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THE RIGHT NOT TO BE DISPLACED

Maria Stavropoulou*

INTRODUCTION

The number of displaced persons in the world increases everyday.¹ Displacement causes unacceptable levels of suffering and misery to those displaced; hostility and tension within the community that hosts them; and occasionally, threatens international peace and security. This phenomenon, however, is not, for the most part, a violation of international human rights norms. Indeed, until fairly recently, it was not even seen as a human rights problem. Presently, displacement is not construed consistently as a human rights violation and, thus, does not trigger international concern in a coherent manner.

Why has international human rights law responded so slowly to displacement? One explanation is that certain forms of displacement are so horrendous that some considered them violations of international customary law as well as international "common morality."² Therefore,

* LL.M., Harvard Law School; LL.M., University College London; Law Degree, Athens Law School. This Article was originally written for the thesis requirement of the LL.M. Program at Harvard Law School. The views expressed herein are those of the author's and do not represent those of the organizations with which she is associated. The author wishes to thank Philip Alston, Terje Einarsen, Chris Tennant, and Ashley Barr for their support and assistance in the course of writing this paper.

1. See, e.g., *Report of Jacques Quenod on Refugees, Displaced Persons and Returnees*, U.N. ESCOR, 2d Sess., 37th plen. mtg. ¶ 10, U.N. Doc. E/1991/109/Add.1 (1991) [hereinafter *the Quenod Report*] (noting that more than 18 million people are presently considered to be either refugees or persons who have crossed international borders and stating that another 24 million are thought to be internally displaced); Michael M. Cernea, *Internal Refugee Flows and Development Induced Population Displacement*, 3 J. REFUGEE STUD. 320, 332 (1990) (claiming that, according to one estimate, the number of people displaced because of development projects or policies is eight to 15 million); Jodi Jacobson, *Environmental Refugees: Nature's Warning System*, 16 POPULI 29, 31 (1989) (stating that, according to a 1989 estimate, the number of persons displaced because of environmental reasons is 10 million).

2. See PROSPECTS FOR A COMMON MORALITY 5 (Gene Outka et al. eds., 1993)

these violations do not need any specific articulation. Another possibility is that no human rights framework addressing displacement exists that would solve more problems than it would create.³ A third explanation is that the causes of displacement are so diverse and complex that even defining "displacement" is a difficult task.

The term "displacement" is interpreted in this paper to mean "forced" or "forcible" or "involuntary," as opposed to "voluntary" movement of people from their area of habitual residence. It is used interchangeably with terms such as "flight," "involuntary migration," or "forced movement."⁴ Displacement is defined broadly so as to include all cases of expulsion, deportation, forced resettlement, relocation, and transfer, whether across national borders or within the home country. Also, the term "displaced" refers to refugees, asylum seekers, persons internally displaced or forcibly resettled, expellees, and uprooted individuals or groups, unless otherwise specified.⁵

Can displacement be addressed in an adequate manner? Literature on this subject proposes two general approaches. The first is mostly anthropological and sociological in nature. Its findings suggest that the causes of displacement, in spite of their inherent complexity and interlinking, should be taken into account more seriously in the shaping of refugee and international human rights law than is presently the case.⁶ The second approach emerges mostly within human rights fora. Similar to the first approach this approach addresses the "root causes" of displacement in human rights terms, to prevent both new coerced movements and to provide better solutions to the existing ones.⁷

(discussing philosophical aspects of the international common morality).

3. It might, for instance, raise concerns about unjustified intervention by states anxious to stem increasing population mobility across their international borders.

4. Cf. REFUGEES AND DEVELOPMENT 15 (Ernst Boesch et al. eds., 1983) (asserting that a distinction exists between "migration" and "flight"). The basis of the distinction is that the term "migration" includes instances of involuntary migration. *Id.*

5. See *infra* notes 254-83 and accompanying text (considering the issue of coercion implied in the terms referred to in the text). Issues relating to the type of displacement, the scale of the movement, its timing, and the possibility of return are beyond the scope of this Article, although some inferences concerning them may be drawn from the analysis that follows.

6. See Michael M. Cernea, *Anthropological and Sociological Research for Policy Development on Population Resettlement*, in ANTHROPOLOGICAL APPROACHES TO INVOLUNTARY RESETTLEMENT: POLICY, PRACTICE AND THEORY 13, 13-34 (Michael M. Cernea & Scott E. Guggenheim eds., 1993) (discussing the need to consider cultural and social migration in fostering a solution).

7. See Guy S. Goodwin-Gill, *International Law and Human Rights Trends Con-*

This Article suggests a complementary approach to the two approaches mentioned above. The approach proposed in this Article contains two elements. The first element analyzes the existing responses of international law to the various causes of displacement and attempts to build a consensus that displacement is a human rights violation. The second element identifies the human rights that displacement violates. This inquiry also assesses the status of the human right not to be displaced.

The suggested approach of this Article is, of course, not unproblematic. One complication is that the pertinent legal provisions vary considerably. Another complication is that there are situations in which displacement is unavoidable or even vital to the interests of the affected people. The right not to be displaced is, therefore, qualified. On the other hand, there is a pressing need to define these qualifications in such a way as to avoid their broad interpretation and consequent misuse.

While the main thrust of this Article is to evaluate the right not to be displaced, the evaluation reveals some doctrinal and methodological issues. For instance, the term "displacement" implies a degree of coercion.⁸ Generally, what is the interplay between the element of coercion and the threat or actual violation of human rights? Could the mere existence of coercion empower those who are threatened with displacement to assert a violation or an imminent violation against the state or another entity implicated in the displacement? Could the right not to be displaced provide some insight into the issues of the agent of displacement, which is often hidden behind the notion of the state as the sole subject of international law? Could it give shape to various other human rights that are threatened? These issues involve broader questions that are connected to the notion of state sovereignty, international responsibility⁹ and general human rights theory, issues which are all beyond the scope of this Article. To the extent that these concepts are increasingly called into question, there may now exist a more positive environment for the enhancement or creation of human rights-based regimes for the protection of displaced persons.

cerning International Migrants and Refugees, 23 INT'L MIGRATION REV. 526, 526-46 (1988) (arguing that migrants and refugees fit squarely within the human rights context and should be discussed in that realm).

8. See *infra* notes 248-50 (discussing whether coercion is implicit in the term displacement).

9. See generally Rainer Hoffmann, *Refugee Generating Policies and the Law of State Responsibility*, 45 ZEITSCHRIFT FÜR AUSLÄNDISCHES UND ÖFFENTLICHES VÖLKERRECHT 694 (1985) (addressing the need for a new approach in international refugee responsibility).

A final issue that arises in the analysis of this Article concerns the impact of the right not to be displaced on refugee law. While this Article only addresses this complicated issue briefly, its significance merits further analysis. This Article, however, does suggest that the right not to be displaced could be incorporated into the inquiry of where to draw the line between "genuine" refugees and voluntary migrants. This is the traditional question posed by the refugee regime. In other words, displacement alone could be employed as *prima facie* evidence of a human rights violation and as a standard for international protection¹⁰ because a violation of the right not to be displaced manifests itself in the form of a coerced population movement.

Consequently, the lack of international protection in cases where such protection is needed requires a reconsideration of the existing humanitarian and refugee regimes, and the institutionalization of new types of protection. In addition, the definition of persecution needs to be re-interpreted along the lines of coercion and victimization, rather than targeting.¹¹

One challenge, then, is to define the measures that are required to ensure that the right not to be displaced will not be another unenforceable right. These measures may require research into the law or the factual situation of different countries and consideration of new instruments or new institutions. Another challenge is the ability to abandon this approach altogether, if there is evidence that the approach's effects are more harmful than beneficial.

I. PRELIMINARY ISSUES

A. DISPLACEMENT IN ITS HUMAN DIMENSION

This Article deals directly with the problem of the continuing frequent occurrence of people being displaced and being cut off from their roots, communities, and support systems, often with little notice and no chance to react. In such circumstances, there is immense potential for serious

10. See Guy S. Goodwin-Gill, *Nonrefoulement and the New Asylum Seekers*, in *REFUGEE LAW IN THE 1980S: THE NEW ASYLUM SEEKERS* 103, 108 (David Martin ed., 1986) (stating that "[w]henver temporary asylum is sought, the existence of danger caused by civil disorder, domestic conflicts, or human rights violations generates a valid presumption of humanitarian need In particular, the presumption should shift the burden of proof from the claimant to the state").

11. See ARISTIDE R. ZOLBERG ET AL., *ESCAPE FROM VIOLENCE* 269, 270 (1989) (discussing the distinction between analyzing persecution through coercion and victimization, as opposed to targeting).

violations of human rights both before and after the displacement, which can result in unacceptable levels of human suffering and misery.¹² This potential for harm has caused some to say that a "refugee movement is a grave human rights issue."¹³ The particular concern of this Article is for those who are at risk of displacement¹⁴ because of a deliberate governmental policy.¹⁵ The need for protection following this kind of displacement is vital.¹⁶ And absent any protection from the home country, such protection should come from the international community.¹⁷

B. ACCORDING INTERNATIONAL HUMAN RIGHTS STATUS TO THE RIGHT NOT TO BE DISPLACED

International human rights scholars caution against characterizing every problem that merits the attention of the international community

12. See Thayer Scudder et al., *From Welfare to Development: A Conceptual Framework for the Analysis of Dislocated People*, in INVOLUNTARY MIGRATION AND RESETTLEMENT 267 (Art Hansen et al. eds., 1982) (discussing the extremely stressful nature of relocation, which reduces the range of coping responses for the period following displacement). Presumably, when there is removal but no relocation, the stress is even more acute. *Id.*

13. See *Note on International Protection*, U.N. GAOR, Hum Rts. Comm., 41st Sess., ¶ 25, U.N. Doc. A/JAC.96/750 (1990) (noting that the refugee movement is of grave concern to the Commission).

14. See *Analytical Report of the Secretary-General on Internally Displaced Persons*, U.N. ESCOR, Hum. Rts. Comm., 48th Sess., Agenda Item 11(a), ¶ 103, U.N. Doc. E/CN.4/1992/23 (1992) [hereinafter *Analytical Report*] (stating that, presently, there is no clear statement of the human rights of those at risk of becoming displaced).

15. *Id.* ¶ 86.

16. See Guy S. Goodwin-Gill, *Who is a Refugee?*, in REPORT OF THE INTERNATIONAL CONFERENCE: REFUGEES IN THE WORLD-THE EUROPEAN COMMUNITY'S RESPONSE 53, 60 (Deny de Jong & Alex Voets eds., 1989) (applying the fundamental question, "is protection needed?" in each case where the issue of defining who is a refugee arises).

17. See JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 105-25 (1991) (noting that one of the key concepts in refugee law is the absence of the protection that is normally expected from the country of origin). See generally Atle Grahl-Madsen, *Protection of Refugees by Their Country of Origin*, 11 YALE J. INT'L L. 362 (1986) (arguing that refugee law must define the role that the state of origin should perform once a refugee has fled that state); Guy S. Goodwin-Gill, *The Language of Protection*, 1 INT'L J. REFUGEE L. 6 (1989) (stating that the deficiency of protection is a primary trait of refugee character, and international law implements its own protection to replace the country of origin's ability to provide it).

as an international human rights issue. Philip Alston, for instance, argues that a proposed new human right should fulfill certain conditions prior to being accorded international human rights status.¹⁸ The "right" not to be displaced, accordingly, should fulfill the following conditions:

(1) "reflect a fundamentally important social value;"¹⁹ (2) "be relevant, inevitably to varying degrees, throughout a world of diverse value systems;"²⁰ (3) "be eligible for recognition on the grounds that it is an interpretation of U.N. Charter obligations, a reflection of customary law rules or a formulation that is declaratory of general principles of law;"²¹ (4) "be consistent with, but not merely repetitive of, the existing body of international human rights law;"²² (5) "be capable of achieving a very high degree of international consensus;"²³ (6) "be compatible or at least not clearly incompatible with the general practice of states;"²⁴ and (7) "be sufficiently precise as to give rise to identifiable rights and obligations."²⁵

The following discussion focuses on whether the "right" not to be displaced satisfies the seven Alston conditions or has the potential of doing so.

According to Alston,²⁶ the perception of a particular gap and the formulation of the relevant aspirations for its solution comprise only the first step in the process of formulating and implementing human rights laws. The other two are: (1) the translation of some of these needs into specific legal norms through recognition by the relevant legislative forum; and (2) the identification and elaboration of means by which to promote realization of the legal norm.²⁷ This Article will introduce an analysis of the first step.

18. See Philip Alston, *Conjuring Up New Human Rights: A Proposal for Quality Control*, 78 AM. J. INT'L L. 607, 614 (1984) (arguing that as the perceived usefulness of the label of "human right" increases, specific interest groups will make a large effort to locate their cause under the term "human right").

19. *Id.* at 615.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. Philip Alston, *A Third Generation of Solidarity Rights: Progressive Development or Obfuscation of International Human Rights Law*, 29 NETH. INT'L L. REV. 307, 315 (1982).

27. *Id.*

C. THE CAUSES OF DISPLACEMENT

Arguably, the categorization and classification of the various types of population movements fare better in the hands of historians, political scientists, anthropologists, or demographers. The factual background in which displacement usually occurs is legally significant, however, because it helps to conceive and understand the "component protections (or rights) which give meaningful content to the right."²⁸ The following is a brief overview of the causes of displacement, which are often divided into "root" and "proximate" causes.

1. The Root Causes

Population movement is an international phenomenon. Although a comprehensive theory explaining international migration is lacking,²⁹ it is uncontested that it is very similar to other global "processes" that challenge the nation-state system,³⁰ foster increased interdependence,³¹

28. See James C.N. Paul, *International Development Agencies, Human Rights and Humane Development Projects*, 17 DENV. J. INT'L L. & POL'Y 67, 80 (1988) (arguing that basic "human rights" have a "symbiotic" relation with each other).

29. See Kimberly A. Hamilton & Kate Holder, *International Migration and Foreign Policy: A Survey of the Literature*, 14 WASH. Q. 195, 196 (1991) (stating that even though an analytical coherency exists in the field of displacement, a comprehensive understanding is still lacking). See generally GLOBAL TRENDS IN INTERNATIONAL MIGRATION (Mary Kritz et al. eds., 1981) (discussing economic, political, and social theories on international displacement); Anthony H. Richmond, *Sociological Theories in International Migration: The Case of Refugees*, in SOCIOLOGY OF INVOLUNTARY MIGRATION 7 (1988) (same).

Some scholars approach the issue of international migration from a political/historical perspective. See generally Aristide R. Zolberg, *International Migrations in a Political Perspective*, in GLOBAL TRENDS IN INTERNATIONAL MIGRATION 3 (1981) (discussing separately the phenomena of labor migration and refugee movements, and suggesting that the deviant character of international migration is related to a fundamental tension between the interests of individuals and those of societies; the inter-relation of which should be evaluated when considering the costs and benefits of migration). In contrast, others address the same issue in an economic context. See George J. Borjas, *Economic Theory and International Migration*, 23 INT'L MIGRATION REV. 457, 457 (1989) (noting that an economic theory of immigration analyzes the allocation of labor across international boundaries). This economic theory is based on the behavioral assumption that individuals migrate because it is in their best interest, either for psychic satisfaction or income. *Id.* at 460. The current theoretical research in the economics of immigration focuses on the notion of the existence of an "immigration market". *Id.*

30. Hamilton & Holder, *supra* note 29, at 196.

and affect international relations.³² “Conceptualizing migration as a global process has a liberating effect, freeing analysis to note the effects of supra-national trends in production, technology, communications, and numerous other circumstances affecting population movements.”³³ But in spite of the intrinsically international nature of the phenomenon, the concept of “national sovereignty” is the starting point for many analyses of international migration,³⁴ precisely because immigration policy is one of the last strongholds of national sovereignty.³⁵

At the policy-making level, national immigration laws and policies, although not always viewed as a foreign policy matter, have unavoidable international political implications.³⁶ Foreign policy studies often fail to

31. See Mary M. Kritz et al., *Introduction, in GLOBAL TRENDS IN INTERNATIONAL MIGRATION* xiv (1981) (noting that the factors for increased interdependence include the expansion of the economic system, the growing populations in many countries, the growing economic disparities, improved communication, transnational institutions, and social networks); see also Aristide R. Zolberg, *The Next Waves: Migration Theory for a Changing World*, 23 INT'L MIGRATION REV. 403, 423 (1989) (commenting on the dynamics that have propelled international population movements and also noting that they will be amplified, leading “to demands for inclusion of more equitable arrangements within the ‘new international order’”).

32. Zolberg, *supra* note 29, at 423; see Myron Weiner, *On International Migration and International Relations*, 11 POP. & DEV. REV. 441, 441 (1985) (indicating that the flow of populations from developing to developed countries substantially impacts international relations).

33. Christopher Mitchell, *International Migration, International Relations and Foreign Policy*, 23 INT'L MIGRATION REV. 681, 692 (1989).

34. See Weiner, *supra* note 32, at 442 (discussing the tension between sovereignty and neoclassical economic liberalism, and the effects that rules of exit and entry have on migration patterns and on international relations); see also Charles B. Keely, *Filling a Critical Gap in the Refugee Protection Regime: The Internally Displaced*, in WORLD REFUGEE SURVEY 22, 22 (1991) (commenting that refugees are the product of the nation-state system and that the nation-state system not only produces refugees, but also defines them).

35. See Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251, 251-52 (1987) (noting that “the power to admit or exclude aliens is inherent in sovereignty” and “that citizenship in Western liberal democracies is the modern equivalent of feudal privilege—an inherited status that greatly enhances one’s life chances”).

36. Mitchell, *supra* note 33, at 682; see Weiner, *supra* note 32, at 443 (observing that some nations have permitted immigrants to enter from countries that they have had historical relationships with, or in situations in which they have a sense of obligation or guilt); see also Michael S. Teitelbaum, *Immigration, Refugees and Foreign Policy*, 38 INT'L ORG. 429, 438 (1984) (mentioning that positive foreign policy goals, such as economic or diplomatic relations, may also encourage out-migration).

adequately take into account migration considerations.³⁷ These studies separate such analyses from other international public policy issues, such as international trade.³⁸ Commentators have criticized this separation as reflecting ignorance of or indifference to the fact that foreign policy often affects patterns of international population movements in unintended ways, such as through political or military interventions or the absence of such interventions.³⁹ The same practice applies to development aid and assistance policies, the hasty implementation of which may actually stimulate migration or have other adverse effects.⁴⁰ A number of studies reveal that states use political interests "as a goal or an instrument"⁴¹ to implement change in migration. In such situations, "clear questions arise as to the responsibility of the migration-generating state."⁴²

Traditionally, studies in migration, especially in labor migration, have tended to exclude the analysis of refugee movements.⁴³ Studies in inter-

Teitelbaum also notes that both advocates and adversaries of U.S. foreign policy view refugee or asylum admissions as important tools in shaping such policy. *Id.* at 440.

37. See generally Jean-Pierre Garson, *International Migration: Facts, Figures, Policies*, 176 OECD OBSERVER 18 (1992) (providing a brief overview of the current migration situation in the world).

38. Mitchell, *supra* note 33, at 695; see Stephen Lande & Nellis Crigler, *Trade Policy as a Means to Reduce Immigration*, in COMMISSION FOR THE STUDY OF INTERNATIONAL MIGRATION AND CO-OPERATIVE ECONOMIC DEVELOPMENT, UNAUTHORIZED MIGRATION, RESEARCH ADDENDUM 533 (1990) [hereinafter UNAUTHORIZED MIGRATION] (explaining that an immigration impact statement could be used in clarifying the nexus between trade and the problems of immigration). See generally Sidney Weintraub, *Treating the Causes: Illegal Immigration and U.S. Foreign Economic Policy*, in THE UNAVOIDABLE ISSUE 185 (Demetrios G. Papademetriou ed., 1983) (discussing how trade, foreign investment, and aid policies can theoretically be implemented to inhibit migrant movements); Norman Myers, *Environment and Security*, 74 FOREIGN POL'Y 23 (1989) (considering environmental issues in the context of migration movements).

39. See Sidney Weintraub, *Policy-Based Assistance: A Historical Perspective*, in UNAUTHORIZED MIGRATION, *supra* note 38, at 1157 (criticizing studies that focus exclusively on macro-economic variables of aid policy and proposing studies of other variables instead, such as human rights, pluralism, or micro-economics).

40. *Id.*

41. Weiner, *supra* note 32, at 437.

42. Mitchell, *supra* note 33, at 700. See generally LUISE DRÜKE, PREVENTIVE ACTION FOR REFUGEE PRODUCING SITUATIONS (1990) (arguing that refugee situations caused by political strife can be managed through peaceful and preventive intercession).

43. See ZOLBERG ET AL., *supra* note 11, at v (attributing this to the presumption that migration is governed by social and economic forces, which are somewhat regu-

national migration patterns, however, increasingly are attempting to combine both refugee patterns and labor migration into a single theory⁴⁴ because such effects reach global social, economic, and political affairs. Many official decision-makers criticize these studies because they prefer to view the crucial factors of migration flows as being internal to the state of origin.⁴⁵ This approach has resulted in the emphasis on persistent structures and trends, which result in population movements including, but not limited to, "instances of external intervention."⁴⁶

For the purposes of this Article, it suffices to note that the phenomenon of population displacement needs to be discussed against the background of the international historical and socio-political systems.⁴⁷ Discussing any "root cause" as if it were independent of other causes, or from the strictly "internalist" view that the causes of refugee or migrato-

lar; in contrast, refugee flows are unruly and unpredictable); Peter Gregory, *The Determinants of International Migration and Policy Options for Influencing the Size of Population Flows*, in UNAUTHORIZED MIGRATION, *supra* note 38, at 420 (stating that while there is a general perception of the forces that influence population flows, considerably less is known about measures that can be used to contain the size of migratory flows).

44. See Demetrios G. Papademetriou, *Migration and Development: The Unsettled Relationship*, in UNAUTHORIZED MIGRATION, *supra* note 38, at 823 (discussing the traditional models in international migration, including classical economic theory, which treats the individual as a *homo economicus*, and conflict theory, which adopts the historical-structural approach, and proposing that the theories should converge into a discussion of the multitude of forces that shape international migration).

45. Mitchell, *supra* note 33, at 686; see ZOLBERG ET AL., *supra* note 11 (illustrating one of the most useful studies in this area).

46. ZOLBERG ET AL., *supra* note 11, at vi (analyzing extensive case studies that lend support to the concept of "patterns of social conflict" and the resulting refugee movements).

47. See Aristide R. Zolberg, *The Future of International Migration*, in UNAUTHORIZED MIGRATION, *supra* note 38, at 1238 (noting that there are two major historical processes that contribute to refugee movements in developing countries). Those processes are the formation of new states and the confrontation within the social order in both old and new states. *Id.*; see Robin Poulton, *On Theories and Strategies*, in PUTTING PEOPLE FIRST 11, 23 (Robin Poulton et al. eds., 1988) (discussing the role of nongovernmental organizations in dealing with different root causes in different areas of the world); Mekuria Bulcha, *Historical, Political and Social Causes of Mass Flight from Ethiopia*, in REFUGEES AND DEVELOPMENT IN AFRICA 20 (Peter Nobel ed., 1987) (describing the root causes of displacement in Africa).

ry flows are internal to the state of origin,⁴⁸ can have little effect in trying to solve population displacement.

2. The Proximate Causes of Displacement

In addition to broadly examining the root causes of displacement, one must analyze the proximate cause of a particular movement.⁴⁹ Behind most of these causes, there are often violations of human rights attributable to a particular state action or policy.⁵⁰

A recent U.N. report on the issue of internally displaced persons⁵¹ suggests the existence of a general consensus on six causes of displacement: armed conflict and internal strife; forced relocation; communal violence; natural disasters; ecological disasters; and the systematic violation of human rights.⁵² To facilitate analysis, however, this Article pro-

48. ZOLBERG ET AL., *supra* note 11, at vi. *See generally*, Aristide R. Zolberg et al., *International Factors in the Formation of Refugee Movements*, 20 INT'L MIGRATION REV. 151 (1986) (challenging the "internalist" view of root causes by explaining that refugee policies of third countries play a substantial role in influencing migratory flows). *Cf.* POLITICS IN DEVELOPING COUNTRIES 3-4 (Larry Diamond et al. eds., 1992) (supporting the idea that whether a democratic government exists in a particular country may have more to do with its history and culture and the internal structures rather than international factors). According to the book, to the extent that international factors are influential, the economic ones tend to play a more significant role than the political ones. *Id.*

49. GERVAISE COLES, GENERAL APPROACH TO THE PROBLEM OF REFUGEES 15 (1989).

50. *Infra* notes 139-223 and accompanying text.

51. *Comprehensive Study Prepared by Francis M. Deng, Representative of the Secretary-General on the Human Rights Issues Related to Internally Displaced Persons*, U.N. ESCOR, Hum. Rts. Comm., 49th Sess., Prov. Agenda Item 11(a), U.N. Doc. E/CN.4/1993/35 (1993) [hereinafter *Deng Study*].

52. *Cf. id.* ¶¶ 33-41 (identifying the causes and consequences of internal displacement). There are innumerable systems of distinguishing among the types of proximate or immediate causes. The different systems depend on the analyses that scholars pursue or on the points they try to elucidate.

A recent report on the human rights dimensions of population transfers analyzes the circumstances and features of the policy under which population transfers occur by dividing the population transfers into those occurring in the context of war/armed conflict and those occurring during non-war time. *Preliminary Report on the Human Rights Dimensions of Population Transfer, Including the Implantation of Settlers*, U.N. ESCOR, Hum. Rts. Comm., 45th Sess., Prov. Agenda Item 8, U.N. Doc. E/CN.4/Sub.2/1993/17 (1993) [hereinafter *Preliminary Report on Population Transfers*] (prepared by Messrs. A.S. Al-Khasawneh & R. Hatano).

poses two generic categories, deliberate displacement and displacement as a by-product of other circumstances. These two categories are discussed below.

a. *Deliberate Displacement*

Deliberate displacement includes two phenomena; the first is deportation and the second is forced relocation or resettlement.⁵³ In both, state authorities or other entities exercising power force people out of their homes and homelands, and either deport them or confine them in other areas, possibly in other parts of the country. In cases of forced relocation, the general purpose of the state authorities may be to control the people, to enforce some sort of assimilation process,⁵⁴ to alter the demographic composition of a territory,⁵⁵ or to cut off supplies to and support for insurgent groups.⁵⁶ Forced relocation can also be part of a

See Michael M. Cernea, *Internal Refugee Flows and Development-Induced Population Displacement*, 3 J. REFUGEE STUD. 320 (1990) (providing an interesting categorization of the causal agent of displacement). Cernea identifies four distinguishing sets of factors leading to displacement: wars and political turmoil; persecution based on ethnicity, race, or religion; natural disasters; and development projects. *Id.* at 323; ZOLBERG ET AL., *supra* note 11. The authors make a distinction among the activist, the target, and the victim using the threat of violence as the common characteristic. *Id.*; REFUGEES AND DEVELOPMENT, *supra* note 4, at 16 (providing frequent examples of analytically useless distinctions).

53. See *Preliminary Report on Population Transfers*, *supra* note 52, ¶ 17 (suggesting that "population transfer" is a term used generically for deportation and forced relocation).

54. See Jason W. Clay, *Research Report: Refugees Flee Ethiopia's Collectivization*, 10 CULTURAL SURVIVAL Q. (1986) (providing an example of when the Mengistu government violated the rights of the Oromo people in the Hararghe Province in Ethiopia through the process of "villagization"). Ostensibly, the government was engaging in this practice to "provide better services." *Id.* In reality, the people were not free to move outside the villages; the children were obliged to learn Amharic in the schools and the farmers were forced to participate in co-operatives. *Id.* One consequence was the disruption of the chain of production and the proliferation of hunger. *Id.*

55. See *Preliminary Report on Population Transfers*, *supra* note 52, ¶ 17 (emphasizing that dominant groups usually displace subordinate peoples and influence nations as a whole).

56. See *Analytical Report*, *supra* note 14, ¶¶ 25-30 (noting the relocation of Iraqi Kurds by the Iraqi government, the evacuation of Kurdish villages in southeastern Turkey, and the relocation of civilian populations by UNITA in Angola); see also DRÜKE, *supra* note 42, at 110, 126 (noting the forced relocation of the Miskitos in 1981 in Nicaragua and criticizing the U.S. role in that case).

tactical policy in times of armed conflict. Moreover, state authorities may justify the relocation by reference to other objectives, such as preserving the welfare of the people or facilitating the implementation of a development project.⁵⁷

b. *Displacement As a By-Product of Other Circumstances*

There are four categories or circumstances that indirectly result in displacement:

- (1) systematic human rights violations;
- (2) war, armed conflict, communal violence, and aggression;
- (3) development-induced relocation; and
- (4) damage to the environment.

Scholars and lawyers in international human rights and refugee law have studied extensively the first two categories. As a result, this Article discusses them only briefly. The next two categories, however, have been the object of less attention and merit more detailed analysis.

Systemic and systematic human rights violations,⁵⁸ usually committed by a government, an insurgent group, or other authority, can cause mass movements of people. Such violations can and often do occur in connection with armed conflict. The violations include acts such as assassination, torture, and the destruction of physical property to intimidate or remove opposing factions and their sympathizers.⁵⁹ They also include

Forced expulsion or deportation has been an incident in the history of many countries, as demonstrated by the recent expulsion of the 418 Palestinians from Israel. Clyde Haberman, *Israel Expels 400 From Occupied Lands; Lebanese Deploy to Bar Entry of Palestinians*, N.Y. TIMES, Dec. 17, 1992, at A1.

57. See Susan F. Martin, *Development and Politically Generated Migration*, in UNAUTHORIZED MIGRATION, *supra* note 38, at 310-11 (noting that not all resettlement programs are undertaken with a legitimate development goal in mind); see also *Preliminary Report on Population Transfers*, *supra* note 52, ¶¶ 30-79 (noting that circumstances that give rise to population transfers include military imperative, foreign occupation, pretext of "national security," food and health care as weapons, post-conflict transfers, man-made environmental degradation, "national development," political control, state integration/consolidation, new state formation, ethnic homogenization and separation, expulsion of aliens or minorities, demographic situations resulting from historical conquest, planning for "public purposes," state of emergency, balancing population density, and racism and discrimination).

58. See HATHAWAY, *supra* note 17, at 101 (describing such violations as persistent harassment or constant infliction of some cruelty, constant or frequent efforts to injure or impose suffering, and hostile agitation by instilling fear).

59. *Analytical Report*, *supra* note 14, ¶¶ 38-39.

acute forms of denial of the right to pursue economic activity and education,⁶⁰ or the creation of certain economic and social conditions that threaten people's physical integrity and survival.⁶¹

In cases of war, armed conflict,⁶² and communal violence,⁶³ the common human rights violation is the element of violence itself. Displacement in these cases is likely a by-product of aggressive behavior, alien domination, foreign military intervention and armed conflict,⁶⁴ whether deliberate or not. Displacement can also cause environmental damage, which might lead to mass migrations later on.⁶⁵ The agent of the displacement will usually be one of the fighting parties or factions.

Development-induced relocation⁶⁶ is more problematic to define as a proximate cause of displacement because it ensues from a policy that is supposed to benefit the national or local welfare, if not the people relocated directly. Consequently, the people affected by such development projects enjoy minimal legal protection. If certain conditions for facilitating the participation and for safeguarding the livelihoods of the people affected are met, the hardships that they endure would not differ very

60. See *Study on Human Rights and Mass Exoduses*, U.S. ESCOR, Hum. Rts. Comm., 38th Sess., Agenda Item 12(b), ¶ 59, U.N. Doc. E/CN.4/1503 (1981) [hereinafter *Study on Human Rights and Mass Exoduses*].

61. *Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*, U.N. GAOR, 41st Sess., Prel. List Item 78, ¶¶ 38-40, U.N. Doc. A/41/324 (1986) [hereinafter *Report of the Governmental Experts*] (referring to the world economic situation that results in food insecurity, desertification, etc.).

62. See *Deng Study*, *supra* note 51, ¶¶ 26-27 (noting that this is the leading cause of displacement according to previous studies and other received information).

63. See *Analytical Report*, *supra* note 14, ¶¶ 18-20 (distinguishing "communal violence" as violence motivated by ethnic or religious hatred, but which has not taken the form of an ongoing political-military struggle). See generally ZOLBERG ET AL., *supra* note 11 (discussing "communal violence" thoroughly).

64. *Report of the Governmental Experts*, *supra* note 61, ¶ 31.

65. *Report of the Governmental Experts*, *supra* note 61, ¶ 31; see Cervenka Zdanek, *The Relationship Between Armed Conflict and Environmental Degradation in Africa*, in *ECOLOGY AND POLITICS-ENVIRONMENTAL STRESS AND SECURITY IN AFRICA* 25, 30 (Mohamad Salih et al. eds., 1989) (discussing the relationship between armed conflicts and environmental damage).

66. See generally Anthony Oliver-Smith, *Involuntary Resettlement, Resistance and Political Empowerment*, 4 J. REFUGEE STUD. 132 (1991) (discussing the various tactics of resistance of the people to be relocated, mentioning that the cause and the agent of the resettlement may be factors eliciting resistance, and referring to cases where this resistance has led to the political empowerment of the people upon whom relocation was carried out).

much from those experienced by refugees or other displaced persons.⁶⁷ Along these lines, observers note that preventing development-displaced people from falling into refugee-like conditions is the primary goal of resettlement policies.⁶⁸ One can extend this logic to cases where development policies, including those promoted by development assistance,⁶⁹ have destabilizing effects. Destabilization can contribute to massive movements of people, like a reaction against a government's decision to implement a particular development policy.⁷⁰ In contrast to the two first categories where discerning the entity causing the displacement is fairly easy, the cause of a development-induced displacement is much harder to identify and to deal with in international legal terms.⁷¹

With respect to causality, environment-related displacement, whether natural or manmade, is the most problematic category of the four. Unlike other causes of displacement, which can give rise to claims against the agent of the displacement, it is difficult to identify who or what is

67. See Michael M. Cernea, *Involuntary Resettlement and Development*, 25 FIN. & DEV. 44 (1988) (describing the problems created by involuntary resettlement); William Patridge, *Involuntary Resettlement in Development Projects*, 2 J. REFUGEE STUD. 373 (1989) (discussing the social consequences of forced resettlement, and listing as potential problems the following: dumping the problem on the local authorities; poor preparation; underestimated population to be resettled; high risk of impoverishment; underfinancing of the resettlement scheme; the environmental impact of resettlement; weak institutional and legal framework; and no consultation with the displaced persons). See generally INVOLUNTARY MIGRATION AND RESETTLEMENT, *supra* note 12 (focusing, *inter alia*, on the characteristics of the stress of dislocation and the similarities and differences among the cases of involuntary migration); Cernea, *supra* note 52, at 320 (arguing that the dichotomy between refugees and uprooted persons because of development projects must be overcome and that conceptual gains can be achieved as a result). Cernea estimates that the number people in this category is between eight to fifteen million. *Id.* at 332.

68. Cernea, *supra* note 52, at 324.

69. See Gayle Smith, *On Taking a Development-Oriented Approach to Refugee Assistance*, in REPORT OF THE INTERNATIONAL CONFERENCE: REFUGEES IN THE WORLD—THE EUROPEAN COMMUNITY'S RESPONSE, *supra* note 16, at 143, 155 (recognizing that poorly planned or improper development programs cause economic vulnerability, which produces refugees).

70. See Martin, *supra* note 57, at 309 (noting examples of such cases occurring in Central America).

71. For instance, will it be the borrowing or implementing government or the lending institution that monitors the project? The answer can only be biased from the point of view of international law. An element of official force or policy will have to be present. A broader notion of international responsibility, however, sheds a different light. The discussion on the legal responses in Part II.B may provide some insight on this point.

responsible for the damage when the displacement is environmentally related.⁷² This type of displacement, however, has attracted significant attention in the last decade.⁷³ Observers of this kind of displacement note an increasing number of people who are forced to move away from their homes for environmentally related reasons. These reasons include: elemental disruptions, such as cyclones and volcanoes; biological disruptions, like locusts; slow-onset disruptions, like drought; accidental disruptions; disruptions caused by abnormal development or uncontrolled urbanization; and environmental warfare.⁷⁴ In theory, apart from earthquakes or volcanic eruptions, human activity or at least one provoked human activity is responsible for all other environmental causes of displacement.⁷⁵ Even for minor disruptions, the indigenous in developing countries are the most affected segment of the population.⁷⁶

72. *Preliminary Report on Population Transfers*, *supra* note 52, ¶ 46 (noting that "it is important to consider the cause of the degradation [of the environment] in the light of any pattern suggesting state responsibility"). Interestingly, this Report goes on to suggest that "technical responsibility for environmental disasters resulting in population transfer may also involve human rights values and help determine appropriate responses." *Id.*

73. See IMPACTS ASSESSMENT OF CLIMATE CHANGE, THE POLICYMAKERS' SUMMARY OF THE REPORT OF WORKING GROUP II TO THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (1990) (directing international attention to the green house effect and rising sea levels, that imply that millions of people could be displaced in the future).

74. Refugee Policy Group, *Migration and the Environment* (1992) (paper for conference); see Jacobson, *supra* note 1, at 31 (noting that the number of displaced persons due to environmental causes was thought to be approximately ten million in 1989). See generally JODI JACOBSON, *ENVIRONMENTAL REFUGEES* (1988) (noting case studies in Africa, Latin America, Bangladesh, Seveso, and Bhopal that lend support to the fact that this type of displacement is serious in numbers and in scope); David Lazarus, *New Strangers at the Door?*, *REFUGEES*, Dec. 1990, at 14; Peter Newhouse, *Global Warning*, *REFUGEES*, July 1992, at 14 (discussing early warning mechanisms for ensuing famines); The Norwegian Refugee Council, *Environmental Refugees* (1992) (discussion paper).

75. See JACOBSON, *supra* note 74, at 16-17 (stating that "human-induced" changes in the environment are causing more people to become displaced than ever before); FRANCIS DENG & LARRY MINEAR, *THE CHALLENGES OF FAMINE RELIEF* 10 (1992) (analyzing the causes of famine); see also THE INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, *REFUGEES: THE DYNAMICS OF DISPLACEMENT* 11 (1986) [hereinafter *THE DYNAMICS OF DISPLACEMENT*].

76. See *Migration and the Environment*, *supra* note 74, at 11 (noting that environmental changes may remove the economic base of a community, driving indigenous people to migrate in order to survive).

At the same time, these disruptions will not always cause people to move, especially in large numbers. Depending on the underlying or intervening factors⁷⁷ such as the political structure, the security situation, or the availability of international assistance, people may be prepared to stay and try to cope with the situation.⁷⁸ This is especially true where the disruption occurs over an extended period of time.

The above discussion highlights that it is not always simple to distinguish proximate from underlying causes. Even where the distinction is relatively easy to make, the contextuality of the relationship between the proximate cause and other background factors complicates the search for the displacement causing agent. Nevertheless, there are two common elements that stand out from this analysis. The first element is coercion. In the final analysis, the fundamental question remains whether the people were forced to move. Part III.C of this Article examines the element of coercion on displacement.

The second element is that human rights violations either occur or are likely to develop. Whether these violations involve the right to personal security, the right to food, or the right to sustainable development, they will depend on the particular facts of each case. In any event, none of the above situations is compatible with the framework of human rights.⁷⁹ In an ideal situation where all human rights are fully observed, displacement should not occur except as a result of elemental disruptions. Even if this proposition were considered to be tenuous, a refugee movement is at least a *prima facie* indicator of the existence of human rights violations. Part II.B of this Article addresses the legal sufficiency of this reasoning.⁸⁰

77. See generally ECOLOGY AND POLITICS, *supra* note 65 (discussing the interrelation among political conflict, environmental degradation; and subsequent movements of people, which may further cause environmental degradation or political conflict).

78. See Migration and the Environment, *supra* note 74, at 15; see also Astri Suhrke, PRESSURE POINTS: ENVIRONMENTAL DEGRADATION, MIGRATION AND SOCIAL CONFLICT 6 (1993).

79. See DRÜKE, *supra* note 42, at 40 (suggesting that human rights violations are one cause of displacement).

80. See JACOBSON, *supra* note 74, at 40 (arguing that the number of people displaced because of environment related causes is an indicator of the severity of the global environmental decline); *supra* note 13 and accompanying text (noting that a refugee movement is a "grave human rights issue").

II. THE RIGHT NOT TO BE DISPLACED IN INTERNATIONAL LAW

A. THE CAUSES OF DISPLACEMENT IN THE INTERNATIONAL SYSTEM OF HUMAN RIGHTS PROTECTION

This section, which discusses the "root cause debate" within the United Nations and scholarly circles, analyzes the proposed responses to displacement and evaluates the extent to which displacement is perceived as a violation of human rights. A general consensus seems to emerge from both sources that displacement should be treated as a human rights issue and should be addressed accordingly. The current situation, however, is one that needs much more elaboration.

1. The "Root Cause Debate" Within the U.N.⁸¹

In the early 1980s, the U.N. launched two initiatives linking the movement of people with human rights violations.⁸² One initiative was within the Commission on Human Rights, and the other was within the General Assembly.

Sadruddin Aga Khan's 1981 *Study on Human Rights and Mass Exoduses*,⁸³ which resulted from a Canadian initiative, revealed that many governments agree on the need to analyze the forces compelling people to move, with particular emphasis on discovering ways to avert

81. See ZOLBERG ET AL., *supra* note 11, 258 (analyzing the "root cause debate" within the U.N., the consequent cleavage between the North and the South (the North arguing that man-made outflows were caused by wilful deportations and discrimination against certain groups, and the South arguing that the main cause was lack of economic development and the inequitable economic order and the ensuing proposals); THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston, ed., 1992) (providing an analysis of the role of the promotion of human rights in the U.N. system).

82. Drüke phrases this focusing of attention as follows:

Traditionally, U.N. preventive international diplomacy and action has been geared primarily toward situations affecting the peace and security interests of member states, and only marginally to addressing specific refugee producing situations. Starting in the early 1980s, committed advocates in the U.N. and governmental and nongovernmental circles have been able to focus their attention on the study of the link between human rights violations and the production of refugee flows.

DRÜKE, *supra* note 42, at 44.

83. *Study on Human Rights and Mass Exoduses*, *supra* note 60.

new large-scale refugee situations.⁸⁴ The study placed the issue of the "root causes" of refugee movements on the U.N. agenda for the first time.

The 1986 *Report of the Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*,⁸⁵ which had been established in 1981 as a result of a German initiative, went one step further by recognizing that coercive population movements (1) create individual human misery (2) impose political, economic, and social burdens upon the international community and especially on developing countries (3) affect the domestic order and stability of receiving states (4) jeopardize the political and social stability and the economic development of the region (5) and endanger international peace and security.⁸⁶ The *Report of the Governmental Experts* also observed that "international efforts to solve the world refugee problem have concentrated on remedying refugee situations *after* they came into existence."⁸⁷

Predictably, however, this shift from an *ex post* remedy to an *ex ante* remedy was not immediately followed by further action relating to the root causes. The United Nations has said much in relation to prevention, but only in general terms⁸⁸ resulting in unspecified repetitive demands for international cooperation.⁸⁹ Clarity has not been a strong point of

84. *Study on Human Rights and Mass Exoduses*, *supra* note 60, ¶ 5.

85. *Report of the Governmental Experts*, *supra* note 61. See Luke T. Lee, *The U.N. Group of Governmental Experts on International Co-operation to Avert New Flows of Refugees*, 81 AM. J. INT'L L. 442 (1987) (distinguishing between political "causes" and socio-economic "factors" implying that the "factors" alone do not themselves cause refugee flows). Lee notes, however, that the Group, despite its tensions and differences, has resolved that the generation of refugees or mass expulsion of citizens is not an internal affair. *Id.*; see DRÜKE, *supra* note 42, at 66 (discussing the role of the U.N. Group, as to generate responses to prevent the creation of new refugee flows); ZOLBERG ET AL., *supra* note 11, at 258 (analyzing the role of the international community through U.N. efforts to reduce or stabilize the underlying causes of migratory flows).

86. *Report of the Governmental Experts*, *supra* note 61.

87. *Report of the Governmental Experts*, *supra* note 61, ¶ 8 (emphasis added).

88. See *Report of the Secretary General on the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa*, U.N. GAOR, 44th Sess., Agenda Item 110, ¶ 75, U.N. Doc. A/44/520 (1989) (noting that prevention is better than a cure).

89. See *Report of the Secretary General on Human Rights and Mass Exoduses*, U.N. GAOR, 46th Sess., Agenda Item 98(b), ¶ 1, U.N. Doc. A/46/542 (1991) (inviting all governments and organizations to intensify their cooperation in addressing the causes of exoduses and to support the early warning arrangements instituted by the Secretary General, and urging the Secretary General to strengthen the early warning

these U.N. statements.⁹⁰ In cases where the discussion is more concrete, the focus has centered mostly around efforts to devise early warning mechanisms in order to contain refugee flows.⁹¹ These mechanisms, coupled with the strengthening of the U.N. system capacity to deal with emergencies,⁹² are important and valuable. The mechanisms, however, do not address the root causes in the manner advocated in the *Study on Human Rights and Mass Exoduses*.⁹³

One explanation is that, until very recently, human rights issues were not very popular within the U.N. beyond the narrow confines of the Commission on Human Rights. Whenever the issue of human rights violations resulting in refugee movements was raised, the discussion

activities in the humanitarian area).

90. See *Note on International Protection*, U.N. High Comm. for Refugees, ¶¶ 43-45, U.N. Doc. A/JAC.96/777 (1981) (stating that, for example, the United Nations High Commissioner for Refugees has, on many occasions, referred to the need for "prevention," and "preventive activity" has been identified as one of the activities for the UNHCR). According to one such formulation, prevention means "the elimination of causes of departure . . . and the early containment of a situation of exodus . . . so that threats to the security and well-being of the persons concerned are not aggravated and the situation remains manageable from both the humanitarian and political standpoint." *Id.* Prevention does not mean "the erection of barriers which leaves causes intact, but make departure impossible." *Id.*; see also *Note on International Protection*, *supra* note 13, ¶ 25 (drawing attention to the need for prevention). Cf. Douglas Stafford, *New Strategies for Refugees in the 1990s*, REFUGEES, Dec. 1992, at 10, 13 (making a different distinction between indirect prevention which involves early warning, preventive diplomacy and conflict resolution, human rights promotion, and development, and direct prevention which involves the establishment of relief centers, the delivery of assistance to victims of war and the internally displaced, and the monitoring of human rights and physical safety).

91. *Joint Inspection Unit, The Co-ordination of Activities Related to Early Warning of Possible Refugee Flows*, U.N. GAOR, 45th Sess., Agenda Items 12, 77, 107, and 123, U.N. Doc. A/45/649 (1990) [hereinafter *JIU Report*].

92. See generally DRÜKE, *supra* note 42, at 43 (analyzing the steps already taken within UNHCR and the U.N. system in the field of preventive activity); Qazi S. Fareed, *Department of Humanitarian Affairs Strengthens U.N.'s Emergency Response*, REFUGEES, Dec. 1992, at 9 (describing the activities of the U.N. Department of Humanitarian Affairs, which is said to operate in the "grey zone where security, political and humanitarian concerns converge").

93. See *supra* note 60 and accompanying text; DRÜKE, *supra* note 42, at 45 (noting that the international response to refugee problems has been "symptom" oriented, rather than concentrating on the root causes that create refugees). Undoubtedly, certain measures of early warning or preventive activity can have a mitigating effect on the escalation of the causes of displacement. *Id.*

would turn into a political debate along Cold War lines,⁹⁴ leaving little room for actual progress.

Similarly, the United Nations High Commission for Refugees' (UNHCR) avoidance of dealing with refugee movements as a human rights issue was hardly surprising,⁹⁵ given the organization's strict emphasis on the protective and humanitarian dimensions of its mandate.⁹⁶ More recently, the UNHCR has participated in a process of re-evaluating its limited mandate. This reevaluation would be a difficult task in view of the political realities, the budgetary constraints, and the risk of undermining everything that the organization has achieved, if it were to venture down the "preventive" road too lightheartedly.⁹⁷ The UNHCR, after all, has been in a position to provide material assistance and a certain degree of protection to a large number of refugees over the past forty-two years. Moreover, the public recognizes its expertise in refugee issues. There are indications, however, that the UNHCR is recognizing the need to focus on the source of the refugee problem and not just the manifestations.⁹⁸

94. ZOLBERG ET AL., *supra* note 81, 258-59.

95. THE DYNAMICS OF DISPLACEMENT, *supra* note 75, at 21, 48; see *Note on International Protection*, *supra* note 90, ¶ 47, at 12 (balancing human rights concerns against state sovereignty issues); Claudena M. Skran, *The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problems*, in REFUGEES AND THE ASYLUM DILEMMA IN THE WEST 8 (Gil Loescher ed., 1992) (describing Nansen's interpretation of what "humanitarian principle" meant); see also Gil Loescher, *Refugee Issues in International Relations*, in REFUGEES AND INTERNATIONAL RELATIONS 18 (Gil Loescher ed., 1989) ("To date the international refugee regime has been largely ineffective in dealing with the root causes . . . The regime was not originally designed for that purpose").

96. See THE DYNAMICS OF DISPLACEMENT, *supra* note 75, at 26 (identifying the limitations of humanitarianism as the fact that many of the states responsible for creating and exploiting some refugee situations are the same states that provide funds to the organization and condition its policy, and stating that actors other than states, who are not bound by international law, are often involved in refugee situations).

97. See THE DYNAMICS OF DISPLACEMENT, *supra* note 75, at 27 (noting that the UNHCR cannot play such a role in the first place because it cannot stop states who elect to force people into exile and keep them there).

98. Stafford, *supra* note 90, at 11. These dilemmas are implicit in a recent article by the Deputy High Commissioner. The Commissioner states that "[i]n this dramatic new stage, we must look again at the ever present challenges . . . [such as] how to prevent and solve refugee problems." Recently, an internal working group on international protection underlined that *displacement, coupled with the need for protection, must be the starting point for any consideration of the competence of UNHCR for a particular group* [T]his would clearly be the case where such persons are

In sharp contrast to the past, recent international political developments have made discussions of the link between human rights violations and population movements easier.⁹⁹ Since 1990, the U.N. has prepared four reports on displacement.

The first was the *Quenod Report*. This report examined large and sudden migratory movements. It focused on the institutional mechanisms of the U.N. and other intergovernmental organizations that deal with the assistance and protection of refugees, displaced persons, and returnees.¹⁰⁰ Also, the report implicitly examined the different root causes of displacement and how the U.N. deals with them in its analysis of the mandates of the various institutions and different groups of displaced persons.¹⁰¹

inextricably mixed with returnees Such measures might also serve to ameliorate conditions so as to prevent *further* displacement." *Id.* at 13 (emphasis added). He continues by stating that "[p]reventive protection is activity undertaken to attenuate the causes of displacement, so that choosing to remain home is a humane and viable option. It is not an activity undertaken to prevent refugee flows." *Id.*

See generally *Note on International Protection, Executive Committee of the High Commissioner's Program*, U.N. GAOR, 44th Sess., U.N. Doc. A/AC.96/815 (1993) (emphasizing prevention and solutions); Sadako Ogata, *Statement to the 44th Session of the Commission on Human Rights* (Geneva, 1993) (discussing the right not to be displaced). The new High Commissioner, Mrs. Sadako Ogata, who has a strong human rights agenda, has dramatically influenced the UNHCR's perception of its own role.

99. See G.A. Res. 44/137, U.N. GAOR, 44th Sess., at 5, U.N. Doc. A/RES/44/137 (1990) (recognizing "the need to address . . . the root causes of refugee movements in order to avert new flows of refugees and to facilitate the solution of existing problems"); ESCOR Res. 1991/78, U.N. ESCOR, 37th plen. mtg., U.N. Doc. E/1990/109/Add.1 (1990) (explaining that five months after the U.N. General Assembly adopted Resolution 44/137, an Economic and Social Council resolution echoed much of what had been said earlier, when it noted the increase in the number of all categories of displaced persons and the impact on the fragile hosting countries).

It further realized "the immense human suffering occasioned by the phenomenon of mass population movements resulting from conflict, natural or man-made disasters and war." *Id.* The Economic and Social Council stressed that "relief, rehabilitation, reconstruction and development are part of the same continuum." *Id.* To this end, the Council requested the Secretary General to initiate a system-wide United Nations review to assess the experience and capacity of various organizations in the coordination of assistance to all refugees, displaced persons, and returnees. *Id.*

100. *Quenod Report*, *supra* note 1.

101. See *Quenod Report*, *supra* note 1, ¶ 24, at 10 (discussing the role of the Secretary General).

In relation to internal conflicts, for instance, the report proposes closer links between the political regime and the humanitarian activities within the U.N. to "improve

Growing concerns over the issue of internally displaced persons triggered the next two reports. These reports examined the root causes of displacement in connection with the relevant human rights violations.¹⁰² The *Analytical Report of the Secretary-General on Internally Displaced Persons*¹⁰³ explored a wide range of root causes of both refugee and displaced person movements¹⁰⁴ by studying specific situations. The report only discussed this vast subject summarily compared to other studies. The report, however, did consider the causal relationship between human rights violations and displacement. Furthermore, the report clearly identified the two questions that this Article attempts to address: (1) whether current international standards adequately protect persons from arbitrary displacement;¹⁰⁵ and (2) whether the drafting of guidelines, providing a list of the most frequent situations of displacement, is possible.¹⁰⁶

The *Comprehensive Study on the Human Rights Issues Related to Internally Displaced Persons*¹⁰⁷ followed the *Analytical Report*. The study reviewed the existing legal standards in international human rights, humanitarian, and refugee law, and their application to internally displaced persons. The study proposed certain institutional mechanisms for their protection and assistance. With respect to the root causes of displacement, the study referred to the *Analytical Report*.¹⁰⁸ In addition to referring to the *Analytical Report*, the study made a contextualized analysis of the evolutionary process that led to gross violations of human rights and mass displacements in different countries.¹⁰⁹

the response to emergencies in cases when political actions failed to prevent a new situation of refugees, displaced persons and/or returnees." *Id.* ¶ 12, at 7. The report also calls for closer links between the humanitarian regime and development cooperation. *Id.* ¶ 29, at 11.

102. Discussions surrounding the issue of internally displaced persons are not restricted by the 1951 Convention definition of "refugee" and are, therefore, more far-reaching when it comes to the question of the human rights dimension of displacement.

103. *Analytical Report*, *supra* note 14.

104. See *Analytical Report*, *supra* note 14, ¶ 9, at 3 (stating that "Nearly all of the countries, having large populations of internally displaced persons are also refugee-producing countries, and the factors causing refugees and displaced persons to flee their homes are often identical.").

105. *Analytical Report*, *supra* note 14, ¶ 74, at 19.

106. *Analytical Report*, *supra* note 14, ¶ 86, at 22.

107. *Deng Study*, *supra* note 51.

108. *Deng Study*, *supra* note 51, ¶ 25, at 9.

109. *Deng Study*, *supra* note 51, ¶ 134, at 34.

The fourth report¹¹⁰ emerged from the recent deliberations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This last report has a slightly different focus. It analyzed the human rights dimensions of population transfers, including the implantation of settlers. The report adopted a broad approach, defining population transfers as "the movement of people as a consequence of political and/or economic processes in which the state government or state-authorized agencies participate."¹¹¹ The report also conducted a thorough analysis of the legal context and the implications for human rights law. All of the above studies placed emphasis on the human rights violations that occurred as *consequences* of displacement.¹¹²

These developments seem to follow the initial observations made in the *Study on Human Rights and Mass Exoduses*.¹¹³ It is encouraging that the question of the "root causes" is being discussed both abstractly, in conjunction with global features of historical and socio-economic factors, and practically, with reference to concrete situations of displacement. The rigorous legal discourse surrounding this issue is also a significant development. This type of approach seems to be the only one that can give any meaningful purpose to the search for the "root causes" and for the enunciation of adequate protection standards.¹¹⁴

110. *Preliminary Report on Population Transfers*, *supra* note 52.

111. *Preliminary Report on Population Transfers*, *supra* note 52, ¶ 14, at 6.

112. *See Preliminary Report on Population Transfers*, *supra* note 52, ¶ 80, at 20 (noting the cumulative effect of displacement on human rights violations); *infra* notes 224-83 and accompanying text (defining displacement in terms of how its consequences are translated into human rights violations).

113. *See Study on Human Rights and Mass Exoduses*, *supra* note 60, ¶¶ 62, 63, 70, at 31 (noting that the various "push factors" should be viewed against the backdrop of other fundamental problems which confront developing countries); *id.* ¶ 77, at 37 (noting the results of colonialism); *id.* ¶ 94, at 43 (noting that discrepancies in humanitarian assistance should not constitute a "pull factor").

114. *See Bridging the Gap Between Returnee Aid and Development: A Challenge for the International Community*, *Executive Committee of the High Commissioner's Programme*, Sub-Comm. on Adm. & Fin. Matters, 43d Sess., 21st mtg. ¶¶ 2, 23, at 1, 7, U.N. Doc. EC/SC.2/56 (1992) (stating that one of the most obvious needs is the elimination of the "root causes" to ensure safe return); *see also* Goodwin-Gill, *supra* note 16, at 53 (noting that a greater awareness of the circumstances of displacement leads to improved standards of protection). *See generally* Mary C. Kilgour, *Refugees and Development: Dissonance in Sudan*, 44 MIDDLE E. J. 638 (1990) (discussing the types of issues the UNHCR and refugee non-governmental organizations are confronted with in the field when faced with the need to provide not only for persons under their mandate, but also for the host community).

2. The "Root Cause Debate" in Scholarly Circles

A number of scholars in the field of law and political science have acknowledged and addressed the need to examine the root causes of coerced population movements.¹¹⁵ Many of these scholars have stressed that this is an important step towards understanding the issue of displacement in a holistic manner.¹¹⁶ Others have acknowledged the impossibility of curing this problem without an investigation of its cause.¹¹⁷ Yet, the differences in how the root causes of mass displacements and, more generally, migration should be dealt with are as vast as the "profound structural problems within the international system"¹¹⁸ that reflect them. The root cause approach itself has been criticized as having a conservative/preventive implication.¹¹⁹ In any event, human rights activists have discussed the issue of "preventive action" at the international level¹²⁰ and have proposed, several different approaches to address displacement. These proposals range from interim measures for

115. See Loescher, *supra* note 95, at 18 (referring to the issue of root causes and the responses by the refugee regime). See generally Hamilton & Holder, *supra* note 29, at 196 (providing an overview of the current discussions on how international migration affects, and is affected, by foreign policy).

116. See THE DYNAMICS OF DISPLACEMENT, *supra* note 75, at 4 (encouraging discussion on the emerging humanitarian questions by providing descriptions of situations of displacement).

117. Michael Harris, *On Charities and NGOs*, in PUTTING PEOPLE FIRST, *supra* note 47, at 1, 3 (Robin Poulton et al. eds., 1988); see Goodwin-Gill, *supra* note 16, at 53 (suggesting that improved knowledge of the conditions that drive people from their homes can open the way to improved protection standards).

118. THE DYNAMICS OF DISPLACEMENT, *supra* note 75, at 17.

119. See ZOLBERG ET AL., *supra* note 11, at 262-63 (observing that "[t]o avert flows would be the equivalent of trying to oppose social change"). The authors further note:

[i]n the aggregate, this of course is impossible, and in particular cases it may well be undesirable An emphasis on conflict prevention . . . has legitimized repressive and socially reactionary regimes In these situations, an outflow of refugees is arguably the most humane form of adjustment. From this perspective, the emphasis on 'averting flows' in the UN debate is unfortunate.

Id.

120. See Jean P. Hocké, *Beyond Humanitarianism*, in REFUGEES AND INTERNATIONAL RELATIONS, *supra* note 95, at 37, 39 (stressing the need for global approaches). Cf. Loescher, *supra* note 95, at 19 (noting that "the international community has little ability to take preventive action . . . because the root causes require political intervention . . . preferably before the people need to flee").

temporary protection for the displaced to prohibiting mass expulsions altogether.

Proposals for interim measures to deal with displacement have included the adoption of new mechanisms, such as systems of early warning,¹²¹ regimes of temporary protected areas,¹²² and provisions of assistance to the entire community under a cross-mandate institutional approach.¹²³ Supporters of these mechanisms believe they are capable of promoting simultaneous solutions to the underlying causes.

Scholars have suggested at least six approaches to address the root causes of displacement. The first possibility is strengthening the existing initiatives at the international level,¹²⁴ and it is based on the assumption that the easing of relations between the major powers and the efficacy of international law may now be used more effectively to enforce human rights instruments and to resolve regional conflicts. This approach could protect civilians from policies seeking to classify them as refugees.¹²⁵

The second suggested way to prevent displacement is to apply the principles of "humanitarian intervention," the "right to intervene," and the "right to humanitarian access"; this approach has attracted significant attention.¹²⁶ Third, the provision of more development aid for refugee-

121. REFUGEE POLICY GROUP, *EARLY WARNING: IMPROVING INTERNATIONAL RESPONSE TO HUMANITARIAN SITUATIONS* (Gregg Beyer ed., 1989); Leon Gordenker, *Early Warning of Disastrous Population Movement*, 20 INT'L MIGRATION REV. 170 (1986).

122. Terje Einarsen, *Mass Movements of Refugees—in Search of New International Mechanisms*, in THE LIVING LAW OF NATIONS (Peter M. Smith ed., forthcoming).

123. Stafford, *supra* note 90, at 12.

124. See generally DRÜKE, *supra* note 42, at 145 (arguing that existing U.N. initiatives should be utilized more effectively to prevent populations from being converted into refugees for political objectives).

125. DRÜKE, *supra* note 42, at 138. Drüke also proposes three policy guidelines: the mobilization of political mediation; the strengthening of institutional arrangements; and the general improvement in communications within the UNHCR and the U.N. *Id.* at 143.

126. See generally David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOL. L. REV. 253 (1992) (arguing that humanitarian intervention is an evolving doctrine and that it is time for a reformulation and reconsideration of the doctrine in light of the end of the Cold War); Gil Loescher, *Mass Migration as a Global Security Problem*, in WORLD REFUGEE SURVEY 7, 8 (1991) (stating that governments should address human rights concerns in their foreign policies); Bernard Kouchner, *A Call for Humanitarian Intervention*, REFUGEES, Dec. 1992, at 14 (stating that there should be a policy of humanitarian intervention that makes the duty to intervene a right "wherever victims are calling out for help" as a method of preventive

producing countries could ease the problem.¹²⁷ This approach grew out of the increasing awareness that these countries happen to be among the poorest and that the political and economic causes of displacement are related.¹²⁸ Agreement does not exist, however, on the feasibility or the desirability of this approach and on the different ways of transferring aid.¹²⁹ A fourth possibility is the implementation of more effective government policies to address the long-term root causes, regardless of whether the cause of the displacement is human rights violations, ecological disasters, or poverty and developing free circulation zones to provide people with a new hope of richness and dynamism.¹³⁰ Another approach to prevent displacement is to plan regional approaches. For example, a European Community advisory committee should be established to develop a human rights policy that effectively deals with refu-

diplomacy).

127. See Carens, *supra* note 35, at 261 ("If rich states are really concerned with the worst-off in poor states, they can presumably help more by transferring resources and reforming international economic institutions than by restricting immigration"); Hamilton & Holder, *supra* note 29, at 207 (concluding that there is general agreement among states receiving refugees that the states from which these refugees come must try harder to relieve the underlying economic and social problems that cause refugees to flee).

128. See CHARLES B. KEELY ET AL., *GLOBAL REFUGEE POLICY: THE CASE FOR A DEVELOPMENT-ORIENTED STRATEGY* (1981) (arguing for an extended development-oriented aid strategy, rather than relief assistance); *The Dynamics of Displacement*, *supra* note 75, at 15. Cf. D. Bronckhorst, *The 'Realism' of a European Asylum Policy: a Quantitative Approach*, 9 NETH. Q. HUM. RTS. 142, 156 (1991) (noting that in relation to the argument that refugee flows should be counteracted by working at the root causes, Western aid only has a limited effect on refugee migration); ZOLBERG ET AL., *supra* note 11, at 260-62 (stating that "[o]ur findings indicate that . . . economic underdevelopment is by itself not a major cause of refugee flows For the South to argue that more development aid, or a reshaped economic order, is necessary . . . is to stretch the logic of social conflict").

129. See Hamilton & Holder, *supra* note 29, at 201 (stating that migration reflects the inequities inherent in the global distribution of wealth and resources). There is no general consensus on how or whether to tie social and economic development efforts with efforts to influence international migration. *Id.* at 207. *Contra* Gregory, *supra* note 43, at 420 (emphasizing that financial aid may actually stimulate population movements or have other adverse effects). See generally Dennis Gallagher et al., *CIREFCA: At the Crossroads Between Uprooted People and Development in Central America*, in UNAUTHORIZED MIGRATION, *supra* note 38, at 327 (analyzing the development approach's role in refugee and displaced persons situations).

130. Jonas Widgren, *Europe and International Migration in the Future: The Necessity for Merging Migration, Refugee and Development Policies*, in REFUGEES AND INTERNATIONAL RELATIONS, *supra* note 95, at 49, 61.

gee and asylum matters.¹³¹ The last tactic is to establish an open borders policy and a "global humanist" approach.¹³²

This brief overview of the proposed responses to coercive displacement reveals a growing consensus that refugee and displaced person movements are increasingly perceived as human rights issues, indicating further that these movements should be dealt with as such. The proposed responses also reveal, however, that there is little effort in constructing a comprehensive, all-inclusive strategy. The least that can be done to develop a comprehensive approach is to focus on the existing international legal provisions on displacement.

Scholars have suggested two such approaches. The first is Lee's *Draft Declaration on the Principles of International Law on Mass Expulsion*,¹³³ which was proposed to the 78th Annual Meeting of the American Society of International Law in 1984 and later adopted by the Inter-

131. Peter R. Baehr, *The European Advisory Commission for Human Rights: A Proposal*, in REPORT OF THE INTERNATIONAL CONFERENCE: REFUGEES IN THE WORLD—THE EUROPEAN COMMUNITY'S RESPONSE, *supra* note 16, at 112.

132. See generally Mel Gurtov, *Open Borders: A Global-Humanist Approach to the Refugee Crisis*, 19 WORLD DEV. 485 (1991) (suggesting that international refugee policies should reflect the complexity that surrounds a particular refugee group's decision to take flight). In suggesting a global humanist approach, Gurtov advocates that decisions about asylum, resettlement, and repatriation should be set with an understanding of the psychological, economic, and political factors at work. *Id.* Effective refugee policies should seek to minimize interstate and intrastate violence, promote humane development, and achieve environmental sustainability. *Id.*

Compare Hocké, *supra* note 120, at 41 (explaining that because the problems of refugees are intertwined with other international issues, all governments should consider the refugee problem as a global one and should work together to resolve it); Carens, *supra* note 35, at 252-70 (drawing upon three contemporary approaches to political theory—the Rawlsian, the Nozicican, and the utilitarian—to construct a powerful argument for an open-border immigration policy); *with id.* at 265-68 (explaining Michael Walzer's claim that based on a theory of community right to self-determination, states may choose to accept or not to accept refugees). Gil Loescher, *The European Community and Refugees*, in REPORT OF THE INTERNATIONAL CONFERENCE: REFUGEES IN THE WORLD—THE EUROPEAN COMMUNITY'S RESPONSE, *supra* note 16, at 139 n.53 (suggesting that Switzerland is an example of a country trying to adopt a global strategy).

133. Luke T. Lee, *Draft Declaration on the Principles of International Law on Mass Expulsion*, in PROCEEDINGS OF THE 78TH ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 342 (G. Walker ed., 1986); see Geoff Gilbert, *Root Causes and International Law: Refugee Flows in the 1990's*, 4 NQHY 413 (1993) (advocating a new approach to dealing with refugee flows that are the root causes of refugee migration).

national Law Association in 1986.¹³⁴ Lee's draft declaration seeks to prohibit mass expulsions. It centers, however, around the concept of mass expulsion of a state's own nationals or aliens across international borders. In this respect, the tactic is limited in that it does not address the issue of indirect coercive displacement or the issue of internal displacement or forcible relocation.

The second approach is Goodwin-Gill's *Suggested Principles for Avoiding and Resolving Problems Arising from the Transfrontier and Internal Displacement of People in Distress*.¹³⁵ Goodwin-Gill's approach calls for commitments from states to honor two International Covenants. The Covenants would oblige contracting states to refrain from pursuing actions that seek to sever the relationship between individuals and the state, to create conditions that promote stability and eliminate the need for people to flee, and to assist states that have people in distress, including people displaced by natural disasters, wars of aggression, or serious disturbances of public order. These principles, however, are based on the premise that there is an international moral obligation to assist those in distress, rather than the recognition of a person's right to be free from distressed situations, especially ones resulting from displacement. Hence, these principles do not play an empowering role.

B. A NEW APPROACH: HIGHLIGHTING THE INTERNATIONAL LAW ON DISPLACEMENT

Some have observed that an individual's forced deprivation of his home violates a basic human right.¹³⁶ "Home" constitutes not only a means of "shelter," but also a means of placing a person in a social and physical space, and of circumscribing a person's private life and social interaction. A "homeland" has similar characteristics. These relate to one's communal life and roots. Observers have never disputed the tragedy involved in one's separation from his home and homeland, in some cases violently and abruptly.¹³⁷ The following section discusses the various ways in which international law has responded to this tragedy. It refers to some of the different legal instruments that deal with displacement, whether the displacement is deliberate or the result of other cir-

134. *Conference Report No. 675*, 62 INT'L L. ASSOC. 12 (1986).

135. Goodwin-Gill, *supra* note 10, at 114-16.

136. REFUGEES AND DEVELOPMENT, *supra* note 4, at 54.

137. See Loescher, *supra* note 126, at 7 (describing the situation of displaced persons in the world).

cumstances, in an attempt to evaluate the extent to which displacement is prohibited or otherwise regulated.¹³⁸

Apart from the legal/doctrinal dimension, the drawing together of the prohibitions of different types of displacement and the clarification of the relevant norms have a second dimension. This dimension hopefully will persuade the agents of displacement to take causal factors into account more seriously and will provide a means of empowerment. This second dimension of the right not to be displaced can be viewed as a preventive approach.

1. The Response of International Law to Deliberate Displacement

Deliberate displacement includes instances of deportation and forced relocation. Although deportation and forced relocation overlap considerably, scholars usually treat them separately. Generally, international law prohibits deliberate displacement.

a. *Deportation and Expulsion*

In 1975, Alfred de Zayas wrote that "a very serious challenge to human rights which has not been effectively dealt with in positive law is the problem of mass transfers of population, which may occur within one country, across international frontiers, in time of peace, or in time of war [A] convention on the *prevention* and *punishment* of this 'crime against humanity' should be adopted."¹³⁹ While much of this statement is true, one needs to examine the factual and legal framework of the population transfer in each case prior to concluding that it is a crime against humanity.

For analytical purposes, the relevant legal provisions can be grouped according to whether they relate to (1) the expulsion by the state of its own nationals across the national border, (2) the displacement of specific groups because of racial or other discrimination, (3) the expulsion of aliens from the country, or (4) the displacement due to wars and cease-fire agreements.

A number of regional human rights documents outrightly prohibit the expulsion of a state's own nationals, whether they are members of a

138. See *Preliminary Report on Population Transfers*, *supra* note 52, ¶¶ 133-361 (providing a thorough and detailed analysis of the body of law dealing with population transfers).

139. Alfred M. de Zayas, *International Law and Mass Population Transfers*, 16 HARV. INT'L L.J. 207, 208 (1975).

minority or not.¹⁴⁰ On the other hand, the major international human rights documents, with the notable exception of article 9 of the Universal Declaration of Human Rights,¹⁴¹ which prohibits exile, do not prohibit expulsion.

The definition of "exile" in article 9 is subject to debate. A recent commentary¹⁴² on the provision notes that the term could apply to both internal and external exiles. The commentary also notes that the absence of the term from later human rights instruments may result from the prohibition of exile's acceptance as a rule of customary international law.¹⁴³ Unfortunately, the practice of many states does not support this conclusion, unless the term "exile" is interpreted exclusively in the context of the Universal Declaration to mean punishment for a criminal offense. In this case, the term would not be applicable to a significant number of persons.

140. Protocol No. IV to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 16, 1963, art. 3, T.S. No. 46 (entered into force May 2, 1968) [hereinafter Protocol No. IV] (stating that article 3 of the Fourth Protocol to the European Convention of Human Rights provides that "no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national"); American Convention on Human Rights, Nov. 22, 1969, art. 22(5), O.A.S. T.S. No. 36, at 1 (entered into force July 18, 1978) (stating that article 22(5) of the American Convention on Human Rights provides that "no one can be expelled from the territory of the State of which he is a national"); American Declaration of the Rights and Duties of Man, Mar. 30-May 2, 1948, O.A.S. Off. Rec. OAE/Ser. L/V/I.4 rev. 6 (noting that article VIII of the American Declaration of the Rights and Duties of Man states: "Every person has the right to fix his residence within the territory of the state of which he is a national, to move freely within such territory and not to leave it except by his own will."); *Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*, GAOR Res. 2391, U.N. GOAR, 23d Sess., Supp. No. 18, at 40, U.N. Doc. A/Res/2376 (1968) (entered into force Nov. 11, 1970) (stating that article 1 (b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity defines "eviction by armed attacks" as such a crime).

141. *Universal Declaration of Human Rights*, G.A. Res. 217A(III), U.N. GOAR, 3d Sess., art. 9, at 71, U.N. Doc. A/810 (1948).

142. See THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: A COMMENTARY 153 (Asbjorn Eide et al. eds., 1992) [hereinafter COMMENTARY].

143. COMMENTARY, *supra* note 142. See generally Alfred M. de Zayas, *Population, Expulsion and Transfer*, 8 ENCYCLOPEDIA PUB. INT'L L. 438 (1992) (providing a detailed evolution of these norms). De Zayas and others seem to agree with this interpretation when they state that deportation of a minority would be a breach of the prohibition of exile. *Id.* Rainer Hoffmann, *Denationalization and Forced Exile*, 8 ENCYCLOPEDIA PUB. INT'L L. 128 (1992).

Some have suggested that a state's expulsion of its own nationals across international borders violates the international law of territorial supremacy.¹⁴⁴ The prohibition of intentional displacement, however, is based on the ground that it violates the sovereignty of other states and not on human rights principles.¹⁴⁵ Others have disagreed on the constant prohibition of deportation and expulsion. Richard Plender observed that "it is doubtful whether individual expulsion is in all circumstances contrary to international law, particularly where another state is willing to accept the expelled person and the means of expulsion is not objectionable. For example, some states still practice banishment. Many others provide for extradition of their own nationals."¹⁴⁶ Nevertheless, the Inter-American Commission of Human Rights has found, that human rights norms reject the government's expulsion of its own citizens under normal circumstances.¹⁴⁷

This raises the important issue of whether a state can strip its nationals of their nationality¹⁴⁸ and subsequently expel them as aliens. While matters of nationality fall under the jurisdiction and discretion of the State and are usually linked to citizens' responsibilities towards their

144. Michael Teitelbaum, *Forced Migration: The Tragedy of Mass Expulsions*, in CLAMOUR AT THE GATES 275 (Nathan Glazer ed., 1985); Hoffmann, *supra* note 143, at 132.

145. Teitelbaum, *supra* note 144, at 275. Convention Relating to the Status of Refugees, July 28, 1951, art. 33, 189 U.N.T.S. 173 (entered into force Apr. 22, 1954) (noting that non-citizens might be afforded stronger human rights protection from expulsion in some cases). For instance, article 33 of the 1951 Convention prohibits the *refoulement* of refugees to the frontiers of territories where their lives or freedom would be threatened on account of race, religion, nationality, membership to a particular social group, or political opinion.

146. COMMENTARY, *supra* note 142, at 355.

147. See HURST HANNUM, THE RIGHT TO LEAVE AND TO RETURN IN INTERNATIONAL LAW AND PRACTICE 64 (1987) (quoting the Inter-American Commission on Human Rights); see also T. Lee, *supra* note 121, at 343 (stating that although existing human rights instruments do not explicitly prohibit the mass expulsion of nationals from their countries, such a prohibition is undoubtedly implied). A government which has physically expelled its citizens from its territory is arguably unable to fulfill its obligations toward them under the Universal Declaration of Human Rights and other human rights instruments. *Id.* Thus, the violation of human rights is total and instantaneous. *Id.* International law allows denationalization or revocation of nationality in limited circumstances, usually where the citizen seeks residence and commits acts of allegiance abroad. *Id.*

148. See Atle Grahl-Madsen, *The Protection of Refugees By Their Country of Origin*, 11 YALE J. INT'L L. 362, 382-95 (1986) (tracing the evolution of the concept of nationality and discussing the modern view of international refugee law).

state,¹⁴⁹ observers indicate that international law recognizes an individual's right to nationality.¹⁵⁰

The displacement of a person or group on racial or other grounds, whether across national borders or not, seems to be firmly embedded in the principle of non-discrimination. This can be inferred from a number of international instruments. For instance, the International Convention on the Elimination of All Forms of Racial Discrimination provides that the states will undertake to prohibit and to eliminate racial discrimination¹⁵¹ in the enjoyment of: (a) the right to freedom of movement and residence within the border of the State; (b) the right to nationality; and (c) the right to own property alone as well as in association with others.¹⁵² The prohibition is implicit also in article 12(5) of the 1981 African Charter on Human and Peoples' Rights which establishes that mass expulsion is defined as those acts aimed at national, racial, ethnic or religious groups.¹⁵³

De Zayas contends that displacement of a national minority within the home country may contravene these provisions as well as the Nürnberg Principles.¹⁵⁴ He also argues that the deportation of a minority may

149. See *Preliminary Report on Population Transfers*, *supra* note 52, at ¶¶ 312-15 (discussing states' rights with regard to citizens and citizens' responsibilities towards states).

150. Johannes M.M. Chan, *The Right to a Nationality as a Human Right*, 12 HUM. RTS. J. 1, 13 (1991).

The Convention on the Reduction of Statelessness prohibits the deprivation of nationality, in cases of transfers of territory, if such deprivation would render a person stateless. Convention on the Reduction of Statelessness, Aug. 30, 1961, art. 8, 360 U.N.T.S. 117 (entered into force Mar. 28, 1968).

151. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 5(d), 1(1), 2(1)(a), 5(b), 660 U.N.T.S. 195.

152. See International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, art. II(c), 1015 U.N.T.S. 243 (entered into force July 18, 1976) (recognizing that inhumane acts resulting from apartheid are crimes violating international law).

153. African Charter on Human and Peoples' Rights, June 26, 1981, art. 12(5), 21 I.L.M. 59 (entered into force Oct. 21, 1986) (hereinafter African Charter). The Charter does not proscribe expulsion of the state's own nationals nor individual expulsion, even on discriminatory grounds. *Id.*

154. See de Zayas, *supra* note 139, at 252 (noting that displacement may also contravene the principles of the United Nations Charter, the Universal Declaration of Human Rights, in addition to the various conventions on the protection of human rights); London Charter, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 (defining crimes against humanity). Art. 6(c) includes deportation in the list of crimes against humanity regardless of whether or not such action is in violation of the law

constitute a breach of the prohibition of 'exile' and of the state's general human rights principles.¹⁵⁵

Governments regulate the expulsion of aliens differently from expulsions pertaining to nationals. This differentiation in the treatment of nationals and aliens is permitted, so long as it is not arbitrary nor discriminatory on such grounds as race. Certain standards for the protection of non-citizens from expulsion do apply. For instance, collective expulsion of aliens may be prohibited¹⁵⁶ and certain judicial rights are required before an individual non-citizen is expelled.¹⁵⁷ Expulsion of refugees will normally also be prohibited under the 1951 Geneva Convention (art. 33).¹⁵⁸

Finally, according to humanitarian law, article 49 of the 1949 Geneva Convention¹⁵⁹ relative to the Protection of Civilian Persons in Time of War prohibits, during times of international wars, individual or mass forcible transfers, as well as deportations of protected persons. Articles 146 and 147 read in conjunction require the parties to the convention to

of the country where perpetrated. *Id.*

155. See Alfred de Zayas, *Population, Expulsion and Transfer*, 8 ENCYCLOPEDIA OF PUB. INT'L L. 438 at 441 (1992) (noting that mass expulsions violate Arts. 3, 5, 9, 12 and 15 of the Human Rights, Universal Declaration (1948) in addition to parallel provisions of Arts. 6, 7, 12, 13, and 17 of the International Covenant on Civil and Political Rights).

156. Fourth Additional Protocol to the European Convention, *supra* note 140, at art. 4; African Charter, *supra* note 153, at art. 12(5); *American Convention on Human Rights*, Nov. 22, 1969, 1144 U.N.T.S. 123; International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, May 2, 1991, art. 8, 39, 56, 30 I.L.M. 1517. The most famous case is the mass expulsion of Asians in Uganda by Idi Amin.

157. See International Covenant of Civil and Political Rights, Dec. 16, 1966, art. 13, 993 U.N.T.S. 3 (entered into force Nov. 23, 1976) (noting that a literal interpretation of Article 13 implies that expulsion of unlawful aliens or immigrants would be permissible). Under such an interpretation, a clear gap exists in the protection of this group against unwarranted expulsion. *Preliminary Report on Population Transfers*, *supra* note 52, ¶ 231.

158. See U.N. Convention Relating to the Status of Refugees, July 28, 1951, at art. 33 ¶ 1, 19 U.S.T. 6259, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter 1951 Geneva Convention] (stating that "[n]o contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion").

159. Conventions Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 49, 6 U.S.T. 3114, 75 U.N.T.S. 31 (entered into force Oct. 21, 1950). Collectively, these Conventions are known as the Geneva Red Cross Conventions. M.J. BOWMAN & D.J. HARRIS, *MULTILATERAL TREATIES* 155 (1984).

provide for penal sanctions for persons committing or ordering any acts of unlawful deportation or transfer of civilians.¹⁶⁰ International customary law can also be read to this effect; this approach was employed in the Nürnberg Trials.¹⁶¹

During a civil war, Article 17 of Protocol II¹⁶² to the Geneva Conventions (1977) explicitly prohibits ordering or compelling the displacement of civilian populations for reasons related to the conflict.¹⁶³ Common article 3 to the 1949 Geneva Conventions prohibits, *inter alia*, violence to life and person and outrages upon personal dignity, especially those involving humiliating and degrading treatment. De Zayas contends that "it is difficult to imagine an involuntary mass deportation that would not violate these norms."¹⁶⁴

De Zayas also argues that during peace the following situations are also proscribed by international customary law:¹⁶⁵ deportation of a mi-

160. See de Zayas, *supra* note 139, at 210 (analyzing the 1949 Geneva Convention). De Zayas further explains that these provisions were codifications of pre-existing laws and customs of war. *Id.* He notes the commentary to the 1949 Geneva Convention mentioned herein and to the 1907 Hague Regulations that require the occupying power, *inter alia*, to respect the rights, the lives, and the property of persons. *Id.*

161. See de Zayas, *supra* note 139, at 212 (noting that the 1949 Geneva Convention does not contain a *clausula si omnes* that would have allowed the parties to evade application of the Convention because some of the belligerents are not parties to it, that the beneficiaries of the Convention are not states, but people, that throughout the second World War the Allies made it clear that they considered mass expulsions to be criminal and that count 3, sections B and J of the Nürnberg indictment charged the defendants with forcible deportations of civilian populations); *Preliminary Report on Population Transfers*, *supra* note 52, at ¶¶ 153-82 (analyzing the legal developments of the international humanitarian law); THEODOR MERON, *HUMAN RIGHTS IN INTERNAL STRIFE: THEIR INTERNATIONAL PROTECTION* 6 (1987) (noting that according to many scholars, the Geneva Conventions reflect customary international law today and discussing the importance of whether the four Geneva Conventions reflect international customary law).

162. 1949 Geneva Conventions Relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 17, 1125 U.N.T.S. 609, 16 I.L.M. 1442 [hereinafter Protocol II].

163. See *Deng Study*, *supra* note 51, ¶ 62 (observing that Protocol II has a higher threshold of applicability). Protocol II required that the internal conflict involve "organized armed groups . . . under responsible command." Protocol II, *supra* note 162, art. 1.

164. De Zayas, *supra*, note 139, at 221. De Zayas further observes that the London Charter to the Nürnberg Trials may be considered as setting a customary rule that forcible displacement is a crime against humanity even in the case of a civil war. *Id.* De Zayas argues that *apartheid*, even though non-international in nature, has been considered to constitute a 'crime against humanity.' *Id.*

165. See de Zayas, *supra* note 139, at 222 (providing a detailed history of the

nority pursuant to a peace treaty, as, for example, the Lausanne Treaty that approved the compulsory transplanting of peoples from their homelands; expulsion of the native population following *debellatio*—by virtue of Article 6 of the Geneva Civilians Convention of 1949; and option agreements and population exchange treaties—unless the populations affected have an option to remain in their homelands, such agreements would appear to be contrary to international customary law.

b. *Forced Relocation or Resettlement*

According to de Zayas,¹⁶⁶ resettlement has served four main purposes: settlement of land; displacement of minorities; punishment of criminals; and more recently, displacement to enable economic exploitation by “the state or transnational enterprises under special concession agreements.”¹⁶⁷ Depending on the circumstances, many of the provisions dealing with deportation and expulsion will apply in the case of forced relocation also, since forced relocation follows forced displacement.¹⁶⁸ Under certain conditions forced resettlement might also breach Article 2 of the Genocide Convention.¹⁶⁹

In sum, one can observe that the provisions dealing with deliberate displacement in time of war are broader than the peacetime provisions, since they do not require the crossing of an international border, nor do they distinguish among ‘civilians’ according to other characteristics.¹⁷⁰

evolution of these norms). De Zayas also evaluates historical incidents of population transfers and exchanges of populations. *Id.* at 234.

166. De Zayas, *supra* note 139, at 243.

167. *See id.* (surveying the history of forced resettlement); United Nations Subcommission Draft Declaration for the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/sub.2/1991/36 (1991) (applying international human rights principles to indigenous persons).

168. *See generally Preliminary Report on Population Transfers, supra* note 52, at 156 (recognizing that population transfers affect basic human rights and noting the circumstances under which transfers occur and the cumulative effects of population transfers).

169. Convention on the Prevention and Punishment of Crime of Genocide, Dec. 9, 1948, art. II, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter 1951 Genocide Convention]. In the present Convention, genocide means “any of the following acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; Forcibly transferring children of the group to another group.” *Id.*

170. *See* LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE HUMAN RIGHTS OF REFUGEES AND DISPLACED PERSONS: PROTECTIONS AFFORDED REFUGEES, ASYLUM

On the contrary, the provisions relating to peacetime are all limited in some significant manner: they prohibit expulsion of nationals across the national border;¹⁷¹ they prohibit expulsion of aliens, if they are refugees, or if the expulsion is 'massive;' they prohibit the expulsion of specific groups and minorities which again must be 'massive,' thereby setting a threshold which they do not define. The prohibition of 'exile' in the Universal Declaration may cover some of the gap, but given its unclear meaning little reliance can be placed on its effectiveness.

This patchwork of provisions seems of marginal help in attempts to deal with deliberate displacement in a comprehensive manner. Nonetheless, a closer examination clearly reveals that the only situation not discussed thus far is the expulsion of an alien to the country of origin, when he or she is not a refugee. This situation, if not a case of massive expulsions, is in principle not prohibited, although certain limitations do exist.

The most serious limitation, however, is that all the instruments mentioned above bind states vis à vis their own nationals or persons falling within their territorial jurisdiction. Apart from Protocol II¹⁷² and the Genocide Convention,¹⁷³ none of the others bind individuals or insurgent groups. They also do not bind states vis à vis the subjects of other states, when they engage in aggression that falls short of a full fledged conflict, but which may aim specifically at displacement.

2. The International Legal Response to Displacement That Occurs as a By-product of Other Circumstances

The general question is whether displacement, when not a deliberate act, but rather the result of other circumstances, can be considered a human rights violation. Note that while the first two categories of provisions, dealing with systematic human rights violations and war, have fairly specific connotations for the case of displacement, the next two,

SEEKERS AND DISPLACED PERSONS UNDER INTERNATIONAL HUMAN RIGHTS, HUMANITARIAN AND REFUGEE LAW 9 (1991) [hereinafter LAWYERS COMMITTEE FOR HUMAN RIGHTS] (noting that the widely accepted Geneva Conventions have been ratified by all but two states).

171. See Lee, *supra* note 133, at 342 (stating that Lee's proposed declaration for the prevention of mass expulsion addressed this issue based on this premise). The expulsion of *nationals* across the boundaries of the state is easier to construe as a violation of international law. *Id.*

172. Protocol II, *supra* note 162.

173. 1951 Genocide Convention, *supra* note 169.

dealing with development-induced relocation and environment-related displacement, have been much less the subject of legal analysis. Accordingly, they are discussed at some greater length.

Generally, an implied prohibition of displacement can be found in the context of the standards governing freedom of movement, the requirements for sustainable development, or the general human rights law.

a. *Systematic Human Rights Violations*¹⁷⁴

Some argue that where systematic violations of international human rights law are taking place, the prohibition of displacement would be a minor addition. If, for example, a government is arresting and torturing members of an ethnic minority, obviously, it is breaching international human rights obligations. If these persons subsequently flee, they can accuse the government of arbitrary arrest and detention, torture, and the breach of other provisions of applicable instruments which might include the International Covenant on Civil and Political Rights;¹⁷⁵ in this case little is added if they claim a further violation of being displaced.

What happens, however, when other members of the minority in our example, fearing similar treatment, decide to flee in order either to seek refuge in another country or another area or go into hiding? The only right violated here is the freedom of movement,¹⁷⁶ which is being restricted insofar as those fleeing cannot exercise one of its component freedoms, the right *not* to move. The right to remain and, once flight has already occurred, the right to return, are all expressions of the freedom of movement.¹⁷⁷

174. See HATHAWAY *supra* note 17 (noting systematic human rights violations); see also MEDINA QUIROGA, *THE BATTLE FOR HUMAN RIGHTS* 16 (1988) (defining systematic human rights violations as "those violations, instrumental to the achievement of governmental policies, perpetuated in such a quantity and in such a manner as to create a situation in which the rights to life, to personal integrity or to personal liberty of the population as a whole or of one or more sectors of the population of a country are continuously infringed or threatened").

175. International Covenant on Civil and Political Rights, *supra* note 157.

176. See *Universal Declaration of Human Rights*, *supra* note 141, at art. 13(1) (providing that "[e]veryone has the right to freedom of movement and residence within the borders of each state"); see also International Covenant of Civil and Political Rights, *supra* note 157, at art. 13(1) (providing that "[e]veryone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence").

177. See HANNUM, *supra* note 147, at 71 (noting that the right to leave and return has been constitutionally recognized in 85 countries in addition to being formally

b. *War, Armed Conflict and Communal Violence*

The issue here is whether the prohibitions of expulsion in times of war under the 1949 Geneva Conventions¹⁷⁸ cover cases where populations move because of generalized violence and fear—as opposed to being “ordered or otherwise compelled to do so.”¹⁷⁹ The *Deng Study* notes that the internally displaced are not covered.¹⁸⁰ On the other hand, the phrase “otherwise compelled” (¶ 2 art. 17 of Protocol II) can arguably be interpreted in a wider sense than the *Deng Study* suggests, to include instances where people are displaced because of the fear of violence or other violations of human rights. The most obvious legal basis for the prohibition of displacement in the context of a war of aggression can be found in the prohibition of war itself, as pronounced in the United Nations Charter, except in self-defense or with the authority of an organ of the United Nations.¹⁸¹

The more difficult point is that governments can never eliminate conflict completely.¹⁸² One can even argue that at times conflict is

accepted by the 85 state parties to the International Covenant on Civil and Political Rights); see also Antonio Walker, *The Right to Stay Where They Are*, Int'l Herald Tribune (Oct. 20, 1993), at H7 (stating that most modern international migration is the result of desperation rather than the choice of most refugees).

178. See Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, art. 49, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950) (prohibiting individual or mass transfers regardless of motive).

179. See Protocol II, *supra* note 162; THE LAWS OF ARMED CONFLICT 689 (Dietrich Schinkler & Jiri Toman eds. 1988); see also Sylvie Junot, *Article 17—Prohibition of Forced Movement of Civilians*, in INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 1471, 1474 (1987) (explaining that if one or more individuals leaves a country due to conflict, it is considered forced movement consistent with its meaning).

180. See *Deng Study*, *supra* note 51, at ¶ 65 (stating that although useful, art. 17 of Protocol II is severely limited since it only covers states party to the Protocol and since the only displacement covered is that which occurs during a period of armed conflict).

181. See *Preliminary Report on Population Transfer*, *supra* note 52, at ¶¶ 156-60 (providing a summary of the interwar periods acceptance of the Kellogg-Briand Pact and how this and the Stimson Doctrine's formula of nonaggression were adopted by the League of Nations). Prior to the U.N. Charter, the prohibition of war and the illegality of its results were enunciated in the Kellogg-Briand Pact and the Stimson Doctrine. *Id.*

182. See generally ZOLBERG ET AL. *supra* note 11 (noting that social conflicts

necessary and beneficial, even to those who suffer its immediate consequences. It would appear that people who derogate human rights principles occurring in this context would justify their actions. Consequently, displacement would not be objectionable in this case. If we perceive this issue from the perspective of those displaced, though, the consequences of armed conflict, including displacement, may not always be thought of as beneficial or legitimate. Those who choose to leave are usually considered in other countries to merit temporary protection as war victims. For instance, in Africa they would be considered refugees under the OAU Convention,¹⁸³ and, in Europe, they may be protected from being sent back under article 3 of the European Convention of Human Rights.¹⁸⁴ The UNHCR Handbook recommends granting asylum to those who flee their home countries to avoid conscription in the military service against their genuine political, religious or moral convictions or . . . their will."¹⁸⁵

Can international law be expected to solve this question? As recently noted, states are searching for alternatives where international law prevades over ethnocentric and other impractical forms of state ideology.¹⁸⁶

c. Expulsion Followed by Forced Resettlement due to Development Projects, Aid, or Other Development Policies¹⁸⁷

relating to general economic and political conditions are enduring, as opposed to conflicts based on temporary political regimes).

183. See Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, Organization of African Unity, art. I(2), 14 U.N.T.S. 691 (entered into force June 20, 1974) (stating that "[t]he term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence . . .").

184. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Europ. T. S. No. 5, Nov. 4, 1950, art. 3 (entered into force Sept. 3, 1953) (stating that "[n]o one shall be subjected to torture or to inhuman or degrading treatment.").

185. Compare Kay Hailbronner, *Non-Refoulement and Humanitarian Refugees: Customary International Law or Wishful Thinking?* 26 VA. J. INT'L L. 857, 895 (1986) with UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶¶ 170 seq (1979), [hereinafter UNHCR Handbook] (providing the contrast of Hailbronner's conclusion that a customary norm of non-refoulement for humanitarian refugees . . . is not supported by the requirements of broad and consistent state practice and opinio juris with the conclusion of the High Commissioner provided in the text above).

186. *Preliminary Report on Population Transfer*, supra note 52, at ¶ 367.

187. See *Deng Study*, supra note 66, at ¶¶ 37 seq. (observing that some aid

Although this type of displacement poses similar problems for the people affected and for those displaced, the law has treated them differently because of systematic human rights violations or armed conflict.¹⁸⁸ Until recently, forced displacement and forced resettlement were considered obstacles to the planned development policies because of the envisaged reactions to them,¹⁸⁹ rather than a human rights issue.¹⁹⁰ Observers, however, note that development in itself cannot legit-

interventions, while addressing one problem successfully, may create or compound others). See generally, BARBARA HARRELL BOND, *IMPOSING AID* (1986) (giving a general overview of the tendency of large projects, such as dams, to affect large numbers of people in a rather negative manner). The discussion also mentions the World Bank's role in the field of displacement caused by development projects. It is probable that a discussion of similar activities financed by other international development agencies would be equally relevant. See generally Ibrahim Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 *DENV. J. INT'L L. & POL'Y* 39 (1988) (providing an overview of the World Bank's role in the promotion of human rights); BARBER B. CONABLE, *Development and the Environment: A Global Balance*, *FIN. AND DEV.* (1989) (providing overviews of the World Bank's role in promotion of human rights).

188. See SARDAR SAROVAR, *The Report of the Independent Review* 17 (1992) (noting that those displaced viewed a bursting dam as a man-made catastrophe rather than a natural calamity); see also Michael Cernea, *supra* note 52, at 321 (providing a similar approach from the point of view of a World Bank sociologist).

189. See *World Bank Operational Directive No. 4.30* 8, ¶ 8 (June 29, 1990) [hereafter *Operational Guidelines*] (providing a realistic observation that "initial resistance . . . is to be expected").

190. See IBRAHIM SHIHATA, *THE WORLD BANK IN A CHANGING WORLD* 181, 182 (1991) (noting that most development projects which include major changes in land use not only involve more involuntary displacement than was previously realized, but also creates short term consequences such as "loss of productive assets, dismantling of social networks, destruction of cultural property and increased morbidity and mortality rates."); see also Paul, *supra* note 28, at 93 (expressing a point of view more toward the individuals hidden behind the 'rates' by noting separation of communities, loss of animals and unharvested crops, hunger, disease, and victimization by corrupt officials, and their forced status as refugees, thereby becoming powerless and vulnerable to all kinds of other human rights violations). See generally Zygmund Plater, *Damming the Third World: Multilateral Development Banks, Environmental Diseconomies and International Reform Pressures on the Lending Process*, 17 *DENV. J. INT'L L. & POL'Y*, 121, 125-26 (1988) (identifying two sets of environmental diseconomies in development projects: class I diseconomies are less likely to receive consideration from the development profession based on developmental pragmatics, but are "relegated to protective initiatives bases on altruistic principles" and include the displacement of indigenous populations, while class II diseconomies involve "off-site problems directly caused by a project that are economically tangible in national or local terms" and also include human dislocation effects).

imize any form of displacement¹⁹¹ or, in more extreme terms, that development projects resemble lawless activities¹⁹² and, therefore, should be somehow regulated.

Those often affected adversely by development projects are the most vulnerable in the community.¹⁹³ Efforts to "resettle" the displaced are often flawed, possibly meaning that the project will not reach its intended beneficiaries and may result in its ultimate failure.¹⁹⁴ Given these problems, Shihata observes that 'rehabilitation,' as a set of measures to help the displaced become economically self-sustaining in the shortest possible period, should substitute compensation (mostly equated with cash payments).¹⁹⁵

In 1980, the World Bank took the first major step toward some regulation of development induced displacement by issuing a set of 'operational guidelines' with other recent efforts.¹⁹⁶ The purpose of the Guidelines is to establish 'appropriate international standards' for development projects by providing for: the minimization of involuntary resettlement; the sharing in the benefits of the project by those displaced; the involvement of resettlers and hosts in planning and implementing the resettlement; and the implementation of detailed planning.¹⁹⁷

191. See Cernea, *supra* note 52, at 333 (arguing that resettlement without rehabilitation, often the case in developing countries with inadequate domestic legislation, effectively legitimizes impoverishment). See generally MICHAEL CERNEA, HARVARD INST. FOR INT'L DEV., *POVERTY RISKS FROM POPULATION DISPLACEMENT IN WATER RESOURCES DEVELOPMENT* (Aug. 1990) (discussing how the population can be economically harmed by certain developmental scenarios).

192. Paul, *supra* note 28, at 72-73.

193. See *id.* at 69-70 (stating that the projects' often impact access to food and other fundamental needs of impoverished communities and that "[f]ailure to identify potential victims . . . and failure to protect the rights at every stage of a project cycle, not only increases risks that these harms will occur and that the social costs and other undesired economic outcomes . . . will be seriously underestimated, it also increases the risk that, when these harms do occur, the victims of them will receive inadequate relief").

194. *Id.* at 92.

195. See SHIHATA, *supra* note 190, at 189 (discussing the concept of eminent domain and the government's corresponding obligation to provide compensation for confiscated property).

196. See *Operational Guidelines*, *supra* note 177 (stating the Guidelines were inspired by the two ILO Conventions, but unlike them, their application is not limited to tribal and indigenous peoples); Organization for Economic Cooperation and Development, *Guidelines for Aid Agencies on Involuntary Displacement and Resettlement*, Doc. OCDE/GD (91) 201 (1991) (noting that all viable project designs should be utilized to avoid or minimized involuntary population displacement).

197. See *id.* at 1 (providing a thorough discussion of the various measures that

In view of the fact that few resettlement plans are prepared by borrowers with the full involvement of legal experts, the national legal framework is often incomplete, and lawyers tend to treat resettlement issues as a subset of property and expropriation law.¹⁹³ There are two points that can cause considerable concern: the emphasis on the concept of eminent domain, and the way the lender sees its role in relation to development projects that cause forced relocations.

The "right of government to take private property for public purpose,"¹⁹⁹ known as the doctrine of eminent domain, contravenes the "sense of violation of rights"²⁰⁰ of those displaced, which may justify their resistance. A government giving priority to the concept of eminent domain, rather than the right of its citizens not to be displaced, may then respond with such measures as "economic blockages, punitive taxes . . . imprisonment of leaders on false charges, rescindment of general civil rights, curtailment of basic services, armed occupation of communities and, in some cases, actually firing by troops on resisters."²⁰¹

Such tactics often affect tribal and indigenous people in particular²⁰² and have warranted action on the part of the International Labour Organization (ILO). The ILO adopted Convention 107 in 1957 and revised it in 1989 through the adoption of Convention 169. Both Conventions recognize the right of ownership and possession of the peoples and prohibit their displacement unless certain conditions are met.²⁰³ Although the Conventions apply only to indigenous and tribal peoples and

should be taken to guarantee development-safe projects); *see also* Paul, *supra* note 28, at 80 (discussing the right to food).

198. SHIHATA, *supra* note 190, at 184.

199. *See id.* at 192 (quoting C. ESCUDERO, *SUSTAINED DEVELOPMENT: AN INALIENABLE HUMAN RIGHT* 12).

200. *See* Oliver-Smith, *supra* note 66, at 138-41 (giving a broad overview of resistance strategies and tactics that can be employed by those facing displacement).

201. *Id.* at 141.

202. *See generally*, Chris Tennent, *A Permanent Hope for Humanity: the Representation of Indigenous Peoples in the International Legal Literature from 1945-1992*, 16 HUM. RTS. Q. (forthcoming 1994) (explaining that this was particularly accentuated in the earlier "integrationist" era of the early post-war period, when indigenous and tribal peoples were considered 'backward,' 'savages,' etc. and states were keen on their integration).

203. *See* Convention Concerning Indigenous and Tribal Peoples in Independent Countries, art. 14(1), 16(1) (1989), *reprinted in* BASIC DOCUMENT ON HUMAN RIGHTS 303 (Ian Brownlie ed., 1992) (revising the provisions of the Indigenous and Tribal Populations Convention, art. 11, 12 (1957) (no. 107)), *reprinted in* SARDAR SAROVAR, *supra* note 171, at 18.

the exceptions they provide can be interpreted broadly,²⁰⁴ they contain at least the concept that removal from one's own land is normally an *infringement* of the right of ownership. Given the potential of flawed development projects and of serious human rights violations, especially to those people who are more vulnerable and in a worse position to react, the starting point of an analysis should be a recognition a person's right not to be displaced.²⁰⁵

Another point of concern is the somewhat superficial manner of dealing with this issue when it comes to the lender's role. Shihata, for example, contends that "[s]uch issues (as involuntary resettlement) affect international public institutions such as the World Bank when, for instance, they finance projects causing displacement, despite the fact that the projects *per se* are the responsibility of the borrowing government."²⁰⁶

The 'policy vacuums' identified earlier, and the dramatic human costs, which may be perceived as actual threats to the human rights of the people affected, warrant a greater involvement by the lender.²⁰⁷ As mentioned earlier, clear standards and principles concerning development-induced relocation both at the international and domestic levels are generally lacking. It should not be assumed that a government has the

204. See *Preliminary Report on Population Transfer*, *supra* note 52, ¶¶ 250-61 (illustrating that the ILO Conventions have been criticized for actually providing the legal basis for the displacement of indigenous peoples: the exceptions under which relocation can take place can be interpreted broadly by the state concerned and the conditions to be fulfilled, particularly the right to lands of equal quality and the right to return, can be devoid of all meaning).

205. See Cernea, *supra* note 52, at 334 (alluding that the need for the recognition of such a right is all the more necessary, given that appropriate assessments may actually show that displacement can be avoided or minimized, or that in view of the social costs the project is not viable, and that policy vacuums and insufficient legal provisions exist in both domestic and international levels); see Plater, *supra* note 190, at 142-52 (providing that evolving international law norms provide very little practical applicable legal theory). The Genocide Convention, for instance, would appear to be an "extremely drastic avenue to integrating human costs and development planning." *Id.* He notes, however, that "there is law in each development loan itself, a sort of project-by-project law or 'law of the case.'" *Id.*

206. SHIHATA, *supra* note 190, at 189.

207. See Plater, *supra* note 190, at 142 (noting that the Narmada, Balbina and Itaparica projects of the Bank have provided a setting where human rights may be perceived as threatened). Plater also notes another problem that compounds what has been already mentioned, namely that the "MDB development loan process is a closed system which quite naturally resists consideration of the negative consequences of its own development mission." *Id.* at 135.

resources to deal appropriately with such issues, as Shihata himself concedes. It may be that lenders refrain from interfering with certain domestic policies of governments. If projects are actually financed and supervised by lenders, however, they might be implicated in the resulting arbitrary displacement whenever it occurs, as noted in the Sardar Sarovar Report.²⁰⁸

d. *Damage to the Environment*²⁰⁹

International legal instruments provide for only minimum legal protection of displacement resulting from damage to the environment.²¹⁰ One reason for this is the difficulty in defining and prohibiting those types of damage to the environment that might cause displacement. International

208. *Sarovar*, *supra* note 188 and accompanying text; see Paul, *supra* note 28, at 67-68 (stating that "there is growing recognition that international development agencies . . . must promote as well as protect 'universal' human rights when . . . they engage in 'development projects' which affect the basic interests of particular people").

209. See generally William Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous People and the Environment*, 31 VA. J. INT'L L. 479, 479 (1991) (discussing the problematic issue of the right to the environment of indigenous people).

210. See Suzan Martin, *The Inhospitable Earth*, 89 REFUGEES 13, 14 (1992) (explaining that unless the environmental degradation is a consequence of a faulty development project or an armed conflict, or there is a mixture of environmental and political causes, so that the resulting displacement is covered by the various norms mentioned earlier, this type of displacement is not regulated in any coherent manner and the persons affected are not protected under an international protection regime). Martin attributes this to the following factors: unclear mandates; lack of coordination; lack of resources and seemingly competing or contradictory interests of the organizations concerned with environmental migration. *Id.* For this reason some have advocated for the expansion of the 1951 Convention refugee definition so as to include 'environmental refugees.' see also, Lazarus, *supra* note 74, at 15 (asserting that a person might inquire "whether the international community's growing efforts to prevent environmental crises should not be accompanied by a formal extension of the refugee concept"); *Migration and the Environment*, *supra* note 74, at 8, 22-23 (citing ESSAM EL-HINNAWI, *ENVIRONMENTAL REFUGEES* (1985)) (providing an overview of the existing institutions in the international field dealing with persons displaced because of environmental degradation or natural disasters); JACOBSON, *supra* note 74, at 6 (noting that "[m]ost governments do not recognize environmental decline as a legitimate cause of refugee movements, choosing instead to ignore the issue"). Neither the U.S. State Department nor the United Nations High Commissioner for Refugees, for example, collects data on this problem. *Id.* Such proposals have been criticized for being too broad. *Id.*; Suhrke, *supra* note 78 (noting that the "minimalist perspective" is skeptical that environmental degradation creates massive population displacement).

law should seek to address displacements without fabricating a distinction between flight resulting from violence and that resulting from hunger²¹¹ or where there is little hope for the development of a renewed [environmental] equilibrium.²¹² International law should seek to address displacements of this type.

Certain themes of the Stockholm²¹³ and Rio²¹⁴ declarations describe the manner in which states are required to integrate and plan appropriately their development policies so as to maximize environmental protection and economic and social benefits for all.²¹⁵ The declarations address how states should cooperate to develop international law relating to liability and compensation for the victims of pollution *and other environmental damage* caused by activities within their jurisdiction to *areas beyond their jurisdiction*.²¹⁶ Furthermore, states must develop laws regarding liability and compensation for the victims of pollution and other environmental damage²¹⁷ and must also conduct environmental impact assessments before undertaking activities likely to have adverse effects²¹⁸ in order to ensure that international organizations pursue coordinated, efficient and dynamic actions to protect and improve the environment.²¹⁹ The Stockholm and Rio declarations also provide for "[t]imely assistance" to remedy environmental deficiencies resulting from natural disasters and under-development."²²⁰ Principle 22 of the

211. ZOLBERG ET AL., *supra* note 11, at 260-61.

212. Suhrke, *supra* note 78, at 7. Suhrke links the concept of sustainable development to the definition of "environmental refugee," adding the role of the government and the time given to the displaced to cope with the displacement. *Id.* The paper describes the various positions taken by sociologists and anthropologists to define the phenomenon. *Id.* It also contains case studies that in an effort to distinguish the cases of "especially vulnerable people who are compelled to leave their area of livelihood due to significant environmental degradation." *Id.*

213. Stockholm Declaration, June 14, 1992, 31 I.L.M. 874.

214. *Rio Declaration*, U.N. Doc. A/Conf.48/14/Rev.1, 11 I.L.M. 1416 (1972).

215. Stockholm Declaration, *supra* note 213, principles 13, 14, and 15. According to principle 15, "projects which are designed for colonialist and racist domination must be abandoned." *Id.*

216. *Id.* at principle 22.

217. *Rio Declaration*, *supra* note 214, at principle 13.

218. *Rio Declaration*, *supra* note 214, at principle 202.

219. *Id.* at principle 25.

220. Stockholm Declaration, *supra* note 213, principle 201. To say how broadly or narrowly this provision can be construed is almost as difficult as trying to ascertain the forces that generate these deficiencies. There is at least some basis, however, for a requirement for international co-operation and assistance when "grave problems" result from them.

Rio Declaration refers to the indigenous people and their communities and other local communities.²²¹ Principle 24 of the Declaration states that warfare is inherently destructive to sustainable development.²²²

To date, none of these environmental principles represent binding international law, nor do they refer explicitly to displacement. Some might, however, become customary international law. In addition, they all enunciate certain principles which, if enforced, would, in theory, reduce migration pressures.²²³

III. THE RIGHT NOT TO BE DISPLACED REDEFINED AS A HUMAN RIGHT

A. HUMAN RIGHTS PROVISIONS WHICH ARE VIOLATED WHEN DISPLACEMENT OCCURS

Human Rights explicitly prohibits displacement under certain circumstances, whether deliberate or not.²²⁴ In other cases, the law requires that certain guarantees or conditions be fulfilled prior to any displacement.²²⁵ A final approach is to focus on the immediate consequences of displacement. If these consequences can be translated into violations of basic human rights, international human rights law should then pro-

221. *United Nations Conference on Environment and Development. Rio De Janeiro. 3-14 June 1992*, U.N. Doc. A/Conf.151/26, U.N. Sales No. E.93.I.8 (1992) (stating that agenda 21 has some provisions that relate to environmental migration: "[r]esearch should be conducted on how environmental factors interact with socio-economic factors as a cause of migration (5.20); demographic concerns, including concerns for environmental migrants and displaced people, should be incorporated in the programmes for sustainable development of relevant international and regional institutions (5.34); the capacity of the relevant United Nations organs, organizations and bodies, international and regional intergovernmental bodies, non-governmental organizations and local communities should, as appropriate, be enhanced to help countries develop sustainable development policies on request, and as appropriate, provide assistance to environmental migrants and displaced persons").

222. *Id.*

223. *World Charter for Nature*, G.A. Res. 37/7, U.N. Doc. A/37/51 (1983), I.L.M. 455, ¶¶ 8, 11, 20, 21(d), 23.

224. See generally ORGANIZATION OF THE AMERICAN STATES, *supra* note 129, at 75 (providing a thorough analysis of the rights that were found to have been violated in a specific situation).

225. These mainly have to do with obtaining the consent of those who are to be displaced or requiring the participation of those affected by development projects in their planning and profits.

hibit displacement. The following discussion examines the situations when a forced movement of people may endanger human rights.²²⁶

Displacement threatens the life, liberty, and security of the displaced—rights which are guaranteed, *inter alia*, in article 3 of the Universal Declaration²²⁷ and article 6 of the International Covenant on Civil and Political Rights.²²⁸ In such cases, there can be little doubt that displacement will amount to cruel, inhuman or degrading treatment as illustrated in Article 5 of the Universal Declaration and article 7 of the International Covenant on Civil and Political Rights.

Article 12 of the Universal Declaration and article 17 of the International Covenant on Civil and Political Rights prohibit arbitrary interference with an individual's home and privacy. Article 17(2) of the Universal Declaration provides that "no one shall be arbitrarily deprived of his property."²²⁹ Article 25(1) also provides that "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family" Similar provisions are found in the International Covenant of Economic, Social and Cultural Rights.²³⁰ It provides for the protection of the family (article 10); the right to an adequate standard of living, shelter and food²³¹ (article 11); the right to physical and mental health (article 12); the right to work (article 6); the right to education (article 13); and the right to pursue freely one's own economic, social and cultural development (article 1); the right to participate in cultural life (article 15).²³² All of the above rights are inevita-

226. See de Zayas, *supra* note 132, at 441 (discussing the relevant provisions).

227. COMMENTARY, *supra* note 142. Human rights principles asserted in the Universal Declaration are now recognized as part of customary international law and are thus enforceable; ROBERT LILICH, INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY 61-62 (1979).

228. Protocol II, *supra* note 160.

229. See ORGANIZATION OF AMERICAN STATES, *supra* note 129, at 125 (stating the right to property of indigenous peoples in particular has two elements insofar as it is violated because of displacement: (1) the claim by the indigenous community to its ancestral lands and to the possession and use of its resources; and (2) the ownership of homes, crops, livestock and other belongings).

230. *International Covenant on Economic, Social and Cultural Rights*, opened for signature December 16 1966, G.A. Res. 2200 A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 at arts. 10, 11, 12, 13, 15, and 16, U.N. Doc. A/6316 (1966).

231. *Analytical Report*, *supra* note 14, at ¶ 41 (noting that denial of the right to food may be used deliberately as a tactic to coerce population groups to leave their place of origin).

232. See *id.* at ¶¶ 40 et seq. (stating in the report that the right to food, shelter and health precede the right to life and personal integrity).

bly violated to a greater or lesser degree when forced displacement occurs.²³³

Displacement may also infringe on a number of other provisions of the International Covenant on Civil and Political Rights. Examples of these violations are: the principle of self-determination (article 1, also article 1 of the International Covenant on Economic, Social and Cultural Rights); the right to legal personality (article 16); the freedoms of thought (article 18); expression (article 19); association (article 20); and assembly (article 21). According to article 4 of the Covenant, articles 6, 7, 16 and 18 are non-derogable even in cases of public emergency.

The freedom of movement²³⁴ and the proscription of exile and their importance in the context of displacement cannot be overemphasized. The freedom of movement is inherently breached when displacement occurs, not only because the displaced are restricted invariably in their movements (whether confined in refugee camps, resettlement villages or welfare centers), but also because they cannot exercise their right to return to their home country or principal area. The Genocide Convention may also apply in instances of both internal and external expulsion if these practices result in genocide or threaten the physical existence of a people. The Convention delineates too high a threshold to be applicable in all cases of displacement.²³⁵

233. See Preliminary Report on Population Transfers *supra* note 52, at ¶¶ 183-274 (providing a detailed analysis for a number of these rights in the context of population transfers, including the right to self-determination and the right to adequate housing).

234. See GERVAISE COLES, *The Human Rights Approach to the Solution of the Refugee Problem: A Theoretical and Practical Enquiry*, in ALAN NASH, HUMAN RIGHTS AND THE PROTECTION OF REFUGEES UNDER INTERNATIONAL LAW, 195 (noting that "in a human rights approach . . . the refugee problem is, basically, that of the denial of freedom of movement to the individual as a result of conditions in the country of nationality that amount to compulsion to leave that country").

235. Convention on the Prevention and Punishment of the Crime of Genocide, *opened for signature* Dec. 9, 1948, 78 U.N.T.S. 277 (*entered into force* Jan. 12, 1951); see de Zayas, *supra* note 132, at 441 (stating in stronger terms that "it is certain that uprooting a population from its homeland always causes grave psychic trauma and may also lead to the physical destruction of part of the group . . . If a mass expulsion would lead to chaos and starvation, this may entail a breach of the Genocide Convention"); *Preliminary Report on Population Transfers*, *supra* note 52, at ¶¶ 211-15 (describing the circumstances under which the Genocide Convention may apply and a discussion of the required proof of intent on the part of the government or other agency to "destroy, in whole or in part, a national ethnic, racial or religious group as such."). Two other shortcomings of the Genocide Convention are also noted: the application of the Convention with its subject as "persons" rather than govern-

Irrespective of the causes of displacement, or of whether or not a particular type of displacement is explicitly prohibited by international law, some of the above rights are likely to be violated in every case in which displacement occurs. Obviously, there are degrees of seriousness of the violations in each case.²³⁶ On this basis alone, however, displacement, whenever it results in violations such as those referred to above, appears to be prohibited by international law. To illustrate this, if a government, for instance, is violating the right to food through starvation practices, thus forcing the people to migrate, it is arguable that it is not only article 11 of the International Covenant of Economic, Social and Cultural Rights that is being breached, but also a series of other articles of the Universal Declaration and the International Covenant of Civil and Political Rights.²³⁷ Leaving aside the question of implementation for the moment, it seems legitimate to conclude that creating, maintaining, failing to eliminate, or failing to take steps in order to mitigate circumstances that are conducive to displacement should be explicitly prohibited.

This section of the paper has elucidated two main points. First, that the great majority of cases of displacement are highly likely to result in the violation of at least one human right. This violation may vary in degree of seriousness and significance for the person affected depending on the circumstances and the more general context in which it occurs and will define the nature of the particular case of displacement in human rights terms. Second, that whereas in some cases uprooted people are conceived of as having suffered human rights violations, in others this is neither clear nor explicit; the result being that they are left unprotected. Yet the phenomenon of displacement is exactly the same in all cases. It is always a dreaded happening. The failure of international

ments that has proved elusive and the fact that it has never been invoked except for rhetorical purposes. *Id.* ¶¶ 216-18.

See William Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous People and the Environment*, 31 VA. J. INT'L L. 479, 489-90 (1991) (discussing the notion of "ethnocide" and cultural extinction in the event that separation from the native lands occurs in the context of indigenous peoples).

236. See *Deng Study*, *supra* note 51, at ¶ 46 (discussing the definition of internally displaced persons). The more abrupt and violent the movement, the less probable it will be that the displaced will have made some preparation or adjustment to minimize its effects. *Id.*

237. See *id.* at ¶¶ 58-61 (including in its analysis of the applicable human rights law the International Covenant of Economic, Social and Cultural Rights).

law to address the issue of displacement in a comprehensive manner results in undeniable gaps in the international protection system.²³⁸

B. THE RIGHT NOT TO BE DISPLACED: A QUALIFIED RIGHT

The analysis in the preceding paragraphs has indicated that the right not to be displaced is a qualified right that can be derogated from in certain cases. As noted above, the right to remain, or the right to stay, or even the right to return, are expressions of the freedom of movement. Article 12(3) of the International Covenant of Civil and Political Rights provides:

The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (*ordre public*), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.²³⁹

In regard to this provision it has been noted, for instance, that the law providing for the restrictions must be adequately accessible and sufficiently precise,²⁴⁰ that "necessity" implies the existence of a 'pressing social need' and must be assessed in the particular circumstances at hand,²⁴¹ that "national security" implies the existence of circumstances that affect the nation as a whole,²⁴² and that "public order," despite its varied meaning in different jurisdictions, refers to concepts as important as the maintenance of the state as a guarantor of social organization.²⁴³ Other clauses of this article have also been interpreted in a similar manner.²⁴⁴

Freedom of movement is also derogable according to article 4 of the Covenant. Article 4(1) states:

238. See generally LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 170 (discussing the bodies of international law that protect displaced persons, and their failure to protect displaced persons fully).

239. International Covenant of Civil and Political Rights, *supra* note 157, art. 12(3).

240. See HANNUM, *supra* note 147, at 25 (discussing the interpretations and conclusions reached in this regard by the U.N. Human Rights Committee and the European Court of Human Rights).

241. *Id.* at 27.

242. *Id.* at 28.

243. *Id.* at 29-30.

244. *Id.* at 41-46.

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States' Parties to the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, language, religion or social origin.²⁴⁵

In regard to this provision and similar provisions in other human rights instruments,²⁴⁶ the Inter-American Commission of Human Rights examined the evacuation of thousands of Miskito people from the villages in a border area to camps inland and concluded that it would be justified only if the government recognized the right of the people to return to their homes once the emergency had been resolved and assisted them in returning and compensated the people for property lost as a result of the displacement.²⁴⁷ The Commission also found that the circumstances that trigger the application of such provisions must be "extremely serious."²⁴⁸

Regarding the conditions under which displacement is to be carried out, guidance can be found in article 17 of Additional Protocol II to the Geneva Conventions which provides: "Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition."²⁴⁹

It was mentioned earlier that in the case of development projects and policies that might result in the displacement of people, the need for exceptional measures and the application only upon acceptable procedures provided by national laws and regulations justify forced displacement.²⁵⁰ Those relocated must not only be compensated, but also as-

245. International Covenant of Civil and Political Rights, *supra* note 157, at art. 4(1).

246. See American Convention on Human Rights, *supra* note 140, at art. 27 (providing that states parties to the Convention may suspend their obligations under certain circumstances); European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 184, at art. 15 (providing that signatories to the Convention may derogate from their responsibilities in time of war or other exigent circumstances).

247. Inter-American Commission on Human Rights, Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Indians, Doc. 10, Rev. 3 (1983) at 114.

248. *Id.*

249. Protocol II, *supra* note 162, at art. 17.

250. See ILO Convention no. 169, *supra* note 203, art. 16(2) (establishing the

sisted with their rehabilitation; they must share in the profits of the development project or policy and they must be helped with their return if the relocation is temporary.²⁵¹ In theory, by implementing the principles contained in the World Bank Operational Guidelines,²⁵² the people subjected to relocation would have few reasons to argue against it. This is true because adequate assessments would have shown the benefits of the project for them and the different measures to be taken to guarantee *improvement* in their standard of living.

Opponents can argue that these derogations are so broad and subject to such varied interpretations that they could effectively undermine the right not to be displaced. The solution to this problem, though, is to draft the exceptions in such a manner so as to limit their abuse rather than to say that the not right not to be displaced does not exist.²⁵³

C. DEFINING THE RIGHT NOT TO BE DISPLACED²⁵⁴

1. Formulating the Prohibition of Coerced Displacement

The following definitions capture the analysis in the preceding chapters concerning the causes of displacement and the legal responses to them:

no one shall be forced to leave his or her home and no one shall be forcibly relocated or expelled from his or her country of nationality or area of habitual residence; unless under such conditions as provided by law solely for compelling reasons of national security or specific and demonstrated needs of their welfare or in a state of emergency as in cases of natural or man-made disasters. In such cases all possible measures shall be taken in order to guarantee the safe departure and resettlement of the people elsewhere.

conditions under which people may be displaced).

251. ILO Convention no. 169, *supra* note 203, arts. 16(3), (4).

252. See generally *Operational Guidelines*, *supra* note 189 (establishing standards for the displacement of persons necessitated by development projects).

253. See Lee, *supra* note 133, at 344-46 (suggesting limitations on the exceptions to the right not to be displaced); see also *Analytical Report*, *supra* note 14, at ¶¶ 88-92 (discussing the need for more international standards concerning the rights of displaced persons).

254. The right to stay or the right to remain have also been occasionally used. De Zayas has advocated for a "right to one's homeland"—but there is a question of whether that would include one's home. De Zayas, *Population, Expulsion and Transfer*, *supra* note 143, at 439.

All possible assistance will be provided to the displaced, so that their security and dignity will be guaranteed. All necessary measures will be taken for the return of the displaced, when conditions allow it. None of the above provisions shall be interpreted in such a manner as to restrict the freedom of movement.²⁵⁵

2. The Element of Coercion

In defining "forced displacement" above and in all the preceding discussions, the element of "coercion" was assumed to exist. Cases of voluntary movement such as travelling, changing one's residence, or migrating legally or even illegally, are not of interest here. A person's choice, or at least their consent, to migrate satisfy the assumption that there is no violation of the right not to be displaced. In every day language the term "refugee" differs from the term "migrant" in that it implies a lack of other options but to flee.²⁵⁶ The assumption that in the wide sense a "refugee" is someone who "flees in order to survive" is often used by scholars who deliberately look behind legal definitions.²⁵⁷

One important question is whether this 'coercion' should be defined in subjective terms (i.e., with reference to the individual involved), or in objective terms.²⁵⁸ The U.N. reports²⁵⁹ refer to the element of "coercion" as being central to the definition of displacement, but do not analyze it. Instead, they relate it to the characteristics of "massiveness"

255. See *Deng Study*, *supra* note 51, at ¶ 79 (citing a statement by the Refugee Policy Group which urges for the adoption of new guidelines and standards). According to the Refugee Policy Group, these guidelines and standards should "contain express prohibitions against the forcible displacement of persons on political, racial, religious or ethnic grounds" and during "wartime". *Id.* In addition, they should elaborate "fully on the right to food . . . as well as interference with humanitarian assistance, [and cover] vulnerable groups such as women, children, the elderly and the handicapped. No derogation from these standards, even in time of emergency, should be permissible" *Id.*

256. ZOLBERG ET AL., *supra* note 11, at 4.

257. Suhrke, *supra* note 78, at 7.

258. See UNHCR HANDBOOK, *supra* note 185, at 12 (discussing whether the fear of state persecution should be ascertained with reference to subjective or objective criteria). It is usually said that a balanced account must be taken of both elements. *Id.* The "fear of persecution" criterion in the refugee definition of the 1951 Convention is linked to the anticipated persecution in case of return to the home country. See HATHAWAY, *supra* note 17, at 75.

259. See *supra* notes 29-48 (discussing various U.N. reports on displaced persons).

and "suddenness" of the population movement, in which case they correctly assume that coercion or compulsion of a certain degree is implied.²⁶⁰ These characteristics may be termed as objective, but cannot be relied upon as conclusive evidence of coercion.

Many studies undertaken in the area of involuntary migration tend to start from an implicit reference to subjective criteria.²⁶¹ A basic premise is that "most human beings do not love to move They seek to move only when life is *very difficult* where they are."²⁶² "People will often remain where they are trying to cope . . . *until or unless* they are unable to do so."²⁶³

The problem is that there is no agreement as to when a movement is forced and when it is voluntary, nor is there consensus in philosophy and psychology as to the notion of "free will" in general.²⁶⁴ For this reason, attempts are then made to insert an objective criterion or an objective method of assessing the lack of free will.

Zolberg, Suhrke and Aguayo, for instance, regard any forced movement as clearly involuntary, whether or not the force occurs as a response to life threatening violence.²⁶⁵ They then discuss the definition and origins of violence and the types of coercive circumstances that have similarly threatening effects.²⁶⁶ They define *life* as including "both biological existence and social existence."²⁶⁷ Since increasing degrees

260. See *Analytical Report*, *supra* note 14, ¶¶ 15-17; *Report of the Governmental Experts*, *supra* note 61, ¶¶ 25-26 (reporting that the experts focused on coerced mass movements of people, rather than on other types of mass movement); see also *Study on Human Rights and Mass Exoduses*, *supra* note 60, ¶ 2, 10 (commenting that millions of people have been displaced in the post colonial period by civil war, racial discrimination, and other violent factors); General Assembly Resolution 36/148 of December 16, 1981 (expressing the General Assembly's "grave concern over the continuing massive flows of refugees . . . and the human suffering affecting millions . . . who flee or are forcibly expelled from their homelands") (emphasis added).

261. See Ernst E. Boesch, *From Expulsion to Hospitality—a Psychologist's Look at the Refugee Problem*, in REFUGEES AND DEVELOPMENT, 56 (Ernst E. Boesch, et al. eds., 1983) (discussing the very different factors that influence one's decision to migrate).

262. Carens, *supra* note 35, at 270.

263. Martin, *supra* note 210, at 14 (emphasis added).

264. See Anthony Oliver-Smith et al., *Involuntary Migration and Resettlement: Causes and Contexts* in INVOLUNTARY MIGRATION AND RESETTLEMENT, *supra* note 12, at 2 (differentiating between the terms migration and forced migration).

265. ZOLBERG ET AL., *supra* note 11, at 31.

266. ZOLDBERG ET AL., *supra* note 11, at 31.

267. ZOLDBERG ET AL., *supra* note 11, at 31.

of violence and coercion inspire increasing degrees of need, it may be necessary to view the differences between refugees and migrants along a continuum of need.²⁶⁸ The problem with the idea of the continuum is that it is very difficult to establish the degree of the required "involuntariness" needed to determine when someone is deemed an involuntary migrant. Richmond provides an interesting chart of such a continuum of proactive and reactive forces, in order to illustrate the fact that, due to varying degrees of freedom, it is not easy to distinguish between "forced" and "free" or "involuntary" and "voluntary".²⁶⁹

Since these forces, which are some times distinguished as "push" and "pull" factors,²⁷⁰ can also vary extremely, one may have to start the inquiry by focusing on the individual. In the words of Kunz, for example, what distinguishes the refugee from the migrant is the *reluctance to uproot oneself*.²⁷¹ Evidence of this reluctance can be found in the evaluation of the push and pull factors, since it can be assumed that in the case of the displaced person it is the former that weighs more than the latter.²⁷² To illustrate this, let us assume that the following choice is given to the person departing. At the moment of departure, is it the right to move or the right not to be displaced that he or she would rather exercise at that particular moment? Depending on the answer, we would get a rough idea of the amount of free will or the reluctance relating to the departure.²⁷³

It may seem that if we define displacement as a human rights violation precisely because of the element of coercion, then it would appear circular to define coercion in human rights terms. Upon closer analysis, however, it emerges that the coercion may be defined in terms either of human rights violations that have occurred or the fear thereof. Displace-

268. *Id.*

269. See Richmond, *supra* note 29, at 21 (charting theories of refugee migration).

270. See GAIM KIBREAB, *Rural Eritrean Refugees in the Sudan: A Study of the Dynamics of Flight*, in REFUGEES AND DEVELOPMENT IN AFRICA 32, 32-37 (1987) (describing the different push and pull factors causing the flight of Eritrean refugees in Africa).

271. See E.F. Kunz, *The Refugee in Flight: Kinetic Models and Forms of Displacement* 7 INT'L MIGRATION REV. 125, 130-31 (1973). (distinguishing between "acute" and "anticipatory" refugee movements).

272. See Oliver-Smith, *supra* note 264, at 3 (explaining how push factors cause migration).

273. See Anders Hjort Af Ornäs, *Environment and Security in Eastern Africa in ECOLOGY AND POLITICS*, *supra* note 65, at 71-74 (describing the case of one of the camel herders in northeastern Sudan).

ment, on the other hand, will be a human rights violation not so much because of what caused it but because of the human rights violations resulting from it, as was shown earlier.²⁷⁴ If a particular movement violates certain human rights, the element of coercion can be assumed to exist at the moment of departure.

One final point that requires clarification is the situation of utmost despair in which a person would have decided to flee if he or she had a place to go to.²⁷⁵ Here, no displacement would in theory take place, but not because of the absence of push factors or proximate and root causes, but because of a complete lack of a possible destination or because of resignation. Since the lack of destination does not neutralize the coercion, one could assume that such a person could be protected by drawing attention to the human rights violations that would constitute the coercion in the case that displacement had in fact occurred. Absent such violations and absent the *prima facie* evidence of a fear thereof (no displacement), there is no reason to analyze this case with reference to a right not to be displaced.

3. Three Uses of the Right Not to Be Displaced: A Way of Empowerment, a Method for Analysis, and a Standard of Protection

The right not to be displaced can have one obvious and very significant advantage. It can provide the people who are in danger of being displaced with a claim that can assist them in drawing attention to a serious human rights problem which encapsulates a whole range of human rights abuses, as was discussed earlier.²⁷⁶ The issue of empowerment is of paramount importance in the realization of human rights. Paul, for example, has noted that a person's rights legitimize their individual or collective efforts to seek protections from threatening acts and redress adequately enough to restore a harmed interest.²⁷⁷ Whether the right not to be displaced will be enforceable or not will depend, of course, on many other factors relating, *inter alia*, to sufficiently detailed legal formulation of the norms, adequate recognition, and enforcement

274. See *supra* notes 224-38 and accompanying text (discussing and analyzing the human rights that are violated when displacement occurs); see also Lee, *supra* note 133, at 43 (explaining that expulsion is the result of direct or indirect coercion).

275. DRÜKE, *supra* note 42, at 73.

276. See also *supra* note 10 and accompanying text (suggesting that displacement could serve as *prima facie* evidence of human rights violations).

277. See Paul, *supra* note 28, at 79 (arguing that articulation of a right is a necessary precondition for seeking redress of violations of that right).

and monitoring mechanisms. Although an examination of the appropriate measures to ensure an effective role for the right not to be displaced is important, that analysis goes beyond the scope of this paper.

Despite that the right not to be displaced may need some time to assert its rightful place within international human rights law, it can already play a more subtle role. It can be used as an 'analytical tool' to shed light on a variety of issues that are currently debated in international law. Because the violation of the right not to be displaced is a violation that becomes immediately obvious in the form of a population movement, any analytical effort concerning it inevitably shifts to other questions, such as who caused the displacement (who was the agent of the violation); what were the precise rights that were violated or were in risk of violation that triggered the displacement; what were the root causes of these violations; what is the relative importance of the various causes; which is the relevant international law that should be called for in a specific situation of displacement; which human rights need to be more emphasized, given that international law does not protect them sufficiently, the result being an increased risk of displacement; and who are the appropriate subjects of international law and international human rights law (i.e., should entities such as transnational corporations, international organizations, insurgent groups, private individuals now be included given that they can be agents of displacement?).²⁷⁸ The results of such discourse promise to be enlightening.

Finally, the right not to be displaced implies at least that refugee law may need to incorporate it in its doctrine. Refugee law is conceived of as having a protective, reactive role, and has traditionally been limited to the protection of the rights of those persons who have already fled (i.e., refugees and asylum seekers).²⁷⁹ Yet the dramatic increase in the numbers of refugees has cast doubts on the viability of the existing refugee regime and the role of the traditional implementing institutions. In some cases it has called for a reconsideration of the "refugee definition"²⁸⁰ as understood under the 1951 Refugee Convention.²⁸¹ From

278. See *supra* notes 132-71 (noting the existing arguments and laws regarding who international law may protect from various types of displacement).

279. See generally JAMES HATHAWAY, *THE LAW OF REFUGEE STATUS* (1991).

280. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 150 no. 2545 (defining a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country"). Protocol Relating to the Status of Refugees of 31 January 1967,

the discussion in this paper, it appears that the right not to be displaced can play the function of a "safety net"²⁸² for a number of other rights which may vary from case to case, but which it helps shape and make concrete. One consequence of this is the use the violation of the right not to be displaced as evidence of persecution. Another is the implication for the "refugee" definition itself, which may require its orientation along the concept of coercion and victimization rather than targeting.²⁸³ A third consequence is its use as the signpost calling for international protection. Lack of protection in certain displacement cases may require reconsidering existing humanitarian and refugee regimes and the institutionalization of new types of protection.

CONCLUSION

Findings by theorists of international migration indicate that the complexity and inherent interlinking of the root causes of displacement lend support to the assumption that there is a need for a scheme of international protection when displacement occurs. By providing the backdrop against which the proximate causes of displacement need to be weighed, the analysis of the root causes facilitates the identification of the agent of displacement and the nature of the human rights violations occurring in its context. The right not to be displaced can be the starting point for such an analysis, the aim of which should be to address the circular issue of displacement, its causes and consequences, in a coherent human rights framework.

In the context of the international system of human rights protection, displacement has been addressed neither adequately nor coherently as a human rights issue. As this situation is changing, support for the approach generally proposed in this paper is emerging. Furthermore, there is a common thread running through the existing law which relates to displacement: displacement can be a human rights violation, whether deliberate or the result of other (conducive to displacement) circumstanc-

606 U.N.T.S. 267 no. 8791. art. 1(A)(2) (1967) (amending the 1951 convention by defining refugee as "any person within the definition of article 1 of the convention as if the words "as a result of events occurring before 1 January 1951 . . ." and the words ". . . as a result of such events" in article 1 A (2) were omitted").

281. HATHAWAY, *supra* note 17, at 14, 231.

282. See James Hathaway, *Reconceiving Refugee Law as Human Rights Protection*, 4 J. REFUGEE STUD. 113, 120-21 (1991) (considering how refugee law may serve as an interim means of addressing the shortcomings of international human rights law).

283. See *supra* notes 4-5 and accompanying text (defining displacement).

es. This evaluation has taken into account not only displacement-specific provisions in international human rights instruments, but also the relevant international customary law, international environmental law and the law relating to development projects and policies.

Certain human rights are likely to be violated whenever displacement occurs. Highlighting the relevant international human rights provisions may serve as a preventive approach insofar as they proscribe causing (directly or indirectly) displacement and requires that the relevant norms are taken appropriately into account. This is not to say that the right not to be displaced is not subject to derogations. It does suggest, however, that these derogations need to be carefully defined and scrutinized in their application.

Defining the factual and legal framework of displacement facilitates the formulation of the right not to be displaced. I have attempted to include all possible types of displacement, as well as instances where derogations will be justified. I have also tried to address the tension between the right not to be displaced and the freedom of movement. Central to this definition is the element of coercion which seems to stem directly from human rights violations or the threat thereof.

This discussion suggests that, in spite of the ambiguities and lack of clear principles concerning displacement, the right not to be displaced fulfills the conditions for according it international human rights status.²⁸⁴ Additionally, it reflects important social values, is relevant and consistent with different value systems, reflects existing international law, and is consistent with, but not repetitive of, the existing body of international human rights law. Furthermore, it has a clear potential for achieving a high degree of international consensus and for being sufficiently precise to give rise to identifiable rights and obligations. As for its compatibility with the general practice of states, if the patchwork of international law currently in force leads to "chronic lack of implementation," then it may be time to rethink seriously on the lack of protection from displacement.²⁸⁵

284. See *supra* note 18 and accompanying text (explaining the relevant criteria for the establishment of a new, internationally recognized human right).

285. See *Deng Study*, *supra* note 51 (recommending that the United Nations adopt a more systematic approach to protecting internally displaced persons).

SUMMARY

The central theme of the present paper is displacement in its broadest sense, (i.e., defined as coerced population movement). Following a brief discussion of the causes of displacement, it assesses the extent to which international human rights law and doctrine evaluate these causes and whether they recognize the right of a person not to be displaced. It attempts to show that such a right is implicit in international law and that its recognition could empower those in danger of being displaced to assert the violation of this and of other human rights. Apart from that, such a construction seems useful as an analytical tool, in shedding light on the link between root causes, human rights violations, and the relevant international law. It also proposes that the conception of displacement as a human rights violation could be incorporated in the enquiry of what should be the appropriate standards for the international protection of displaced persons.