room for the humanitarian initiative of the ICRC, and the third concerns "special agreements" by which Parties to a conflict could apply all or some of the provisions of the Conventions. Finally, the fourth section is in the nature of a disclaimer to the effect that the application of the Common Article 3 shall not affect the legal status of the Parties to the conflict.

[48] *Id.* at 27-28. In subsequent Conferences, most notably the XVIth and the XVIIth, the ICRC envisaged an increasingly unqualified application of humanitarian law to all forms of internal armed conflict. This was embodied in the draft proposal that was submitted to the Diplomatic Conference of 1949 that eventually came up with the present Geneva Conventions. Unfortunately, the approved version limited the number of cases in which humanitarian principles shall apply. For a detailed discussion, *see* UHLER, *supra* note 46, at 30-34.

[49] Miriam Defensor-Santiago, *Humanitarian Law in Armed Conflicts: Protocols I and II to the Geneva Conventions*, 54 PHIL. L. J. 191 (1979). The Conventions included guidelines for the treatment of the wounded and sick in the armed forces (Geneva Convention I); of the wounded, sick and shipwrecked members of the armed forces at sea (Geneva Convention II); of the prisoners of war (Geneva Convention III); and of civilian prisoners (Geneva Convention IV).

[50] DEVELOPMENT, *supra* note 40, at 45.

[51] Forsythe, *supra* note 33, at 273.

Although the value of Common Article 3 is not disputed, it has also been criticized for its ambiguity and incompleteness, particularly in the field of application. The article is supposed to govern "non-international" conflicts, but no one seems certain as to its exact application. Hence, during the Diplomatic Conference of 1949, several participating States expressed their apprehension that the term might cover any situation where force and violence is employed within the confines of a State.[52]

This obscurity, however, may be understandable if viewed in the context of a desire to give more breadth to the application of Article 3, as well as the Geneva Conventions as a whole.

> We think , on the contrary, that the scope of application of this article must be as wide as possible. There can be no drawbacks in this, since the Article in its reduced form, contrary to what might be thought, does not in any way limit the right of a State to put down rebellion, nor does it increase in the slightest the authority of the rebel party.[53]

This is also the reason for the disclaimer appearing in the last part of the article to the effect that the legal status of the Parties to the conflict shall not be affected by the application of the article. This clause had been written into the article precisely to anticipate any apprehension by States that their observance of the article would impair their power to contain and suppress armed revolt, or that it may confer belligerent status on insurgents and rebels. Moreover, it serves as an avowal that the Convention in no way attempts to meddle in the internal affairs of States, and that its purpose is limited to purely humanitarian concerns, not political.[54]

Other criticisms have also been levelled at the article. Hence, it has been pointed out that although the article provides a catalogue of protections (which incidentally are inadequate) for non-combatants[55] , it fails to lay down rules for the conduct of hostilities which would have greatly enhanced the safeguards enumerated. Also, it has been note that said article only affords general protections and obligations, and succeeds only in forbidding the commission of the most flagrant violations of humanitarian law.[56] Furthermore, Common Article 3 does not provide for the designation of an impartial humanitarian body to supervise the implementation of humanitarian norms or to monitor the conduct of the conflicting parties. In this regard, the article merely authorizes the ICRC to offer its services, but which a State may refuse.[57]

It may be by reason of these inadequacies that Common Article 3 has not been seriously observed. Despite the article's existence, internal armed conflicts have lost little of their savagery in those instances following the post-1949 period. The article, after all, has not proven to be an effective deterrent.

This is not to say, however, that Common Article 3 should be dismissed. No doubt, it represents the first instance where international law requires a State, in times of internal armed conflict, to treat its *own* nationals pursuant to international community standards. Likewise, as part of the plenary Conventions, it is "treaty law which is universally adhered to in the sense of being formally accepted."[58] Moreover, there have been past indications that efforts have been directed towards applying the spirit of Common Article 3.[59] The point being that without Common Article 3, international efforts to arrive at an effective piece of legislation to regulate internal war would have been more difficult.

[52] Uhler, *supra* note 46, at 35. During the Conference, there had been some suggestions that certain conditions be incorporated to limit the scope of the term, but this idea was later abandoned. Ironically, a substantial number of these conditions later appeared in the final draft of Protocol II which created a new set of problems as will be seen later.

[53] *Id.* at 36.

[54] *Id.* at 44. Ironically, this argument has not proven to be very persuasive. It has been argued that the Conventions still bestow a certain degree of legal status to groups hostile to the established government. Thus, a minimum of legal standard shall perforce apply to a situation of internal conflict regardless of the will of the government. For a discussion of this point, *see* THEODOR MERON, HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION 30 (1987) [hereinafter INTERNAL STRIFE].

[55] The following acts committed against persons taking no active part in the hostilities are prohibited at all times and in all places: violence to life and person, taking of hostages, outrages upon personal dignity, the passing of sentences and carrying out of executions without due process.

[56] *Application of Humanitarian Law in Non-international Armed Conflict: A Panel Discussion* 85 *ASIL Proc.* 83, at 86 (1991) p. 86 [hereinafter *Application*].

[57] Santiago, *supra* note 49, at 211.

[58] Forsythe, *supra* note 33, at 274. The import of this international acceptance shall be discussed in Chapter III.

[59] *See* the example of the French-Algerian conflict *cited in* FORSYTHE, *supra* note 23, at 277.

3. PROTOCOL ADDITIONAL TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, AND RELATING TO THE PROTECTION OF VICTIMS OF NON-INTERNATIONAL ARMED CONFLICT (PROTOCOL II)

a. A Brief Historical Note

On the basis of the inadequacy of Common Article 3 of the Geneva Conventions, a conference of government experts was convened in the early 1970s under the auspices of the ICRC to examine the possibility of further developing the laws of war, particularly those directly impinging on internal armed conflict.[60] As a direct offshoot of these series of consultations, the ICRC recommended the formulation of a draft Protocol that would address the specific concerns posed by non-international or internal armed conflict. And thus, in 1974, a Diplomatic Conference was convened and the task of actually drawing up a draft was delegated to Committee II.

Initially, Protocol II was conceived as a continuation or extension of Common Article 3 of the Geneva Conventions. There had been a near unanimous agreement that Common Article 3 required supplementation as it only laid down fundamental and general rules which afforded little or no protection at all to those most severely affected by domestic hostilities – the civilian population.[61] In this regard, suggestions had been proffered for a refinement of the concept of non-international armed conflict based on some objective standards. It was hoped that through such objective standards, little would be left to the discretion of States in characterizing internal conflict.[62]

Protocol II was the fruit of a long and arduous diplomatic struggle, owing to the resistance of several participating States to recognize the regulation of internal armed conflicts by customary international law. Understandably, the most heated debates centered on assigning an acceptable level or threshold of armed conflict, in view of the expressed desire of the majority to have the Protocol apply automatically once objective conditions have been reached. As a result, there was a perceived trend towards a more restrictive definition of non-

[60] *A Discussion of Protocol II to the Geneva Conventions of 1949: A Panel Discussion"* 82 ASIL PROC. 613 (1988).

[61] COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, at 1325, 1328 (Jean Pictet ed., 1987) [hereinafter PROTOCOL COMMENTARY].

[62] *Id.* at 1328.

international armed conflict in the course of the negotiations, and apprehensions had been expressed that such a radically narrowed scope would no longer be in line with Common Article 3.[63] In the end, the proponents of State sovereignty and non-intervention prevailed, and they succeeded in emaciating the Protocol from the original proposed draft of 48 articles to the final approved version of 28 articles.

b. Content

Article 1 serves as the keynote to the entire Protocol as it provides the material scope of its application. Briefly, it states that the Protocol shall apply to all armed conflicts which are not included in Article 1 of Protocol I (relating to international armed conflict) and which take place between forces of a High Contracting Party and dissident armed forces within the former's territory. It further provides that the dissidents must be under a responsible command and must have control over a portion of the territory as to enable them to carry out sustained military operations. The second paragraph excludes from this coverage those situations of internal disturbances and tensions, and other "isolated and sporadic acts of violence."

It is at once clear that Article 1 has raised the threshold of applicability to an exceedingly high level. Some have pointed out that level of intensity contemplated here approaches that prevailing in a classical civil war, as in the American War of Rebellion, without the recognition of belligerency.[64] The problem with this is that a substantial gamut of internal conflicts are left out where neither international humanitarian or human rights law would apply,[65] and thereby creating opportunities for States to resort to repressive measures to a degree which ordinarily would not be allowed under either juridical regimes. As it is, the degree of compliance with humanitarian norms has not been encouraging due to claims by States that such norms are inapplicable because of the *sui generis* nature of the conflict.[66]

[63] *Id.* at 1331.

[64] INTERNAL STRIFE, *supra* note 54, at 30.

[65] To recall an earlier discussion, humanitarian and human rights law have different fields of application. The former applies in time of strife while the latter applies in time of peace. In turn, human rights laws have provisions for State derogation in times of public emergency and threats to national security.

[66] *Inadequate, supra* note 42, at 600.

It could, of course, be argued that in such situations not covered by Article 1, Common Article 3 comes into play since the latter applies to non-international armed conflict in general. This, however, fails to take into account that Protocol II is supposed to supplement Common Article 3 whose safeguards have proven to be too general to be adequate.

Moreover, there is also the difficulty of determining whether the conditions set forth in Article 1 have already been met.[67] Thus for instance, how much territory must be under the control of the insurgents? How long must they exercise this control?

In this regard, it has been likewise pointed out that the Protocol fails to provide for an impartial body that can make binding characterizations of the internal conflict. Unfortunately, the role of the ICRC in such conflicts has been limited only to "the performance of [its] traditional functions in relation to the victims of the armed conflict".[68] Of course, in an appropriate context, the United Nations Security Council may possibly make such a characterization, although the suggestion has been made that a UN determination may possibly "politicize" the conflict, thereby raising objections of intervention in internal affairs.[69] At any rate, it is undisputed that the matter of determining the character of the dispute cannot be left entirely to the will of States which, incidentally, is not binding on the international community.

At this point, it should be mentioned that although the intent is for the Protocol to apply *ipso facto* upon the fulfillment of the conditions set forth in Article 1, some crucial points remain unclear and shall have to wait for clarification in state practice. More concretely, the query may be put thus: once the threshold embodied in Article 1 has been met, does the application of the Protocol simply require the adherence of a State, without doing more? An affirmative response, as one author intimates, is not exactly realistic.

> First, there is the question whether states will seek to make an ad hoc governmental assent necessary, as a legal principle, for the application of the Protocol. As a practical matter, that ad hoc consent will be necessary, at least for the application of the law by governmental forces, notwithstanding for the formal legal argument that material conditions activate the law, once a state adhered to the instrument.[70]

[67] Forsythe, *supra* note 33, at 286.

[68] Protocol II, Art. 18.

[69] INTERNAL STRIFE, *supra* note 54, at 50.

[70] Forsythe, *supra* note 33, at 285.

Despite the major disappointment occasioned by the restrictiveness of Article 1, Protocol II is not without its significance. In specifying the fundamental guarantees to be accorded the victims of internal armed conflict, it has addressed a major need left unanswered by Common Article 3.[71] Worthy of note, as far as this study is concerned, are Articles 13 and 17 which deal with the treatment of civilian population and the prohibition of forced movement of civilians, respectively. Article 13 forbids attacks and acts of terrorism on non-combatants while Article 17 specifically addresses the problem of displacement which is an important element of civilian protection. This prohibition against forced movements, however, is not without limitation. It may be allowed under exceptional circumstances to prevent the population from being exposed to a grave danger and for imperative military reasons. And in case 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." These articles are particularly significant in that they codify a recognized principle of customary international law on the protection due the civilian population.[72]

Mention should also be made of Article 25 governing the procedure and effects of denunciation. Since denunciation is basically a unilateral act by a State, the exercise of this option is hedged with vital restrictions in order to prevent a State from evading its commitment at a time when it is most essential. Thus, a denunciation made by a State involved in a conflict shall not take effect until after peace has been restored. Likewise, under the fourth preambular paragraph of the Protocol, a denouncing Party shall remain bound by the principle of the law of nations, as they result from the usage established among civilized people, from the laws of humanity and the dictates of public conscience.[73] This is the so-called Martens clause which insures that even if a State makes a valid denunciation, or does not consider itself bound by Common Article 3 or Protocol II, it will, nevertheless, be bound by non-conventional humanitarian principles.[74] Obviously, the intention is to prevent denunciation from becoming a real obstacle to the implementation of humanitarian law.

[71] See Articles 4, 5, 6, 13, 17.

[72] PROTOCOL COMMENTARY, *supra* note 61, at 1448.

[73] Gerard Niyungeko, *The Implementation of International Humanitarian Law and the Principle of State Sovereignty*, INTERNATIONAL REVIEW OF THE RED CROSS, March-April 1991, at 109.

[74] PROTOCOL COMMENTARY *supra* note 61, at. 1341.

These positive advances notwithstanding, there still seems to be a serious doubt as to whether Protocol II could, at all, exert any real and positive impact on the regulation of internal armed conflict given the insurmountable obstacle posed by state sovereignty. The fact that Protocol II, in its Article 3, upholds non-intervention is not of any help. Ironically and if at all, the sole restriction on State sovereignty under said article is the use of "legitimate means" by States to maintain its security and integrity. And since States themselves will have to determine what these "legitimate means" are, the restriction becomes illusory.[75]

4. OTHER LAW-MAKING ATTEMPTS

As seen earlier, the high threshold requirement of Protocol II has been its main drawback. By adopting a severely restrictive view of non-international armed conflict, it is unable to reckon with diverse forms of conflict situations which, though not reaching the degree of violence contemplated by the Protocol, are productive of an equal level of suffering.

The post-Protocol II period has been characterized by efforts to fill the gap created by Article 1 of the Protocol. Hence in November 1983, by way of a response to suggestions to draft a declaration of basic and non-derogable rights applicable to cases not covered by existing humanitarian laws, the President of the ICRC stated that the matter would be examined by the ICRC in collaboration with experts.[76] A month later, the ICRC General Assembly agreed to come up with a set of humanitarian principles, drawn from human rights and humanitarian laws, which would be "valid even in situations in which the applicability of international humanitarian law is contested."[77] In 1984, a series of meetings with private legal experts were held in connection with the subject.

Finally in June 1987, the Norwegian Institute of Human Rights convened a meeting of experts who agreed to adopt the Oslo Statement on Norms and Procedures in Times of Public Emergency or Internal Violence.[78] This was later followed by another expert meeting in December

[75] Niyungeko, *supra* note 73, at 125.

[76] INTERNAL STRIFE, *supra* note 64, at 132.

[77] *Id.*

[78] Theodor Meron and Allan Rosas, *A Declaration of Minimum Humanitarian Standards*, 85 AJIL 375, at 376 (1991) [hereinafter *Declaration*].

1990 held under the sponsorship of the Abo Akademi University Institute for Human Rights in Finland, which prepared the draft to what is called Declaration of Minimum Humanitarian Standards.[79]

The Declaration represents a major advance from existing international humanitarian instruments pertaining to the protection of the victims of internal armed conflict. Drawing its inspiration from both human rights and humanitarian laws, the Declaration catalogues a core of humanitarian norms and human rights that must be applied at all times.[80] Moreover, it avoids a selective application that had been the pitfall of Common Article 3 and Protocol II by covering all instances of internal violence. Furthermore, derogations under any circumstances are not allowed. Obviously, the drafters intended to make it more difficult for States to reject the applicability of humanitarian principles in internal armed conflict.[81]

C. Concluding Remarks

In the course of this chapter, attention has been drawn to the various problems surrounding the issue of protection of persons displaced by internal armed conflict. Attention was first drawn to the fact that human rights law and humanitarian law have not been tightly woven. The derogability of certain human rights crucial for the protection of internally displaced persons have made the task of protection even more difficult. While it is axiomatic under international law that no State may derogate from a rule of *jus cogens* (*i.e*, peremptory norms accepted and recognized by the international community from which no derogation is possible and which can only be altered with the emergence of a new norm of equal dignity)[82], the identification of the

[79] *Id.*

[80] Article 7 of the draft provides that displacement can only be resorted to in order to insure the safety of the civilian populations and for imperative military reasons. To further strengthen this guarantee, its second paragraph declares that no one shall be compelled to leave his own territory. For the complete text, *see* UNITED NATIONS, GENERAL ASSEMBLY, 47TH SESSION, REPORT OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, QUESTIONS RELATING TO REFUGEES, RETURNEES AND DISPLACED PERSONS AND HUMANITARIAN QUESTIONS: NEW INTERNATIONAL HUMANITARIAN ORDER (A/47/352) 21 August 1992.

[81] To insure a greater possibility of acceptance by States, Article 2 of the draft provides that it shall apply to "all persons, groups and authorities, irrespective of their legal status and without any adverse discrimination." Hence, even those forces hostile to the established government are covered and bound by the obligations set forth therein.

[82] MALCOLM SHAW, INTERNATIONAL LAW 94 (2nd ed, 1986).

scope of this rule gives rise to certain difficulties. Owing to this uncertainty, the invocation of such peremptory rule in times of strife is largely unavailing.

Turning to Common Article 3 and Protocol II, the complexity of various conflicts have made the humanitarian norms contained therein almost ineffectual. Considering that the applicability of the norms will have to depend on the characterization of the conflict, a substantial range of internal armed conflict situations where protection is no less needed has been left out. Clearly, the "selective humanitarianism" which has characterized the history of Common Article 3 and Protocol II has deprived these instruments of a greater measure of positive contribution than they presently have. And although subsequent attempts to arrive at a remedy may offer a semblance of hope, the fact remains that the success of these efforts hinges on the extent by which they will be accepted by States.

Instruments of an essentially humanitarian character are supposed to have a wider claim to application since they do not bear upon the political or economic interests of States. Unfortunately, treaties and conventions which have for their purpose the protection of human rights have not enjoyed a greater participation by States as one would expect. Aside from the inconsistent practice by signatory States, there is also the problem posed by States which are not parties to these instruments. Since States are not bound by obligations embodied in treaties to which they are not signatories, the source of human rights obligations for these non-participating States must be found in customary law. One will therefore have to examine and to assess the extent to which human rights have been incorporated into the corpus of customary international law.

III. HUMAN RIGHTS AS CUSTOMARY INTERNATIONAL LAW

A. Formation and Role of Custom

Custom is a major component of international legislations. Article 38 (1) of the Statute of the International Court of Justice (ICJ) lists international custom as one of the principal sources of international law.

To say that a rule or principle is customary in character is to assert that it is legally binding, either globally or regionally, as the case may be. Although slow to form and often imprecise in content, custom derives its advantage from a wide range of recognition and acceptance

coming as it is from a "concerted practice and a community of belief, thus giving it some degree of stability and predictability."[83] This formulation is particularly significant in laying down the elements of custom – state practice and *opinio juris*.

1. STATE PRACTICE

a. Elements

The concept of State practice embraces not only physical but also verbal acts of States. In fact, it has been argued that the actual conduct of States is only a subsidiary means of ascertaining the rules of practice.[84] Thus, the International Law Commission has cited, among others, national legislation and regulation, diplomatic conference, opinions of national legal advisers, policy statements, official manuals (including military manuals) and military orders as legitimate indications of state practice.[85]

Classical doctrine requires that a practice, to establish a rule of custom, must be supported by an abundant usage over a period of time. Nonetheless, it is also recognized that one or two acts may become productive of custom, as in the case of multilateral treaties which make it possible for large numbers of States to participate in a single act.[86] Moreover, it has been suggested that advances in communications have reduced the importance of duration as a determinant of state practice.[87]

b. Opinio Juris

Practice in itself, however, is not enough. Once a specific usage has been identified, it becomes necessary to consider how a State views

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[83] Dinah Shelton, *The Customary International Law of Human Rights*, COLLECTION OF LECTURES 3 (1991).

[84] Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 41 BRITISH YEARBOOK OF INTERNATIONAL LAW 300 (1965-66). Hence, in the *Nuclear Tests* case, the Court declared that a unilateral declaration by a State is no less binding than a treaty. For a detailed discussion of the relationship between physical and verbal acts, *see* Michael Akehurst, *Custom as a Source of International Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1-8 (1974-75).

[85] Shelton, *supra* note 83, at 4-5.

[86] Akehurst, *supra* note 84, at 14. In this regard, Akehurst has pointed out that multilateral treaties have the inherent advantage of "speaking with one voice."

[87] *Id.* at 16. Thus, it is now possible for the rest of the world to be immediately apprised of the actions and reactions of States.

its own behavior. More particularly, there must also be evidence of the belief that this practice is rendered obligatory by the existence of a rule of law requiring it.

In the *North Sea Continental Shelf* case, Denmark and the Netherlands argued that the equidistant principle, while concededly not customary prior to the 1958 Geneva Convention on the Continental Shelf, had nevertheless acquired customary character by the impact of Article 6 of the Conventions and subsequent state practice. In dismissing this argument, the ICJ commented that for this process to occur, it was imperative that Article 6 should have been accompanied by *opinio juris*, i.e., a belief that the same is legally obligatory. Courtesy, convenience or tradition is not sufficient.

> ... the States concerned had agreed to draw or had drawn the boundaries concerned according to the principle of equidistance, but there was no evidence that they had so acted because they felt legally compelled to draw them in that way by reason of a rule of customary law.[88]

Largely owing to its subjective character, evidence of *opinio juris* is difficult to obtain. Thus, it has been proposed that instead of inquiring into the subjective motive of States, one can infer *opinio juris* from the objective evidence of state practice.[89]

c. Acquiescence and Protest

In a large number of cases, a customary rule develops through the practice of a few states and the acquiescence of many. In the case of the latter group, consent is indicated by silence or absence of protest in circumstances that generally call for a more positive reaction as in the case of an objection. Thus, in the *Anglo-Fisheries* case, the following observation was made regarding the adoption of Norway of the straight-line method:

> The Judgment notes that the Norwegian Decree of 1812, as well as a number of subsequent texts (Decrees, Reports, diplomatic correspondence) show that the method, imposed by geography, has been established in the Norwegian system and consolidated by a constant and sufficiently long practice. The application of this system encountered no opposition from other States.[90]

[88] UNITED NATIONS, SUMMARIES OF JUDGMENTS, ADVISORY OPINIONS AND ORDERS OF THE INTERNATIONAL COURT OF JUSTICE, 1948-1991, at 75 [hereinafter SUMMARIES].

[89] SHAW, *supra* note 82, at 73.

One can infer from the foregoing that protests can themselves create a rule of customary law. This is true, however, only if the acts complained of are withdrawn, or if the instances of protest outnumber the acts protested against.[91] Moreover, a State which has persistently objected to the substance of a customary norm during the latter's formative period will not be bound by the norm.

At this point, one has to make the crucial distinction between a protest directly challenging a specific usage and that which is based on a denial of the applicability of such usage on factual grounds.[92] In the former, the protest may eventually work as a bar to the usage ripening into customary law; in the latter, the status of the usage is arguably enhanced by its implicit acknowledgment. The ICJ addressed this point in the *Nicaragua* case in the following manner:

> If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on the basis, the significance of the attitude is to confirm rather than to weaken the rule.[93]

2. TREATIES

a. Codification Treaties

The impact of treaties in the formation of custom is of particular importance in the field of human rights. Considering that international human rights law is only a recent development, this would generally preclude a reliance on practice over a period of time. Thus, the cumulative effect of multilateral treaties can justify the passage of human rights and humanitarian norms into customary international law.[94]

[90] SUMMARIES, *supra* note 88, at 22. This is not to say that each claim or assertion must be made in the context of a specific dispute. Statements made during meetings of international organizations are significant because they are voted for by the representatives of States.

[91] SHAW, *supra* note 82, at 75.

[92] Oscar Schachter, *International Law in Theory and Practice*, 178 RECUEIL DES Cours (182-V) 338.

[93] *Cited in* Shelton, *supra* note 83, at 8.

[94] Baxter, *supra* note 84, at 286.

A treaty can codify a custom existing at the time of the adoption of the agreement. For instance, in the *Nicaragua* case, the ICJ concluded:

> [T]here is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions,... since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give pecific expression.[95]

It should be pointed out, however, that the Geneva Conventions, is more of an exception rather than the rule, considering that said Conventions is a mere further articulation of a general standard already existing pursuant to earlier conventions, most notably the Hague Conventions.[96] At any rate, the possibility of a treaty codifying customary human rights norms remains limited in view of the relatively recent development in this field as previously indicated.[97]

b. Norm-creating Treaties

Generally, treaties partake of the essence of contracts and as such, are only binding upon the parties. Nonetheless, it is likewise possible that a treaty may constitute a rule which, coupled by *opinio juris*, can pave the way for the creation of a binding custom governing all states, not only those which are parties thereto. In this regard, it is imperative that a treaty or a provision therein must be fundamentally norm-creating.

This law-making process is not without its difficulties. The non-codifying nature of human rights and humanitarian conventions do not merely "photograph" or declare a current practice in the international community. Rather, certain norms or values which are perceived to be deserving of promotion and acceptance are incorporated into

[95] *Cited in* Theodor Meron, *The Geneva Conventions as Customary Law*, 81 AJIL 348, at 352 (1987) [hereinafter *Geneva Conventions*]. In this regard, there has been considerable criticism on the manner (or lack of it) by which the Court arrived at this conclusion. Evidently, the Court failed to consider whether *opinio juris* and practice support the finding that Common Article 3 has attained customary status. However, it should be pointed out that it is not so much the conclusion which merits criticism (since it is granted that some of the basic human rights enumerated under Common Article 3 have attained the status of *erga omnes*), but the virtual absence of discussion of the evidence supporting such conclusion.

[96] Baxter, *supra* note 84, at 286.

[97] Shelton, *supra* note 83, at 10.

these conventions in order to establish a better conduct of nations. Consequently, there is a marked gap between the norms stated and the actual practice of states.[98]

In view of what has been said, the element of *lex ferenda*, i.e., the law as it ought to be (as distinguished from *lex lata*, i.e., the law as it is), plays a central role in the creation of human rights and humanitarian law. And depending on the measure of the gap between the "is" and the "ought to be", a particular instrument will either be accepted by the international community or will fall eventually into oblivion and disuse.

Finally, there are other complex interrelationships between treaties and customs, more particularly the question of whether treaties may derogate from customary norms. A detailed treatment of this topic is, however, already beyond the scope of this paper. Suffice it to say that the possibility of derogation is limited by the concept of *jus cogens*, i.e., peremptory norm of international law from which no derogation is permitted and which can only be altered by the emergence of a new norm of equal dignity.[99]

B. Customary Human Rights Norms

Whether or not the concept of human rights has assumed a customary character cannot be determined alone on the basis of the usual process of forming customary law. Since human rights instruments are generally hortatory in nature, it is difficult to find an instance of actual state practice conforming to the standards contained therein *de hors* treaties.

This is not to say, however, that it is impossible to determine the extent to which human rights have attained customary status. In this regard, various indicators have been suggested as plausibly reflecting the relevant behavior of States, like the frequency with which a particular right appears in human rights instruments[100]; the extent of limitations imposed on the right; the existence of practice that supports or negates the right. Other determinants can also include the inclusion of human rights provisions in national constitutions and the enforcement of these

[98] *Geneva Conventions*, *supra* note 95, at 363.

[99] SHAW, *supra* note 82, at 95.

[100] Owing to the cumulative effect of human rights and humanitarian law, rights which are often included are not of mean significance.

by national courts[101]; the numerous United Nations resolutions and declarations that refer to the duty of all States to respect basic human rights[102]; and the instances of international condemnations of human right violations[103], to name a few. Although none of the foregoing, alone and by themselves, would be sufficiently determinative, taken together, they can offer a significant proof of the extent to which fundamental human rights have attained the level of custom.

In this respect, some attempts have been made to come up with a listing of customary international human rights, notable of which is the Restatement of the Foreign Relations Law of the United States (1987). Its Section 702 provides that

> A state violates international law if, as a matter of state policy, it practices, encourages, condones
>
> (a) genocide,
> (b) slavery or slave trade,
> (c) the murder or causing the disappearance of individuals,
> (d) torture or other cruel, inhuman, or degrading treatment or punishment,
> (e) prolonged arbitrary detention
> (f) systematic racial discrimination, or
> (g) a consistent pattern of gross violations of internationally recognized human rights.[104]

Interestingly enough, the last item on the list coincides and finds support in the draft articles on State responsibility of the International Law Commission. Under Article 19 (2), such violations are considered as a serious affront to the fundamental interests of the international community which would justify its condemnation as an international crime.[105]

[101] Thus, the US federal court case *Filartiga v. Pena-Irala* held that freedom from torture is customary pursuant to the Universal Declaration on Human Rights. *See* Shelton, *supra* note 83, at 16.

[102] An exampie would be the Teheran Proclamation issued on the occasion of the International Conference on Human Rights (April 22 - May 13, 1968) which affirmed the obligatory nature of the Universal Declaration on Human Rights and the Internationai Covenant on Civil and Political Rights. *See* THE PROCLAMATION OF TEHERAN, paragraphs 1 and 2.

[103] Thus, in actual diplomatic practice, economic sanctions have been threatened against States which have committed or tolerated gross abuses and violations.

[104] *Cited* in Shelton, *supra* note 83, at 19. The list lays no claim to being exhaustive as it may omit other rights no less fundamental and which find support in international practice, as for instance, the right to shelter, food and medical treatment which are intimately linked to subsistence.

[105] Kamen Sachariew, *States' Entitlement to Take Action to Enforce International Humanitarian Law*, INTERNATIONAL REVIEW OF THE RED CROSS , May-June 1989, at 179.

Incidentally, it has been opined that a wholesale and forcible transfer of persons may qualify as a crime against humanity. This view finds its support from the Charter of the International Military Tribunal at Nuremberg which considered "crimes against humanity" to include, among others, deportations or transfers of population before or during the war. Such act was held to be "contrary to international conventions,... the laws and customs of war, the general principles of criminal law as derived from criminal laws of all civilized nations, and to Article 6 (b) of the Charter."[106] Admittedly, this pronouncement was made in the context of an international war; nonetheless, if mass population transfer constitutes a crime against humanity, then whether the same is committed during an international war or an internal armed conflict is immaterial.[107]

C. Human Rights as Obligations Erga Omnes

The idea that basic human rights are *erga omnes* was given currency by the ICJ in the *Barcelona Traction* case. Commenting on the responsibility of a State on the treatment and protection of aliens admitted into its territory, the Court said

> In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes. Such obligations derive, for example, in contemporary international law,.... Some of the corresponding rights of protection have entered into the body of general international law....[108]

Properly speaking, this pronouncement was no more than an *obiter dictum*; nonetheless, it has been widely influential, most notably in the drafting of the Restatement cited above.[109]

Whether or not this *erga omnes* principle, by its sheer impact, can exert a significant influence in increasing the level of compliance and observance by States has yet to be pass the test of actual practice.

[106] Article 6 (c) of the Charter, *cited in* Alfred M. De Zayas, *International Law and Mass Population Transfers*, 16 HARVARD INTERNATIONAL L.J. 214-15 (1975).

[107] *Id.* at 220-22. A point of interest would be the manner in which international crimes such as this would be prosecuted. The possibility of judicial enforcement has been advanced.

[108] *Cited in* Theodor Meron, *On a Hierarchy of Human Rights*, 80 AJIL 1, at 10 (1986) [hereinafter *Hierarchy*].

[109] Schachter, *supra* note 92, at 340-41.

Nonetheless, if, as this doctrine holds that violations of obligations *erga omnes* constitutes a breach over a matter impressed with global concern and interest, it seems to follow that any member of the international community has the standing to vindicate the right violated.

This idea is not as novel as one would think. Considering that States and international bodies have criticized infringements of human rights committed by other States against its own nationals, this can be construed as a manifestation of legitimate international interest in the enforcement of human rights guarantees. But whether or not this notion can be made to extend to other fields of action merits further study.[110]

D. Concluding Remarks

Based on the foregoing discussion, there seems to be hardly any dispute that the fundamental rights of the human person has achieved customary status. And no doubt the rapid evolution of international human rights will witness the catalogue of customary human rights norms increase over time, with more widespread acceptance.

Now, to say that basic human rights norms are customary is to uphold their binding character. And to further say that these are obligations *erga omnes* is to assert that each State has a legitimate interest and standing, not only in insuring respect for and observance of human rights, but also in seeking redress for violations, regardless of whether or not the victims are its own nationals.

So far, this paper has discussed the deficiencies in the existing regime of human rights and humanitarian conventions in Chapter II. In turn, this chapter has highlighted the compelling character of basic human rights as customary law and as obligations *erga omnes*. The following chapter presents the point of convergence for these two chapters as it lays down a number of recommendations that will embody the lessons learned and the insights gained from what has preceded.

[110] For instance, there has been considerable interest in ascertaining whether the concept of human rights norms as *erga omnes* may be used to justify judicial action by one State against another. This notion is derived from the Roman principle of *action popularis*. *See* Schachter, *supra* note 92, at 196-97; 341-42.

IV. THE NEED FOR REMEDIES

A. Preliminary Observations

Recalling the discussion in Chapter II, cases of humanitarian emergencies occurring within the territorial limits of a State are often not subjected to the humanizing influence of human rights and humanitarian instruments by virtue of the crucial flaws inherent in the prevailing regime. States resort to a number of measures to derogate from certain peacetime human rights in the name of public emergency without recognizing the applicability of humanitarian law. Given these conditions, it is not surprising that appalling violations of fundamental human rights occur during situations of internal armed conflict.

Recent years have witnessed a proliferation of human rights instruments, both regional and international. These instruments, numbering sixty seven,[111] however, govern "normal" or "peacetime" situations.

The international community still has to come up with a concise and modest instrument containing an irreducible and non-derogable core of human rights norms applicable to situations of collective internal violence that do not fall within the scope of existing humanitarian instruments.

In working towards a new instrument, one would do well to be able to build on the already established principle that no derogations from humanitarian instruments are permitted. Since this principle has to a large extent attained universal consensus, it will not be very difficult to take that additional step of extending this same principle to analogous situations. Following international law-making procedure, the process can begin with the adoption of a solemn declaration by a major organ of an intergovernmental organization, such as the General Assembly of the UN. Although such an instrument *per se* does not create international law, it has the positive effect of raising the

[111] According to a recent publication of HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS, *cited in* Theo van Boven, *The Future Codification of Human Rights. Status of Deliberations – A Critical Analysis*, 10 HUMAN RIGHTS LAW JOURNAL, 2 (1989).

expectations and awareness of the global community, even as its principles may subsequently serve as the nucleus of a new treaty.[112]

While the adoption of a new instrument will help foster an appropriate climate for protecting and assisting the internally displaced, a large measure of its success will have to depend on the presence of a global organization mandated to monitor its implementation. To date, there is no single body, within or without the UN framework, that answers to this long-standing need.

The objective of this chapter is, therefore, two-pronged. First, it will review and reflect on some desiderata concerning the areas of applicability and normative content of a future instrument. While the eventual content of such an instrument will, no doubt, depend on political consensus, the favorable influence of an informed opinion and scholarly writing may be brought to bear on the future developments in this important initiative. Second, it shall also discuss the competence of established institutions working with the internally displaced with the view of selecting one which can cater to the needs of the internally displaced.

B. A Call for a New Instrument

1. MATERIAL SCOPE

Approaches to plug the gap created by the highly restrictive field of applicability of Common Article 3 and Protocol II may be divided into two: first, conceiving an instrument that will apply in situations where existing humanitarian instruments are not applicable; and second, that which will cover all situations of internal collective violence.

The first approach seems to be dictated by simple logic. A situation of violent domestic strife falling outside the confines of Common Article 3 or Protocol II will be subject to the proposed instrument. This, however, is not without its dangers. An implicit option is still granted to States concerned whether to apply the new instrument in lieu of Common Article 3, for instance. And considering the stricter regime obtaining under the proposed instrument (e.g., its non-derogable

[112] During its 47th session in 1992, the UN General Assembly adopted the DECLARATION OF MINIMUM HUMANITARIAN STANDARDS after a favorable decision by the Subcommittee on Prevention of Discrimination and Protection of Minorities. This has yet to be transformed into a binding international obligation. For an overview of this instrument, *see* Chapter II, *supra*.

character), it is not altogether impossible that States will opt for the least exacting instrument.[113] Of particular import is the absence of an international body which can make binding characterization of the conflict. And even if there were, the task of classifying the nature of the conflict is not rendered any easier.

The second approach, admittedly, only minimizes but not totally avoids this problem. Finding its application in all situations, including internal disturbances, low-intensity conflicts and public emergencies during which collective violence occurs,[114] a similar difficulty may be found in defining what "collective violence" consists of.

There are, to be sure, instances of violence which should clearly not fall within the contemplation of the term, such as syndicated criminal activities and concerted actions with more or less limited objectives (e.g., demonstrations).[115] It has also been suggested that the nature of government response may serve as an important aid. Thus, recourse to certain governmental measures which are not appropriate to the usual systems of monitoring, deterring and penalizing ordinary crimes may be indicative that a situation prevails which calls for the application of the new instrument.[116] So far, this appears to be a workable solution.

At any rate, the problem of definition is an inevitable one and must be handled with utmost care in the actual drafting of the text. And since the good faith of States can no longer be presumed, one must anticipate evasions and make them as difficult as possible.

[113] It is uncontested that Common Article 3 does not afford enough protection. And although Protocol II has delineated what these protections are, there remains the problem of determining whether the conditions set forth in its Article 1 are already present. As intimated in Chapter II, Protocol II is not self-executing. *See also* the brief discussion in INTERNAL STRIFE, *supra* note 64, at 147-48.

[114] Article 1 of the Declaration of Minimum Humanitarian Standards has such an application. It further provides that the standards found therein shall be respected whether or not a state of emergency has been proclaimed.

[115] In this regard, reference is sometimes made to political intent as a criterion. Nonetheless, this gives rise to serious difficulties since political intent is rarely made explicit, and there is usually a dearth, if not absence, of a conclusive evidence of such an intent. More importantly, due to the superior resources at the disposal of established governments, it is not unusual for dissident forces to resort to "common" criminal activities. This is precisely the stratagem adopted by the communist insurgents in the Philippines as NPA "sparrow units" conduct urban assassinations and kidnappings. For a more detailed discussion of this point, *see* INTERNAL STRIFE, *supra* note 64, at 81-83; and Forsythe, *supra* note 33, at 293.

[116] INTERNAL STRIFE, *supra* note 64, at 84.

2. PERSONAL SCOPE

A future instrument must contain a core of non-derogable provisions which should apply to the civilian population as a whole. This broad application finds its justification in the light of the evolving forms of internal armed conflict. Thus, for instance, in a low-intensity conflict, the traditional distinction between participants and innocent bystanders fades and becomes obscure. Moreover, considering the inadequacies of non-derogable provisions found in existing human rights instruments, the need to apply the new instrument to the population without distinction becomes even more urgent.[117]

A matter of importance is the applicability of the instrument to forces in opposition to the government. Naturally, the chances of humanizing domestic strife are greatly improved if the obligation to abide by the essential humanitarian principles is imposed in such a way that these duties are reasonably balanced and are not unduly favorable to one side. Normally, the relationship between a government and the forces hostile to it is governed by municipal law, with international norms only serving a moderating role. And as pointed out in Chapter II, any semblance of giving an internationally recognized status to such elements would be met with vigorous opposition from governments.

To facilitate acceptance of the instrument, a disclaimer similar to that found in Common Article 3 must be written into the new instrument. And where the nature of the duty imposed is not peculiar to the government (e.g., judicial guarantees), the same should be addressed to everyone.

3. NORMATIVE CONTENT

The process of selecting and formulating the essential rights to be included in the new instrument's catalogue of protection is of crucial importance since the rights thus stated will constitute both a response to and a remedy against human rights infringements during times of internal armed conflict. In this connection, the principal sources from which such rights may be derived are the existing human rights and

[117] Naturally, distinctions have to be preserved where these are called for. For instance, the guarantee of due process will find its application only to those prosecuted for offenses related to the internal armed conflict.

humanitarian instruments in view of the greater chances of attracting broader support. Likewise, particular attention must also be devoted to insure the inclusion of those norms recognized as *erga omnes* to reinforce the binding character of the obligations enunciated in the suggested instrument.

A starting point would be to ascertain the particular rights which are frequently violated such as the right to life and physical integrity; the right to humanitarian aid, food and shelter; the right to freedom of movement; the right to family unity; the right against indiscriminate attacks on civilian population; the right against forcible deportation and massive population transfers, among others. At this point, it may be useful to review this list of rights against those existing under the non-derogable provisions of major human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR), the European Convention on Human Rights (European Convention) and the American Convention on Human Rights (American Convention). Considering that groups of States acting severally had already affixed their imprimatur on the principle of non-derogability of the rights contained in these instruments, there is reason to hope that a broader list built on a compilation of existing ones will encounter little or no opposition.

Nonetheless, the primary inspiration must be drawn from existing humanitarian instrument in view of their special relevance to conflict situations.[118] As a matter of fact, the scarcity of appropriate non-derogable provisions justifies this approach. Incidentally, it is worth noting that this task of borrowing from humanitarian instruments, namely the Geneva Conventions and Protocol II, is made easier by the level of acceptability which they have reached.[119]

At this juncture, a word must be said about the Declaration of Minimum Humanitarian Standards. Brief but comprehensive, the Declaration has extensively borrowed from existing human rights and humanitarian instruments to arrive at normative provisions broad enough to provide essential protections but not too broad as to make global

[118] The International Covenant on Civil and Political Rights, for instance, does not contain a clear and non-derogable prohibition against forcible deportations. The essential prohibition in this regard appears well-established in humanitarian instruments (*see* Geneva Convention IV, Art. 49 and Protocol II, Art. 17).

[119] The Geneva Conventions and Protocol II have been ratified by 167 and 97 States, respectively. *See* INTERNATIONAL REVIEW OF THE RED CROSS, November-December 1991.

consensus improbable.[120] It includes, among others, the right to be regarded as a person before the law (Art. 3 {1}) which is derived from Article 16 of the ICCPR; a listing of prohibited acts (Art. 3 {2}) which is directly drawn from Article 4 (2) of Protocol II; the prohibition against attacks on non-combatants (Art. 5 {1}) which is similar to Article 4 (1) of the Protocol; the right against arbitrary taking of life (Art. 8) which corresponds to Article 6 of the ICCPR, Article 4 of the American Convention and Article 2 of the European Convention; the prohibition against displacement (Art. 7) which finds its source in Article 17 of the Protocol and Article 49 of the Geneva Conventions IV and, to some extent, in Article 22 of the American Convention, Articles 12 and 17 of the ICCPR and Article 8 of the European Convention.

To be sure, there will be a number of overlaps between the Declaration and other humanitarian and human rights instruments. When a situation of internal violence is covered by both the Declaration and by the non-derogable provisions of a particular human rights instrument, differences may arise in the degree of protection afforded by each, with that provided in the Declaration proving to be more advantageous. This should not present any difficulty at all. If it should occur that one offers an improved measure of protection, then its implementation will generally insure the implementation of the lesser one.

C. A Question of Mandate

1. BACKGROUND

From an international perspective, the crisis faced by the internally displaced lies partly in the absence of a clear mandate of an international body tasked with the special responsibility for their protection. International involvement during times of humanitarian emergencies have so far been *ad hoc*, limited and unsatisfactory.

Traditionally falling within the ICRC's field of action, institutionalized assistance to persons displaced by internal armed conflict was formally considered in 1991 by the UN Commission on Human Rights. Drawing the attention of the Secretary-General to the plight of these people, the Commission requested the Secretary-General to prepare

[120] Of its 18 articles, 13 enumerate the fundamental rights from which no derogation is permitted. This is of course crucial since a number of these rights are either not provided for or may be derogated from in the major human rights instruments.

"an analytical report based on information submitted by Governments, the specialized agencies, relevant United Nations organs, regional and intergovernmental organizations, the International Committee of the Red Cross and non-governmental organizations."[121] Pursuant to this request, the Cuenod Report was submitted calling for the mobilization of the entire UN system to deal with the situation of widespread displacement. In particular, it singled out the vital roles to be performed by the UNHCR and the ICRC in this regard. Finally, in order to enable the UN to deal with this problem with dispatch, the Report proposed that the Commission evaluate the feasibility of setting up a separate body.[122]

At this point, it may be argued that the proliferation of international organizations and agencies do not favor this idea. In addition, the introduction of a new structure may possibly undermine material and financial resources presently on hand. A distinct and workable option, however, is to review existing institutional mechanisms. More particularly, the mandates of the ICRC and the UNHCR can be examined in order to determine which agency is in the better position to insure the protection of the internally displaced.

2. THE ICRC MANDATE

The ICRC's mandate vis-a-vis internal refugees, in general, is primarily derived from its Statutes, particularly Article VI (5) which provides that

> As a neutral institution whose humanitarian work is carried out particularly in times of war, *civil war or internal strife*, it endeavors at all times to insure the protection of and assistance to military and civilian victims of such conflicts and of their direct results.[123] (Italics supplied)

[121] Francis Deng, *Protecting the Internally Displaced. A Challenge for the United Nations*, circulated by the Refugee Policy Group at the meeting on Displacement and Democracy, University of Colombo, Sri Lanka, August 18-19, 1993 at 2.

[122] *Id.* at 2-3. It bears mentioning that the Commission did not go to the extent of recommending the creation of a machinery for the internally displaced persons. Rather, it limited itself to requesting for the designation of a Representative of the Secretary-General on Internally Displaced Persons. This paved the way for the appointment of Francis Deng, a former diplomat to Sudan, to serve in this capacity. *See* Roberta Cohen, *Strengthening United Nations Human Rights Protection for Internally Displaced Persons*, circulated by the Refugee Policy Group at the meeting on Displacement and Democracy, University of Colombo, Sri Lanka, August 18 - 19, 1993 at 5.

[123] THE INTERNATIONAL COMMITTEE OF THE RED CROSS AND THE LEAGUE OF RED CROSS SOCIETIES, COMPENDIUM OF BASIC REFERENCE TEXTS ON THE INTERNATIONAL RED CROSS 11 (1982)[hereinafter COMPENDIUM].

Article VI (6) adds to this by defining the ICRC's right of initiative which has often served as the basis for its action, especially extra-conventional ones. The same is reiterated by the 1949 Geneva Conventions and their additional Protocols.[124] These are further supplemented with the adoption of a resolution during the Twenty-fifth International Conference of the Red Cross in 1986.[125]

The ICRC also enjoys an existing mechanism that is ideal for gaining immediate access to internally displaced persons. Thus, in Resolution XI of the XVIIth International Conference held in Stockholm in 1948, the ICRC had provided for the establishment and recognition of National Societies[126], thereby paving the way for a working infrastructure in the local level. All these, taken together with the ICRC's apolitical character[127], would seem to indicate that the ICRC is the clear choice.

In practice, however, the ICRC's role is rather limited. Its program is more adopted to emergency situations where swift material assistance is required, and is basically of transitory nature only.[128] Moreover, the ICRC has exhibited a marked reluctance to involve itself in a field outside the scope of humanitarian law, due perhaps to the traditional distinction between human rights and humanitarian regimes.[129] Even the legal significance of its right of initiative to offer humanitarian assistance is likewise unclear since States have no formal obligation to accept such an offer. Under these conditions, the ICRC often finds itself unable to operate without coordinating with other organizations, such as the UNHCR.

[124] *See* Common Article 3 of the Geneva Conventions, Art. 17 of Protocol I, Art. 18 of Protocol II.

[125] *See* Resolution XVII in the *Resolutions of the International Conference*, INTERNATIONAL REVIEW OF THE RED CROSS, November – December 1986, at 362 [hereinafter RESOLUTIONS].

[126] COMPENDIUM, *supra* note 123, at 105.

[127] The ICRC is committed to impartiality and universality as among its basic principles adopted during the XXth International Conference in October 1965. *See* COMPENDIUM, *supra* note 123, at 3.

[128] Vitit Muntarbhorn, *Protection and Assistance for Refugees in Armed Conflicts and Internal Disturbances: Reflections on the Mandates of the International Red Cross and Red Crescent Movement and the Office of the United Nations High Commissioner for Refugees*, INTERNATIONAL REVIEW OF THE RED CROSS, July-August 1988, at 355 .

[129] *Internal Strife*, *supra* note 64, at 142-43.

3. THE UNHCR MANDATE

The competence of the UNHCR to protect and assist refugees is provided under the General Provisions of its Statute, to wit,

> The United Nations High Commissioner for Refugees, acting under the authority of the General Assembly, shall assume the function of providing international protection under the auspices of the United Nations, to refugees who fall within the scope of the present Statute and of seeking permanent solutions for the problem of refugees...[130]

This mandate, however, extends only to those refugees who qualify under the 1951 Convention and its 1967 Protocol, i.e., those who leave their country of origin due to a well-founded fear of persecution on grounds specified therein. It is, therefore, clear that internal refugees are, *stricto jure*, outside the scope of the UNHCR. Notwithstanding this inherent limitation, the UNHCR has managed to play a significant role in rendering aid to the internally displaced, particularly in Iraq and in the former Yugoslavia.

There appear to be strong reasons favoring the extension of the UNHCR's mandate to cover victims of internal displacement. Aside from the fact that it has already involved itself in this concern in the past, experience also reveals that the causes of internal displacement and transborder refugee movement are often one and the same. Furthermore, the UNHCR not only provides material relief assistance but is also more disposed towards reaching a greater range of long-term services and protection as reflected in its Statute and in the list of rights appearing in the 1951 Convention.[131] Finally, the designation of a Representative of the Secretary-General may prove advantageous to the UNHCR as the former provides a vital linkage to the institutional network and capabilities of various UN bodies.[132]

[130] COLLECTION OF INTERNATIONAL INSTRUMENTS CONCERNING REFUGEES 5 (1988).

[131] Muntarbhorn, *supra* note 128, at 364.

[132] During the UN Commission on Human Rights emergency session held in 1992 to discuss the developments in the former Yugoslav republic, the Commission called upon the Representative to give urgent attention to the situation. On the strength of this resolution, Representative Deng, together with the Special Rapporteur, went on an information-gathering mission to ascertain the plight of the internally displaced persons in the war-torn areas. For other similar missions, *see* Cohen, *supra* note 122, at 6.

On the other hand, it is also true that an expanded mandate may present some problems for the UNHCR. In the past, it encountered some difficulties in performing its protective tasks in situations which produces both transborder and internal refugees.[133] In other words, an expanded mandate may prove to be an unwelcome burden that may eventually hamper and impair the UNHCR's effectivity in protecting and assisting the two groups.

4. REFLECTIONS

Despite what has been said above regarding the ICRC's narrow conception of its role in humanitarian emergencies, it remains to be the more logical and feasible choice. Aside from its long history of involvement in armed conflicts, it likewise has, in its favor, a working and flexible network of linkages at the State level which could be utilized to its optimum given the statutory mandate envisioned in this study.

Incidentally, recent events would seem to indicate a growing readiness of the ICRC to move away from its usually limited role and to assume an enlarged participation. In the recently-held International Conference for the Protection of War Victims (30 August - 1 September 1993), the ICRC prepared a report which, among others, tackled the crucial issue of appropriate international action for continued violations of humanitarian law.

> Consultation is necessary to determine the most appropriate methods and framework for implementation of States' obligation to ensure respect for international humanitarian law, as well as the type of cooperation with the United Nations in the event of serious violations of that law...[134]

In particular, the Conference has cited the International Fact-Finding Commission, created in 1992, which is empowered to "enquire into all violations of humanitarian law, including those committed in non-international armed conflicts, and thereby demonstrate their determination to clarify alleged violations of that law."[135]

[133] Cohen, *supra* note 122, at 3.

[134] *Summary of Suggested Measures to Strengthen Protection for War Victims and Respect for International Humanitarian Law*, THE LAWYERS REVIEW, Sept. 1993, at 2-3.

[135] *Id.* at 3.

A final point. Given the arrangement proposed herein, it would be appropriate to briefly discuss the relationship which the ICRC has vis-a-vis the new instrument. Under its suggested mandate, it will be more logical for the ICRC to assume the task of drafting the proposed instrument. In so doing, it shall have to provide for the exercise of such traditional functions such as monitoring, information-gathering and reporting to pertinent authorities. The international fact-finding body mentioned above may prove to be suitable to this task.

More importantly and to strengthen its implementing role, it is likewise recommended that the ICRC undertake to study the viability of creating a body, not unlike the Human Rights Committee provided under the ICCPR[136], which shall act as a form of a "complaints and action center." It shall have the competence to receive and entertain complaints by both individuals and States regarding violations of the new instrument. This body will not have any adjudicatory powers (due to the anticipated difficulty in having States accept and recognize the jurisdiction of such a body), but shall have investigative powers in aid of its primary function of facilitating negotiation and reaching an understanding with the parties to a complaint. As a main feature of the instrument, this "soft approach" to dispute-settlement will hopefully attract a greater level of support and acceptance thereof by States.

With this system, the ICRC will ostensibly have a two-fold role in relation to internally displaced persons: first, on the strength of its extended mandate, it shall serve as a guardian of those who are nationals of States who shall refuse to participate in the new instrument; and second, on the basis of the new instrument, it shall act as protector of those who are nationals of States who shall become parties thereto. Either way, this will translate to a better regime of protection for the internally displaced.

CONCLUSION

For the international community to develop an adequate response to the serious problem posed by internal displacement due to armed conflict, a great deal of work will have to be done with respect to legal instruments and implementing mechanisms. This thesis has attempted

[136] *See* Arts. 28-42 of the International Covenant on Civil and Political Rights and Arts. 1-5 of its optional protocol. The composition of this proposed body will have to be threshed out by the drafters of the new instrument.

to outline a skeleton of a more or less broadly conceived framework for dealing with this two-fold challenge. In so doing, the following guidelines have been observed to the extent possible:

1) **Consistency with existing international human rights and humanitarian instruments** – Most, if not all, of the rights guaranteed under the new instrument are based on those found in existing ones which have not been given the proper emphasis, either because they have not been always included or because they are derogable.

2) **Fundamental in character, being derived from the inherent worth and dignity of the human person** – As an improvement over its predecessors, the model instrument shall safeguard those rights which are liable to be most violated during internal armed conflict, to wit:

   (i) the right to be free from torture
   (ii) the prohibition against involuntary disappearances
   (iii) the proscription on attacks and acts of terrorism against non-combatants
   (iv) the prohibition against displacement of populations unless required by imperative military reasons or for the safety of the civilian population
   (v) the right against arbitrary taking of life
   (vi) the right to receive humanitarian assistance
   (vii) the prohibition against destroying or pillaging civilian property, particularly those necessary for subsistence and for livelihood
   (viii) the prohibition against recruitment of children below eighteen years of age to take part in the hostilities
   (ix) the right of the wounded and sick, without distinction, to be treated humanely and given, as far as practicable, propermedical attention

Precisely because of their fundamental character, these rights may not be derogated from.

3) **Establishment of a practicable implementing machinery** — Aside from the formulation of the new instrument, the re-definition of the ICRC's mandate to include the protection of internally displaced persons can lay a broader basis for the conventional or extra-conventional exercise by the ICRC of its humanitarian initiative.

4) **Enjoyment of a wider base of support from the international community** — In order to limit, if not foreclose, the grounds for objections, the proposed instrument is basically built around principles extant in current instruments which have attained a respectable level of acceptance by the international community.

Before concluding this study, it bears mentioning that the effectivity of the preceding recommendations will also depend on the capability of the ICRC, under its proposed expanded mandate, to make binding characterization of an ongoing conflict. More particularly, there is need to pinpoint the precise situations which call for the application of the new instrument – on one end, those attaining the level of hostility contemplated by existing humanitarian instruments, and on the other end, those forms of internal disturbance characterized by a certain seriousness or duration, which may or may not degenerate into open struggle but would nonetheless compel the authorities to utilize extensive repressive or preventive measures. Considering the inherent complexity attending this task, it is thus imperative that some "objective tests" be furnished to determine the status of the conflict.

As earlier indicated, the nature and extent of government response to a national emergency may be utilized to determine whether the situation falls within the material scope of the proposed instrument. Thus, for instance, resort to the use of military force by the government, instead of ordinary police measures, can be reflective of the fact that a situation has deteriorated to the extent that an application of the proposed instrument is called for. Or the fact that instances of actual displacement are taking place brought about by the hostilities can provide a firm basis for a declaration by the ICRC to put the proposed instrument into effect. In such instances, it will be difficult, if not altogether impossible, for the State concerned to evade its obligations under the instrument.