TOWARDS A GENERAL RIGHT TO REPARATION FOR INTERNALLY DISPLACED PERSONS?

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Abstract: The paper argues that there is a shift towards a general right to reparation for internally displaced persons (IDPs) gradually materializing under international law. A general right is a right which is addressed specifically to IDPs as holders of a particular legal status, pertains to any violations of international law or any harm suffered by IDPs, and has its source in customary law. To illustrate the shift, reparation regimes to which IDPs have been traditionally subject under human rights law, international humanitarian law, and international criminal law, are exposed. This regulation is compared and contrasted with the rules on reparation which are contained in several more recently adopted legal instruments focussing specifically on IDPs, such as the 1998 Guiding Principles on Internal Displacement, or the 2009 Kampala Convention. In its second part, the paper discusses two questions relating to the emerging general right of IDPs to reparation. One pertains to the forum in which the right could be claimed, the other has to do with the concrete parameters of this right (the type of acts that would trigger the right, the identity of relevant duty holder(s) etc.). The two substantive sections are preceded by a terminological remark elucidating the main terms used in the text (IDPs and reparation).

Resumé: Článek tvrdí, že v současném mezinárodním právu se postupně vyvíjí obecné právo vnitřně přesídlených osob (IDPs) na odškodnění. Obecným právem se zde rozumí právo, které je adresováno specificky IDPs coby nositelům zvláštního právního statusu, vztahuje se na jakákoli porušení mezinárodního práva či jakoukoli škodu utrpěnou IDPs a vychází z mezinárodního obyčeje. Vývoj obecného práva na odškodnění je dokumentován v několika krocích. Nejprve jsou stručně představeny reparační režimy, jimž byly IDPs tradičně podřízeny v rámci práva lidských práv, mezinárodního humanitárního práva a mezinárodního trestního práva. Tyto režimy jsou následně srovnány s ustanoveními týkajícími se odškodnění, která obsahují některé novější smluvní instrumenty specificky zaměřené na IDPs, jako jsou Řídící principy pro vnitřní přesídlení (1998) a Kampalská úmluva (2009). Ve své druhé části se článek zabývá dvěma otázkami souvisejícími s vyvíjejícím se právem na odškodnění. První se týká fóra, na němž je možno právo uplatnit, druhá konkrétních parametrů, jež by toto právo mělo mít (typ jednání dávající vznik právu, okruh nositelů odpovídajících povinností apod.). Obe věcné části textu předchází terminologická poznámka objasňující základní pojmy textu (IDPs a odškodnění).

Key words: internally displaced persons, reparation, human rights, international humanitarian law, international criminal law.

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Introduction

Internally displaced persons (hereafter IDPs) are among the most vulnerable groups of people. Evicted from their habitual place of residence by natural or manmade causes, forced to flee to a different part of the country and settle there in conditions rarely permitting a return to normalcy, they become exposed to various sorts of outrageous practices violating their human rights and dignity.[1] Does international law endow them with a right to reparation for the material or moral harm that they suffer in these circumstances? And if so, in which forum and under what conditions can they claim such a right? These are just two of the many legal questions which surround the issue of an IDPs' right to reparation. Although this issue has so far largely escaped scholarly attention, the number of persons facing internal displacement and the increasing pressure both they themselves and those acting in their interest put on governments indicate that time has come to bring it to the forefront of legal debate and to cast some light on it. That is what this paper hopes to do.

In line with the two questions stated above, the paper is divided into two sections. The first section puts forward the claim that *a shift towards a general right to reparation for IDPs is gradually materializing under international law.* A general right is a right which is addressed specifically to IDPs as holders of a particular legal status, pertains to any violations of international law or any harm suffered by IDPs, and has its source in customary law. To illustrate the shift, the reparation regimes to which IDPs have been traditionally subject under the three branches of international law applicable to them, i.e. human rights law, international humanitarian law, and international criminal law, are exposed. This regulation is then compared and contrasted with the rules on reparation contained in several more recently adopted legal instruments, rules which specifically focus on IDPs, such as the 1998 *Guiding Principles on Internal Displacement,*[2] or the 2009 *Kampala Convention.*[3] The second section of the paper briefly discusses two questions relating to the emerging general right of IDPs to reparation. One question pertains to the forum in which the right could be claimed, the other has to do with the specific parameters of this right (the

[1] See Mooney, E., The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern, *Refugee Survey Quarterly,* Vol. 24, Issue 3, 2005, pp. 9-26.

[2] The text is available at http://www.idpguidingprinciples.org/ (visited 6 January 2011).

[3] The text is available at http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/0541BB5F1 E5A133BC12576B900547976/$file/Convention(En).pdf (visited 6 January 2011).

type of acts that would trigger the right, the identity of the relevant duty holder(s) etc.). The two substantive sections are preceded by a terminological remark.

Terminological Remark

This paper uses two crucial terms which need to be defined from the outset to avoid misunderstandings. The first term is that of ***Internally Displaced Persons*** (IDPs). Introduced in the second half of the 20th century, the term remained originally undefined, giving rise to doubts and controversies.[4] Yet, over the past decade, the definition contained in the preamble of the 1998 *Guiding Principles on Internal Displacement* seems to have gained increasing acceptance in the international community. It has been, among others, cited *expressis verbis* in the 2009 *Kampala Convention* and, likewise, in the 2006 *Protocol on the Property Rights of Returning Persons,* adopted at the International Conference of the Great Lake Regions. Since these treaties, unlike the *Guiding Principles,* are legally binding, it could be convincingly argued that the definition is no longer merely descriptive[5] or operational,[6] but has acquired – or has been acquiring – an important normative dimension as well.

Under this definition, IDPs are *"persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border".*[7] Two elements of the definition merit consideration. The first is the coercive or otherwise involuntary nature of internal displacement,[8] which makes IDPs similar to refugees. Yet, unlike refugees,[9] IDPs

[4] See Phuong, C., *The International Protection of Internally Displaced Persons,* Cambridge University Press, Cambridge, 2004, pp. 13-38.

[5] In his high-quality annotations to the *Guiding Principles,* authored in 2000 and revised in 2008, the former UN Special Rapporteur on the Human Rights of IDPs, Walter Kälin, stresses that *"the notion of who is an internally displaced person /.../ is not a legal definition. Becoming displaced within one's own country of origin or country of habitual residence does not confer special legal status in the same sense as does, say, becoming a refugee".* W. Kälin, *Guiding Principles on Internal Displacement. Annotations,* ASIL and the Brooking Institute, 2000 and 2008, p. 2 and 4 (respectively). While this claim could have been true in 2000, it is less certain whether it is still valid in 2011. In spite of Kälin's conviction that IDPs *"need not and cannot be granted a special legal status under international law comparable to refugee status"* (ibid., p. 3 and 4 respectively), it seems that international legal regulation has been gradually taking the direction of creating a special status for IDPs.

[6] Catherine Phuong makes a distinction between a legal definition which *"seeks to establish a legal regime of international protection"* and an operational definition which *"is aimed at facilitating material assistance and protection measures on the ground".* C. Phuong, op. cit., p. 28. She believes that with regard to IDPs, only the latter definition is available. Again, this may have been a correct assessment of the situation in 2003, when her book was completed, but it is open to doubt whether this assessment could still be upheld today.

[7] Par. 2 of the Preamble of the *Guiding Principle.* See also Article 1(k) of the *Kampala Convention.*

[8] The 2009 *Kampala Convention* in its Article 1(l) explicitly defines internal displacement as "*the involuntary or forced movement, evacuation or relocation of persons or groups of persons /…/".*

[9] See Article 1 of the 1951 *Convention Relating to the Status of Refugees* and Article 1 of the *Convention Governing the Specific Aspects of Refugee Problems in Africa.*

do not need to fit into one of the enumerative categories specifying the exact causes of their displacement. Indeed, those causes may be quite diverse, ranging from armed conflicts, violence below the threshold of armed conflict, massive violations of human rights, or natural disasters, up to development projects, or forced relocations.[10] A shorter list of these causes is provided in the definition itself. The use of the expression *"in particular"* confirms that the list is demonstrative, and other causes of displacement may be legitimately taken into account as well. It is nevertheless evident that the category of IDPs does not encompass persons who move inside their country voluntarily, to find a better place to live or to improve their economic situation.

The second element of the definition pertains to the fact that internal displacement takes place, as the word "internal" indicates, within national borders. In contrast to refugees, IDPs do not cross internationally recognized borders but remain within the territory of the state in which they have their homes or places of habitual residence. As Walter Kälin rightly states, this requirement is not to be interpreted restrictively. It would be met even by those who *"have to transit through the territory of a neighbouring state in order to gain access to a safe part of their own country; first go abroad and then return (voluntarily or involuntarily) to their own country but cannot go back to their place of origin/habitual residence or home /.../; or left voluntarily to another part of their country but cannot return to their homes because of events occurring during their absence that make return impossible or unreasonable"*.[11] From the legal point of view, the territorial element is of great import. People within the jurisdiction of their state have always been treated differently under international law than those outside its jurisdiction. Although the sanctity of the sovereignty principle and the impenetrability of the *"domaine réservé"* have been significantly diminished over the past century, the distinction between what is inside and what is outside states maintains its relevance. This explains why various initiatives aimed at merging the legal regimes applicable to IDPs and refugees[12] have so far been unsuccessful, and IDPs remain a legally distinct category of persons.

The second crucial term used in this article is that of ***reparation.*** Under international law, the term has traditionally been linked to the area of state responsibility, where it is used to refer to measures which aim at *"wiping out all the consequences of the illegal act and re-establish the situation, which would, in all probability, have existed if that act had not been committed"*.[13] In this conception, the duty to provide reparation is a logical consequence of the occurence of an international wrongful act imputable to a state. It is *"a principle of international law that any breach of an engagement involves an obligation to make reparation"*.[14] Reparation may take the form of restitution,

[10] For more details, see Phuong, C., op. cit., pp. 29-33.

[11] Kälin, W., 2008, op. cit., pp. 3-4.

[12] See Lee, L. T., Internally Displaced Persons and Refugees: Toward a Legal Synthesis?, *Journal of Refugee Studies,* Vol. 9, No. 1, 1996, pp. 27-42. For a rather critical comment, see Phuong, C., op. cit., pp. 24-25.

[13] PCIJ, *Chorzów Factory Case*, *Poland v. Germany,* Merits, Series A, No.17, 1928, p. 47.

[14] Ibid., par. 103. See also Article 31 of the *Articles on Responsibility of States for internationally wrongful acts,* in UN Doc. A/56/10, *Report of the International Law Commission on the work of its Fifty-third*

compensation, or satisfaction. Restitution, seen as the preferred form, aims at re-establishing the situation *ex ante*, i.e. the situation which existed before the wrongful act was committed. Compensation, financial in nature, takes place when restitution is either impossible or would involve *"a burden out of all proportion to the benefit deriving from restitution instead of compensation"*.[15] Satisfaction, a non-pecuniary form of reparation, either complements one of the two previous forms or is provided autonomously. It may consist, for instance, of *"an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality"*.[16]

The instrument of reparation (especially in the form of compensation) is not confined to the responsibility regime only. It additionally constitutes an important element of another accountability regime known in international law, that of liability. Liability (also called strict/absolute responsibility) posits that the obligation to make reparation stems from the mere fact that damage or injury has occurred, even if it has not been brought about by an unlawful act.[17] So far, the liability regime has been largely confined to hazardous activities, often implying the use of modern technologies, where risks are high and the potential damage enormous. Examples include space activities, the nuclear energy industry, or the protection of the environment.[18] Yet, there is no reason why it could not extend to other areas of international law as well.

Both the responsibility regime and the liability regime originally applied to inter-state relations only. Modern developments in international law have, however, brought about their expansion or, rather, the creation of parallel accountability regimes applicable to other entities such as international organizations or individuals. The parallel regimes tend to operate on principles similar to those of responsibility or liability. It is presumed here that this is also the case of the reparation regime for IDPs, though the concrete parameters of this regime are only discussed in Section 2 of this paper.

Reparation to IDPs can take on any of the three classical forms. The choice of the appropriate form depends on the concrete circumstances and needs of particular IDPs. Yet, some general patterns of behaviour can probably be found in most situations. Reparation related to an act of internal displacement should take the form of restitution, which in this case means return to the original place of residence. Only when return is not possible, desirable, or indeed desired by the IDPs themselves, they can be, with their consent, resettled in another part of the country. Financial compensation may be provided to them in this context as well. Reparation for violations of law or harm incurred in the course of displacement would usually consist of a combination of restitution (property), compensation (for physical and

session, Official Records of the General Assembly, Fifty-sixth session, Supplement No. 10, November 2001, pp. 43-59.

[15] Article 35 of the *Articles,* ibid.

[16] Article 37(2) of the *Articles,* ibid.

[17] Goldie, L. F. E., Liability For Damage And the Progressive Development of International Law, *International and Comparative Law Quarterly,* Vol. 14, 1965, pp. 1189-1264.

[18] See, for instance, the resolution entitled *Responsibility and Liability under International Law for Environmental Damage,* adopted in 1997 by the Institute of International Law.

mental harm suffered), and satisfaction (acts of apology, etc.). There is no general rule on when reparation should be provided for. While reparation for the act of internal displacement is inherently linked to the end of displacement and would, in fact, bring about this end of itself, reparation for acts incurred in the course of displacement can in principle be claimed for and awarded at any time during or after internal displacement, depending again on the specific circumstances involved.

1. Towards a General Right to Reparation for IDPs

In this section, the author argues that there is a shift towards a general right to reparation for IDPs under international law. A general right is defined as a right[19] which fulfils three main criteria. First, it needs to be addressed specifically to IDPs as holders of a particular legal status. In this way, it applies to all IDPs and to IDPs only. Second, the right has to pertain to a large set of violations of international law or to any harm suffered by IDPs. It should not be associated with just one branch of international law but should cover a whole category of various unfavourable situations in which IDPs can find themselves. Finally, the right should be embedded in customary international law. In this way, it would be binding upon all states of the international community.[20] The argument in support of the emergence of a general right to reparation for IDPs unfolds in two steps. The first subsection exposes the three reparation regimes to which IDPs have been traditionally subject under human rights law, international humanitarian law, and international criminal law, and which have not granted them a general right to reparation. The second subsection illustrates the shift towards such a right, drawing on several recent instruments specifically focused on IDPs, such as the 1998 *Guiding Principles* or the 2009 *Kampala Convention.*

1.1 Three Reparations Regimes for IDPs

There is no doubt that under current international law, IDPs enjoy protection both against internal displacement and in the course of it. Traditionally, this protection has been granted by a set of legal norms stemming from three different but equally ***relevant branches*** of international law.[21] The first of these branches is

[19] The term *right,* as used in this article, encompasses both the right-claim to reparation, to which the duty to provide reparation on the part of the responsible/liable subject corresponds, and the liberty to claim this right. See Hohfeld, W. N., Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, *Yale Law Journal*, Vol. 23, 1913, pp. 16-59.

[20] Although the right to reparation does not need to be directed against states, states will always have a role to play in its regard (providing reparation themselves or establishing mechanisms allowing IDPs to claim reparations from other entities).

[21] For a very detailed, albeit no longer completely up-to-date account of these legal norms, see UN Doc. E/CN.4/1996/52/Add.2, *Internally displaced persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57. Compilation and analysis of legal norms,* 5 December 1995; and UN Doc. E/CN.4/1998/53/Add.1, *Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1997/39. Addendum. Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement.* 11 February 1998.

human rights law. Human rights law is based on the idea that *"all individuals are endowed with basic human rights which are inherent attributes of human dignity and which are recognized by virtue of international law that both recognizes and protects them"*.[22] The recognition and protection have to be provided for by states in the territory or under the jurisdiction of which individuals find themselves. The applicability of human rights law to IDPs does not seem controversial. Such persons remain within the confines of their state and are therefore fully entitled to have their human rights protected by it. The extent of applicable rights and the way in which they are implemented vary in dependence of the obligations binding upon a specific state. Only the *hard core* of human rights, which has acquired the status of customary rules, and the rights anchored in universally ratified treaties,[23] will apply invariably in all countries around the world.

The second applicable branch is international humanitarian law (hereafter IHL). IHL *"regulates the conduct of hostilities in and seeks to protect the victims of armed conflicts"*.[24] Unlike human rights law, which applies both in times of peace and war, IHL is applicable only in situations of armed conflicts.[25] Consequently, it does not lend protection to all IDPs but only to those who are caught up in a country facing an armed conflict. The circle of applicable rules differs depending on the type of conflict (international or non-international) and the obligations of a specific state. Yet, the development of a robust body of customary IHL rules[26] together with the gradual convergence of the legal regimes applicable to international and non-international armed conflicts have given rise to a set of uniform norms which apply in all armed conflicts. In contradistinction to human rights law, which is only binding upon states, IHL imposes obligations on all parties to armed conflict, be they states, national liberation movements, or armed opposition groups.

The third relevant branch of international law is international criminal law (hereafter ICL). ICL outlaws certain heinous international crimes, such as war crimes, crimes against humanity, or genocide, and establishes individual criminal responsibility for the perpetrators of these crimes. The regime is rather uniform in its substantive norms, which are nowadays considered mostly customary in nature, but differs in the procedural mechanisms aimed at enforcing the substantive norms at the national or international level. IDPs are protected by ILC in the same circumstances as any

[22] UN Doc. E/CN.4/1996/52/Add.2, op. cit., par. 13.

[23] Probably the only international treaty which could aspire to such a status is the 1989 UN Convention on the Rights of the Child with its 193 State Parties.

[24] UN Doc. E/CN.4/1996/52/Add.2, op. cit., par. 21.

[25] Armed conflict is as *"a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State"*. ICTY, *Prosecutor v. Duško Tadić,* Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, par. 70.

[26] Henckaerts, J.-M., Doswald-Beck, L., (eds), *Customary International Humanitarian Law*, Volume I (Rules), Volume II (Practice), Cambridge, International Committee of the Red Cross, Cambridge University Press, 2005.

other individuals, i.e. when they become victims of serious international crimes. In addition to the three branches of international law discussed above, IDPs may also indirectly, *per analogia,* enjoy the protection of international refugee law, which *"provides rules for the legal status and treatment of refugees in host countries".*[27] Yet, since this law serves more as a source of inspiration than as directly applicable law,[28] and since, moreover, it does not contain a specific reparation regime, it is not dealt with in this text in any greater detail.[29]

All of the three branches of international law applicable to IDPs regulate the issue of ***reparation***. Yet, they do so in quite distinct and possibly even diverging ways.[30] Human rights law links reparation to a previous violation of primary human rights. It does so either by virtue of specific treaty provisions,[31] or through a general clause which either obliges states to provide individual victims of human rights violations with effective remedies,[32] including reparation,[33] or authorises relevant monitoring bodies to decide on reparation in appropriate circumstances.[34] This regulation exists under conventional human rights law. It is less clear whether a right to reparation has emerged under customary human rights law and if so, whether it would result from any violations of human rights or just the most serious ones.[35] Although reparation under human rights law could take on any of the three classical forms (restitution, compensation, satisfaction), compensation is probably the most common.

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[27] UN Doc. E/CN.4/1996/52/Add.2, op. cit., par. 24.

[28] *„/…/ refugee law, by analogy, can be useful in proposing rules and establishing guidelines to protect the needs of the internally displaced."* Ibid., par. 25.

[29] See Klinov, R., *Reparations and Rehabilitation of Palestinian Refugees,* in Benvenisti, E., Gans, C., Hanafi, S., (eds), *Israel and the Palestinian Refugees,* The Max Planck Gesellschaft, Heidelberg, 2007, pp. 323-346.

[30] Due to the lack of adequate practice, it is unclear what the relationship between these different regimes is and which of them should be given priority in case of conflict. It seems nevertheless probable that in specific procedures initiated under any of the regimes, due account would be taken of parallel or precedent procedures relating to the same events that would have taken place under another regime.

[31] Article 9(5) of the ICCPR: *"Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."*

[32] Article 2(3) of the ICCPR: *"Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy /…/; (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent /…/ authorities; (c) To ensure that the competent authorities shall enforce such remedies when granted."*

[33] On the interpretation of the term remedy, see Shelton, D., *Remedies in International Human Rights Law,* Second Edition, Oxford University Press, Oxford, 2006. See also HRC, *Hill v. Spain,* Communication No. 526/1993, 2 April 1997 confirming that under *"article 2, paragraph 3 (a), of the Covenant, the authors are entitled to an effective remedy, entailing compensation"* (par. 16).

[34] Article 41 of the ECHR: *"If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."*

[35] See UN Doc. A/RES/60/47, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law,* 21 March 2006.

The right to reparation for human rights violations can be invoked by any individual, including IDPs. In their case, it can arise both from the act of internal displacement and from any violation suffered in its course. While the existence of an independent right not to be displaced has not been yet established with sufficient clarity under international law,[36] it is clear that in view of its coercive or otherwise involuntary nature, the displacement can, and often does, involve violations of various human rights (right to life, right to liberty, right to family life etc.). The same applies to the acts occurring in the course of displacement. Here again, various human rights can be, and often are, encroached upon (attacks on life, physical integrity, loss of private property, encroachments upon the liberty of movement, denial of adequate housing etc.). The applicability of human rights to IDPs and their right to obtain reparation for any violations committed against them have been repeatedly confirmed by international human rights bodies.[37]

The situation under IHL is less clear, as far as reparation is concerned. This is so despite the fact that IHL contains norms which are specifically designed to protect IDPs both against displacement and in the course of it. IHL prohibits *"the displacement of the civilian population /…/ for reasons related to the conflict, unless the security of the civilians /.../ or imperative military reasons so demand"*.[38] *If displacement occurs, "all possible measures must be taken in order that the civilians concerned are received under satisfactory conditions of shelter, hygiene, health, safety and nutrition and that members of the same family are not separated"*[39] *and "the property rights of the displaced persons must be respected".*[40] *Whereas those primary norms are relatively clear, it is uncertain whether their violation gives rise to an individual right to reparation.* In this context, Articles 3 of the 1907 Hague Convention IV and Article 91 of the 1977 Additional Protocol I to the Geneva Conventions are often invoked as a possible legal basis.[41] They stipulate that *"a belligerent party which violates the provisions /.../ shall, if*

[36] See Stavropoulou, M., The right not to be displaced, *American University Journal of International Law and Policy,* Vol. 9, 1994, pp. 689-749.

[37] See ECHR, *Saghinadze and others v. Georgia,* Application No. 18768/05, 27 May 2010 (Georgia was ordered to either return the right to use the cottage confiscated by the state or to give the applicant another appropriate lodging, or to pay him a reasonable monetary compensation; in addition, Georgia was held liable to pay 15,000 EUR in respect of non-pecuniary damage). See also ECHR, *Mammadov v. Azerbaijan,* Application No. 4762/05, 17 December 2009. Compare with a set of Azeri cases in which people complained against the non-enforcement of Azeri court judgments ordering the eviction of Nagorno Karabakh IDPs from flats which had been sold to the complainants, e.g. the ECHR, *Hajiyeva and Others v. Azerbaijan,* Applications Nos. 50766/07, 50786/07, 50871/07 and 50913/07, 8 July 2010.

[38] Article 17(1) of *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II).* See also Article 49 of Geneva Convention IV and Rules 129 and 130 of the ICRC Study on *Customary International Humanitarian Law.*

[39] Rule 131 of the ICRC Study on *Customary International Humanitarian Law.* See Article 17(1) of Protocol II.

[40] Rule 133 of the ICRC Study on *Customary International Humanitarian Law.*

[41] See Bílková, V., Victims of war and their right to reparation for violations of international humanitarian law, *Miskolc Journal of International Law,* Vol. 4, No. 2, pp. 1-11; Gillard, E.-C., Reparation for violations of international humanitarian law, *International Review of the Red Cross,* Vol. 85, No. 851, September

the case demands, be liable to pay compensation" (Article 3). It is believed that this rule has become customary.

Yet, its applicability to IDPs raises several difficulties. The rule applies *stricto sensu* to inter-state wars only, whereas most IDPs are confronted with situations of non-international armed conflicts.[42] Moreover, it is often seen as regulating inter-state relations only, not giving rise to an individual right to reparation. So far, the rule has been, mostly unsuccessfully, relied upon by individuals in proceedings relating to the events of the Second World War and the 1999 NATO aerial campaign against the Federal Republic of Yugoslavia. None of the cases concerned IDPs. Yet, IDPs certainly could seek to make use of the IHL reparation mechanism, either by invoking Article 3 or by finding a legal basis in any of the general peace or reparation treaties or relevant UN Security Council resolutions (1919 *Versailles Treaty*, 1951 *San Francisco Peace Treaty*, 2000 *Agreement between Eritrea and Ethiopia,* 1991 Resolutions establishing the UN Claims Commission etc.). The outcome of such proceedings remains nonetheless uncertain and, moreover, this avenue is only open to IDPs caught up in armed conflicts.

ICL is primarily aimed at prosecuting persons responsible for serious international crimes (which in itself could be probably seen as a form of satisfaction). In recent years, however, specific reparation regimes for the victims of such crimes have been developed in ILC. The most elaborate of these is probably that established by virtue of Article 75 of the Rome Statute of the International Criminal Court (hereafter ICC). This provision entitles the ICC to determine in its decisions, *"upon request or even on its own motion, the scope and extent of any damage, loss and injury to, or in respect of, victims"* (par. 1) and to specify, in an order against a convicted person, appropriate reparation, *"including restitution, compensation and rehabilitation"* (par. 2). The award for reparation can also be made through the Trust Fund established under Article 79 of the Statute.[43] While the ICC has not so far had the occasion to effectively use its powers under Article 75, it is obvious that this mechanism is accessible to IDPs or, more precisely, to those among them who have been victims of serious international crimes. The Rome Statute criminalizes forcible transfer of population[44] as well as various unlawful acts to which IDPs could be exposed while displaced.

The survey of the three branches of international law applicable to IDPs reveals that each of them contains a reparation regime which is, *inter alia,* open to IDPs. The regimes are distinct from each other in many ways. Reparation under human rights

2003, pp. 529-553; Zegveld, L., Remedies for victims of violations of international humanitarian law, *International Review of the Red Cross,* Vol. 85, No. 851, September 2003, pp. 497-526.

[42] For a contrary view, see in Henckaerts, J.-M., Doswald-Beck, L., (eds), Vol. I, op. cit., pp. 537 and 545-550 (Rule 150). This view does not seem convincing, all the more so since its existence is largely supported by evidence drawn from human rights and international criminal law, not by IHL proper.

[43] See Dannenbaum, T., The International Criminal Court, article 79, and transitional justice: the case for an independent trust fund for victims, *Wisconsin International Law Journal,* Vol. 28, No. 2, 2010, pp. 234-298.

[44] See Articles 7(1)(d) and 8(2)(e)(viii) of the Rome Statute.

law is aimed at redressing the negative consequences of violations of primary human rights and is due from the state which is responsible, by commission or omission, for these violations. Reparation under IHL should make victims of armed conflicts better off and, at least theoretically, could fall on any party to the conflict accountable for IHL violations. Reparation under ICL is reserved for victims of serious international crimes and should, in principle, be settled by individual perpetrators.

The differences do not, however, prevent the regimes from sharing certain common features. First, none of the regimes applies specifically and exclusively to IDPs. This legal category is unknown to all of them and IDPs are treated just as any other individuals. Second, each of the regimes links the right to reparation to previous violations of its own norms. From that perspective, the regimes are, in a way, "self-contained". Thirdly, the three regimes have their main source in international treaties, though it is indisputable that customary rules relating to reparations evolve gradually in all the three branches of international law.[45] Each of these shared elements, and even more so a combination thereof, show that the regulation traditionally applied to IDPs, which draws on human rights law, IHL and ICL, does not endow IDPs with a general right to reparation.

1.2 Towards a General Right to Reparation for IDPs

The lack of a general right to reparation for IDPs has given rise to various problems of both a theoretical and practical nature. IDPs face specific problems and have particular needs not necessarily shared by the rest of the population. Moreover, they often find themselves in complex and rather chaotic settings which preclude them from studying the complexities of various international legal regimes and making a competent decision on which one of them to choose. Finally, the fact that some IDPs might benefit from a rather extensive reparation regime, while others could be completely cut off from any chance to get reparation, seems to collide with the fundamental principles of justice, humanity and equality. The realisation of these factors, together with a general development of international law towards a more individual-focused system, has brought about a gradual change in the legal regulation.

The starting point of this change and the true landmark in the evolution of the legal protection of IDPs came with the adoption of the 1998 *Guiding Principles on Internal Displacement.* The document was drafted by the then Representative to the UN Secretary-General on Internally Displaced Persons, Francis Deng,[46] and was subsequently endorsed by the UN Commission on Human Rights[47] and the UN General Assembly.[48] In his 2005 report titled In Larger Freedom, the

[45] See also Geissler, N., The International Protection of Internally Displaced Persons, *International Journal of Refugee Law,* Vol. 11, 1999, pp. 451-478.

[46] UN Doc. E/CN.4/1998/53/Add.2, *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39. Addendum: Guiding Principles on Internal Displacement,* 11 February 1998.

[47] UN Doc. E/CN.4/RES/1998/50, Internally Displaced Persons, 17 April 1998.

[48] UN Doc. A/60/L.1, 2005 *World Summit Outcome,* par. 132.

UN Secretary General Kofi Annan referred to the Guiding Principles as *"the basic international norm for the protection"*[49] of IDPs. The document has been repeatedly cited by international organs[50] and despite its non-binding nature (*soft law*) it has acquired great respect internationally. The Guiding Principles are the first instrument to treat IDPs as an autonomous category of persons with specific needs and preferences. Though the document primarily offers *"the compilation /…/ of legal norms pertaining to internally displaced persons"*[51] drawn from human rights law, IHL, and ILC, it is clear in acknowledging that *"there /…/ exist significant gaps and grey areas as a result of which the law fails to provide sufficient protection"*.[52] This situation forced the author to go beyond the mere scrutiny of existing norms and to try to formulate new rules which would fit into the system, filling in the gaps and grey areas. Such rules are designed to meet the needs of IDPs and are often devoid of a link to the three traditional branches of international law applicable to them. This is also the case with regard to reparation.

The issue of reparation is addressed in section 5 of the document, entitled *Principles relating to return, resettlement and reintegration.* Principle 28 deals with voluntary return or resettlement of IDPs. It imposes upon the competent authorities the duty to *"establish conditions, as well as provide the means"* (par. 1), which would allow IDPs *"to return voluntarily /.../ to their homes or places of habitual residence, or to resettle voluntarily in another part of the country"* (ibid.). Principle 29 relates to the restitution of, or compensation for, *"their* (IDPs') *property and possessions which they left behind or were dispossessed of upon their displacement"* (par. 2). The competent authorities have the duty to assist IDPs in recovering their property or in *"obtaining appropriate compensation or another form of just reparation"* (ibid.). It is interesting to note that section 5, unlike most other sections of the document, does not speak in terms of individual rights of IDPs but in terms of duties of states, without specifying who the holders of the corresponding rights are (individuals, other states?). The section is also quite limited in its scope, focusing solely on return and restitution of lost property. The omission of references to other possible forms of reparation could have resulted from the drafter´s belief (substantiated or not) that these forms are adequately covered by existing norms of international law and that, moreover, they are not specific to IDPs. It is in any event clear that the Guiding Principles do not posit a general right of IDPs to reparation; yet, they start moving towards such a right by recognizing that IDPs have specific needs which should be addressed in a direct and autonomous way.

[49] UN Doc. A/59/2005, *In larger freedom: towards development, security and human rights for all. Report of the Secretary-General,* 21 March 2005, par. 210.

[50] See the Legal Database on the Guiding Principles, available at http://www.idpguidingprinciples.org (visited 6 May 2011).

[51] UN Doc. E/CN.4/1998/53/Add.2, *Internally Displaced Persons, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39.* 11 February 1998, par. 6.

[52] Ibid.

The publication of the *Guiding Principles* drew attention to problems faced by IDPs and intensified the debate on the best legal solution to these problems. One of the first contributions came from the International Law Association (ILA), a non-profit organization aimed at *"the study, clarification and development of international law, both public and private, and the furtherance of international understanding and respect for international law".*[53] In its 2000 session, the ILA adopted the *London Declaration of International Law Principles on Internally Displaced Persons,*[54] which had been drafted by its Committee on IDPs chaired by Luke T. Lee. Similarly to the *Guiding Principles,* the *London Declaration* also primarily compiles *"principles of international law as applicable to the legal status of internally displaced persons"* (preamble). Yet, again, it goes beyond mere compilation and adds new rules to make the regulation more coherent. This ambition is clearly reflected in the approach to reparation. For the first time, reparation is addressed in an autonomous provision stipulating that IDPs *"shall be entitled to restitution or adequate compensation for property losses or damages and for physical and mental suffering resulting from their forced displacement"* (Article 9). Another provision grants IDPs the right *"to return to their homes or places of habitual residence freely"* (Article 5(1)). These two provisions make the London Declaration the first document to recognize that IDPs have a right to reparation for the act of displacement and any material and moral harm suffered in its course, without linking this right to any traditional legal and reparation regime.

The gradual change in the legal regulation of reparation for IDPs has been confirmed in a series of instruments adopted within the framework of regional international organization in the 2000s. In addition to several non-binding resolutions, which usually only grant the right to return,[55] this series includes two binding international treaties, namely the 2006 *Protocol on the Property Rights of Returning Persons*[56] and the 2009 *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention).* The two treaties were adopted in the African context, the former in the sub-regional setting of the Great Lakes Region, the latter in the framework of the African Union. The increased interest in IDPs in Africa can be easily explained by the fact that the African continent is one of those most exposed to the phenomenon of internal displacement.

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[53] ILA, *About us*, available at http://www.ila-hq.org/en/about_us/index.cfm (visited 18 March 2011).

[54] For the text, see *International Journal of Refuge Law,* Vol. 12, 2000, pp. 672-679; and L. T. Lee, The London Declaration of International Law Principles on Internally Displaced Persons: Its Significance and Implications, *International Journal of Refuge Law,* Vol. 14, No. 1, 2001, pp. 70-78.

[55] CoE, Parliamentary Assembly Resolution 1631 (2003), *Internal displacement in Europe,* 25 November 2003, par. 13; CoE, *Recommendation Rec(2006)6 of the Committee of Ministers to member states on internally displaced persons,* 5 April 2006, par. 12; OAS, General Assembly Resolution 2417, *Internally Displaced Persons,* June 2008, par. 6.

[56] The Protocol is not aimed only at IDPs but at returnees in general, the term being defined as encompassing *"internally displaced persons and refugees who return to their original places of residence in their country of origin"* [Article 1(8)].

Both the *Protocol* and the *Kampala Convention* contain provisions on reparation. The Protocol is, in fact, almost exclusively concerned with this matter. At the same time, it deals solely with the restitution of or compensation for the loss of property. States are called upon to assist IDPs in the recovery of their property. When such recovery is not possible, states shall compensate the loss, if they are directly responsible for it, or *"establish a framework for enabling the compensation /.../ by those responsible for the loss"* [Article 8(2)], in other situations. Similarly to the Guiding Principles, the Protocol speaks in terms of duties and it is not clear whether it aims to establish an individual right to reparation.

The *Kampala Convention* is the first international treaty (*hard-law*) which focuses specifically on IDPs and seeks to create a truly comprehensive legal regime for them. The issue of reparation is addressed primarily in Articles 11 and 12, though other provisions could be seen as relating to it as well.[57] Article 11 urges states to *"seek lasting solutions to the problem of displacement by promoting and creating satisfactory conditions for voluntary return, local integration or relocation /.../"* (par. 1). Article 12 stipulates that effective remedies need to be provided to persons affected by displacement and that those persons need to be able to claim reparation. Reparation is due from states, when they refrain *"from protecting and assisting IDPs in the event of natural disasters"* (par. 3). In other situations, states have to *"establish an effective legal framework to provide just and fair compensation and other forms of reparations, where appropriate, /.../ in accordance with international standards"* (par. 2).

The evolution occurring at the international level has been seconded at the national level. Several countries have over the past two decades enacted legislation relating to IDPs. Such legislation has been put in place in countries[58] as different as Bosnia and Herzegovina,[59] Georgia,[60] Peru,[61] the Russian Federation,[62] or Sri Lanka.[63] In view of the differences in the circumstances existing in these countries, it is not surprising that the laws differ in scope and comprehensiveness. Yet, they all share some common features: they focus specifically and sometimes exclusively on IDPs;[64] they form part of the national legal systems but tend to incorporate elements

[57] In fact, the set of measures that reparation may encompass is so wide-ranging that it is somewhat difficult to draw the line between provisions which relate to reparation and those that do not.

[58] For a more comprehensive survey, see the database of the *Brooking-Bern Project on Internal Displacement,* available at http://www.brookings.edu/projects/idp.aspx (visited 24 January 2011).

[59] *Law on Displaced Persons and Returnees in The Federation of Bosnia and Herzegovina and Refugees From Bosnia and Herzegovina,* FBih Official Gazette, No. 15/05 of 16 March 2005.

[60] *Law of Georgia on Internally Displaced Persons* (amended in 2001, 2005 and 2006)*;* and *Law of Georgia on Property Restitution and Compensation for the Victims of Conflict in the Former South Ossetian Autonomous District in the Territory of Georgia* (2006).

[61] *Law Concerning the Internally Displaced* (2004).

[62] *Law of the Russian Federation on Forced Migrants* (1993, amended in 1995 and 2003).

[63] *National Framework for Relief, Rehabilitation and Reconciliation* (2002); *Tsunami (Special Provisions) Act* (2005); *Resettlement Authority Act* (2007).

[64] Some of the legislative acts focus exclusively on IDPs, others deal with refugees, returnees or other similar categories of persons as well.

of international law as well; and they contain provisions on reparation.[65] Those provisions are in most cases primarily focused on voluntary return/resettlement and the restitution of/compensation for lost property, although some of the laws adopt a more generalist approach.[66] Unlike the two African treaties, national laws often do not see the reparation issue solely through the lens of state obligations but refer directly to individual rights.

A survey of the practice documented at the international and national levels indicates that there is a gradual shift towards a general right to reparation for IDPs. IDPs are more and more frequently treated as an autonomous legal category with specific needs. These needs manifest themselves also in the area of reparation, where emphasis is placed upon a voluntary return or resettlement, the recovery of the lost property and, less frequently, the redress of the moral and psychological harm suffered. Moreover, the right to reparation is made less conditional on a previous violation of primary norms belonging to one of the traditional branches of international law. Rather, it is linked automatically to an act of displacement, the loss of property or an attack upon physical or moral integrity, though the specific circumstances under which such cases of interference occur may have influence upon the modalities of the right. These facts indicate that a general right to reparation for IDPs has been gradually emerging on the international scene. Yet, in the current stage of evolution, it would be premature to claim that such a right has already materialized. The legal regulation is not close-knit, widespread or representative enough to be able to give rise to a new rule of (customary) international law. Moreover, the contours of the new right remain unsolidified, since the available legal instruments do not treat the reparation issue in a uniform way. Yet, though all the elements of the general right are not present as yet, it seems that there is an evolution towards the creation of such a right. It is thus appropriate to look at the concrete parameters that such a right could or should acquire.

2. Concrete Parameters of a General Right of IDPs to Reparation

In view of the conclusion reached in the previous sections, it is evident that this section involves considerations of both a *de lege lata* and *de lege ferenda* nature. In other words, it combines lessons learnt from the empirically observable international and national practice with theoretical reflections upon what the general right to reparation for IDPs could and should be like. Two questions deserve attention in this context. The first relates to the forum in which the right to reparation could be claimed by IDPs. The other focuses on several parameters of this right, especially the type of act that would trigger it, and the identity of the relevant duty holder(s).

[65] Some of the legislative acts deal with reparation issues in just a couple of provisions, while others – and definitely not a minority – are wholly focused on those issues.

[66] See, for instance, the Peruvian *Law Concerning the Internally Displaced* (2004).

2.1 Choice of the Appropriate Forum

There is no privileged forum in which a general right to reparation for IDPs could be claimed. Under the reparation regimes embedded in the traditional branches of international law, IDPs could present their claims to the adjudicative organ competent for the application and interpretation of the rules belonging to the given branch. Such organs exist both at the national and international levels and are judicial, quasi-judicial or administrative in nature. Under human rights law, most claims are settled before national courts, but international organs, such as the European Court of Human Rights, the Inter-American Court of Human Rights, or the UN Human Rights Committee, are also available. These organs are competent, once a case falls within their jurisdiction and all requirements of admissibility are met, to consider individual complaints and award,[67] or recommend,[68] reparation for violations of human rights (often in the form of financial compensation).

Under IHL, individual claims are mostly dealt with by domestic courts or specifically established national or international bodies such as the UN Claims Commission created by the UN Security Council in the aftermath of the first war in Iraq (1991). Since the jurisdiction of regular courts is still contested and these courts encounter important substantive or procedural problems (jurisdictional immunities, political acts doctrine etc.), specialized organs have become the preferred option in recent armed conflicts, provided the post-conflict situation has allowed for their creation. Individual reparation claims under ILC are also settled before either domestic courts, in proceedings regulated by national legislation, or before international courts, if their statutes so determine, as the Rome Statute of the ICC does. It is evident that the choice of the appropriate forum reflects the main features of the traditional regulation: there are no specific organs created just for IDPs and the procedures under the three branches of international law differ considerably.

The gradual emergence of a general right to reparation for IDPs could hardly remain without impact upon the choice of the appropriate forum. Two main alternative options are available here. First, common courts or administrative bodies operating at the national or international level could be left to cope with reparation claims presented by IDPs.[69] This option seems well suited for countries in which internal displacement occurs on a rather sporadic basis. Second, the claims for reparation could be settled by specialised courts or administrative bodies (a claims commission etc.) established by individual states, groups of states or international organizations. This option would be appropriate when dealing with situations involving massive and large-scale transfers of population inside a country, independently of the specific causes of such transfers. The practice witnessed at the

[67] See Article 50 of the ECHR and Article 63(1) of the ACHR.

[68] See Article 4(2) of the Optional Protocol to the ICCPR.

[69] Compare Cepeda-Espinosa, M. J., *How far may Colombia's Constitutional Court go to protect IDP rights?,* Brookings-Bern Special Issue, available at http://www.fmreview.org/FMRpdfs/BrookingsSpecial/13.pdf (visited 5 January 2011).

national level, under the legislation adopted in various countries throughout the world, seems for the moment to give credence to these conclusions. No proposals aimed at the creation of a permanent international organ tasked to settle reparation claims of IDPs have been presented so far. Indeed, taking into account the politically sensitive nature of the topic, such proposals would probably be doomed to fail. The establishment of *ad hoc* international reparation bodies for IDPs seems more realistic and could materialize in the future.

2.2 Other Parameters of a General Right of IDPs to Reparation

Two other questions remain to be discussed, namely the nature of the act which triggers the right to reparation and the identity of the relevant duty holder(s). Under the three traditional branches of international law, the right to reparation is linked to a previous violation of primary legal norms of the given branch. Those norms protect IDPs both against internal displacement itself and against attacks upon their life, human dignity, physical and moral integrity, private property etc. Thus, the traditional reparation regimes are clearly based on the responsibility logic (responsibility for violation). The emerging general right to reparation does not, by contrast, seem to be necessarily conditional on a previous unlawful act. While this requirement is not absent from the recent national or international instruments, it is often complemented by, or even replaced with, an emphasis placed upon the existence of harm/damage (forced transfer, loss of property, moral harm etc.). This element is more and more frequently considered sufficient to trigger the reparation mechanism. Thus, the new reparation regime for IDPs emerging on the international scene tends to be at least partially based on the liability logic (responsibility for harm/damage). The change could be linked to the simple fact that the existence of harm/damage is usually easier to prove and the liability logic makes it possible to streamline the regulation by imposing upon states the same reparation obligations towards all of their IDPs.

The first question is closely linked to the second one, which seeks to identify the specific holder(s) of the reparation duty. In this case, the three traditional branches of international law are not completely uniform in their approach: human rights law addresses the duty to states; IHL focuses on states and armed opposition groups; and ICL turns towards individual perpetrators and, potentially, the international community as a whole. The emerging general right to reparation has to overcome this lack of uniformity in some way. Two main models have been used so far, both reserving an important place for states. Under the first model, states provide reparation for all violations/harm/damage caused to IDPs and it is up to them to decide whether they will subsequently seek recourse against the responsible entities. Under the second model, states provide reparation only for those violations/ harm/ damage which are directly imputable to them. Reparation for all other wrongs is due from those who have effectively caused them; yet, it is still incumbent upon states to establish mechanisms facilitating such provision. The two models could be combined in various ways, with the first, for instance, being used in cases of massive

interference with IDPs' lives (internal displacement etc.), and the second applying to more isolated acts of such interference (certain violations occurring in the course of displacement).

Conclusions

As members of one of the most vulnerable categories of persons, IDPs are often exposed to various outrageous practices, from the act of displacement itself up to the loss of property, the severance of family ties, attacks upon their human dignity, etc.. It has become the task of international law to ensure that these practices, exempt from the *domaine réservé* of states, stop and that reparation is provided for any violation/harm/damage suffered due to them. The legal regulation in this area has been undergoing significant changes in the recent period. Traditionally, IDPs have not been treated as holders of an autonomous legal status entitling them to a special right to reparation. They could claim reparation under the three branches of international law applicable to them, i.e. human rights law, IHL and ICL. Yet, none of the relevant reparation regimes has been designed specifically for them, to suit their needs, and they all link the right to reparation to previous violations of the primary norms of such laws.

Over the past two decades, however, a series of legal instruments has been adopted at both the international and national level which indicates that a general right to reparation for IDPs has been gradually emerging under international law. This right is addressed to IDPs as holders of a particular legal status, and seeks to reflect their specific needs. It is not embedded in just one branch of international law, and it is not necessarily conditioned on a previous violation of this law; rather, it is often automatically linked to any harm/damage that may be incurred by IDPs. This general right has not yet been well established and has no firm roots in customary regulation. Moreover, its contours and content remain to be clearly defined, both with respect to the forum in which the right could be claimed and with regard to the specific parameters (the type of act that triggers the right, the identity of the relevant duty holder). Yet, despite this, the shift towards a general right to reparation for IDPs seems beyond doubt. The question is no longer *whether,* but *when, how and in what specific form* a general right to reparation for IDPs will emerge under international law.