Part III Substantive Guarantees, 18 Protection During Migration, Forced Displacement, and Flight

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Content type: Book content
Product: Oxford Scholarly Authorities on International Law [OSAIL]
Published in print: 29 August 2019
ISBN: 9780198825685

Subject(s):
Right to liberty of movement — Migrants, rights — Refugees — Forced transfers or displacement
I. The Issue

Migration, forced displacement, and flight have been part of the human experience from the earliest times. From a human rights perspective, people displaced within their own country (internally displaced persons) and refugees are people who require special protection because they have been deprived of the protection and security normally enjoyed by people who can remain in their homes. Thus, they have specific needs that non-displaced persons do not possess. Even if people move for predominantly voluntary reasons, they might become particularly vulnerable as migrants.

Movement of persons can be voluntary or coerced and can occur within a person’s own country or across international frontiers. Four distinct groups of people in need of human rights protection may be derived from combinations of these elements: (1) those who leave their homes voluntarily for economic, family-related, or similar reasons to settle elsewhere within their country; (2) migrants, that is, those who move to another country for the same reasons; (3) internally displaced persons (often called ‘IDPs’), that is, those who are forced to leave their homes to seek refuge in another part of their own country; and (4) refugees, that is, those who are forced to seek protection against persecution by fleeing abroad.\(^1\)

While there are no global statistics on voluntary or economically motivated within-country movement of persons, the number of persons living outside their country of origin reached 258 million in 2017, 25.9 million of whom were refugees and asylum-seekers.\(^2\) Refugees are forced to flee. Although many migrants feel compelled to leave their homes because of poverty, unemployment, or unacceptable living conditions, in legal terms their movement is nevertheless deemed “voluntary” as long as people, while not necessarily having the ability to decide in complete freedom, still possess a measure of choice between different realistic options including the option not to migrate.

The coercive nature of displacement and flight differentiates not only refugees but also internally displaced persons from migrants. At the end of 2017, the number of persons internally displaced by acts of violence and armed conflict stood at about 40 million.\(^3\) In addition, an estimated average of 25.3 million persons was newly displaced each year between 2008 and 2016 in the context of disasters triggered by sudden-onset natural hazards such as flooding, windstorms, or earthquakes.\(^4\)

Migration and refugee law have developed into separate and highly complex branches of international law that go beyond the scope of this book. The following sections focus on the specific contributions of human rights law to these areas of law.
II. Liberty of Movement in One’s Own Country

The right to liberty of movement and freedom to choose a residence in one’s own country is a fundamental component of personal development and, at the same time, provides a legal framework for issues related to internal migration. It is guaranteed by ICCPR, Article 12(1), CRPD, Article 18, ACHPR, Article 12, ArCHR, Article 26(1), IACHR, Article 22, and P 4/ ECHR, Article 2.

People should be able to travel freely within their own country, and without authorization to do so if as travellers they do not have a permanent home, as well as have the choice to settle where they find employment or other economic opportunities, where they want to be educated or trained, or where they plan to raise a family. Freedom to choose a residence includes the right to remain where one is settled and affords protection against forced displacement or relocation. These rights can be restricted by law where such action is necessary to protect national security, public order, public health or morals, or the rights of others (ICCPR, Article 12(3)). Permissible measures to limit freedom of movement include forced evacuation from disaster areas, the establishment of restricted military zones, or prohibitions to leave or enter specific locations in the event of an epidemic.

Freedom of movement also includes the right to leave one’s own country (ICCPR, Article 12(2)) and hence the right to a passport as well as the right not to be deprived of a passport without legitimate reasons. While these rights can be limited, relevant laws must clearly define the circumstances which allow banning a person from leaving his or her country. Prohibitions to leave one’s own country violate the principle of proportionality if states cannot show that the infringement was necessary to protect legitimate purposes. It is, for instance, permissible to prevent persons subject to military service or pending criminal proceedings from leaving the country or to deny them a passport. However, such measures were not proportional in a case where an arrest warrant had been pending for seven years and a passport was denied during that entire period. A violation occurred in the case of a man who was automatically, and without possibility to have his case individually assessed, banned from travelling abroad in order to ensure that he would pay maintenance in respect of his child. A travel ban imposed because the person concerned had previously violated immigration laws of a third country amounted to a violation, too. Prohibitions to leave one’s own country imposed on the basis of UN Security Council sanctions have to be assessed in the light of the requirements for legitimate restrictions.

According to Article 12(4) of the ICCPR, nobody may be arbitrarily deprived of the right to enter his or her own country. As stressed by the HRCttee, this provision has various facets. It implies the right to remain in one’s own country, thus prohibiting expulsion or punishment by exile. It guarantees the right to return not only for persons who have travelled abroad but also for those who are visiting their country for the first time because they were born abroad. The right to return is also important for refugees seeking voluntary repatriation when they no longer feel persecuted in their country of origin. Although these rights are not absolute, the HRCttee has stressed that there are few, if any, circumstances in which the application of a restriction to one’s own nationals can be reasonable.

III. Migrants

1. Entry

In principle, states are free to exercise their territorial sovereignty in regulating the entry, residence, and departure of foreigners. However, this freedom of action is limited not only by bilateral treaties and provisions in agreements concerning the free movement of persons but also in specific cases by human rights such as the prohibition of discrimination or the right to family reunification. Furthermore, the Global Compact on Migration enshrines twenty-three objectives and commitments of states and thus creates...
a legally non-binding framework that “fosters international cooperation among all relevant actors on migration, acknowledging that no State can address migration alone, and upholds the sovereignty of States and their obligations under international law.”

2. Rights during stay

Regardless of their immigration status, foreigners are in principle entitled to invoke all human rights vis-à-vis the state of sojourn.\(^{24}\)

The right to liberty of movement and freedom to choose one’s residence under ICCPR, Article 12 and corresponding regional guarantees protects “[e]veryone lawfully within the territory of a State” and thus not only nationals of the country concerned but also migrants. Thus, for example, foreigners or stateless persons required to report to the police every time they wish to change their place of residence or visit family friends can invoke their right to liberty of movement.\(^{25}\) However, the right to (p. 524) liberty of movement and freedom to choose one’s residence is subject to restriction under Article 12(3). In the Celepli v Sweden case, for instance, the HRCttee held that it was permissible to prohibit a refugee suspected of supporting terrorist activities from leaving without permission from the municipality where he lived.\(^{26}\)

Only citizens enjoy the right of access to public services and the right to take part in elections and referendums (ICCPR, Article 25). Other rights, such as the right to freedom of political expression,\(^{27}\) may be subject to more extensive restrictions than are permissible for a country’s own nationals. Thus, differentiating between citizens and non-citizens does not per se constitute discrimination if differential treatment can be shown to pursue a legitimate aim.\(^{28}\) On the other hand, rights may be limited in the case of foreigners in irregular situations.\(^{29}\) Core human rights guarantees, however, such as the right to protection of life and physical integrity and fair trial guarantees are applicable without restriction, regardless of status. Particularly important are also specific provisions protecting migrant women\(^{30}\) and children.\(^{31}\)

Special rights for migrants are contained in the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families adopted in 1990. ICRMW, Article 2(1) defines the term “migrant worker” as “a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national.” The Convention defines the rights of migrant workers before departure, while in transit, and while working abroad and thus establishes obligations for countries of origin, transit, and destination. Although the Convention creates no entitlement to entry and residence, it sets out the rights of persons falling into the category of migrant workers in great detail, including the rights of those not lawfully resident in the country concerned (undocumented migrants). While, to a large extent, it reflects existing principles established by previous human rights instruments, some of the provisions on migrant workers in an irregular situation arguably expand the scope of human rights protection considerably. This may be a key reason for the still relatively low number of ratifications of the Convention.\(^{32}\)

3. Expulsion

By virtue of the principle of territorial sovereignty, states are basically free to determine the conditions governing not only the entry but also the departure of foreigners. (p. 525) However, where persons are lawfully resident in the territory of a state,\(^{33}\) the authorities who wish to expel or extradite them\(^{34}\) must respect certain procedural guarantees.

Expulsions and deportations are unilateral acts of the state, ordering foreigners to leave its territory and, if necessary, forcefully removing them. The terminology used at the domestic or international level is not uniform but there is a clear tendency to call expulsion the legal order to leave the territory of a state, and deportation the actual implementation of such an order in cases where the person concerned does not follow it voluntarily. Expulsion and deportation as unilateral acts must be distinguished from extradition, that is, the surrender
of a person accused or convicted of a criminal act from one country to another on the basis of the latter’s request.  

According to ICCPR, Article 13, ICRMW, Article 22, ArCHR, Article 26 and P 7/ECHR, Article 1, expulsions are permissible only where three conditions are met: First, the decision to expel is reached “in accordance with the law,” that is, based upon and compatible with substantive provisions and procedural safeguards as set out by domestic law.

Second, and as the ICJ has stressed, “the applicable domestic law must itself be compatible with the other requirements of the Covenant” and equivalent guarantees of applicable regional conventions, and the expulsion “must not be arbitrary in nature, since protection against arbitrary treatment lies at the heart of the rights guaranteed by the international norms protecting human rights.” Further substantive restrictions can be derived from other human rights, in particular the right to life and the prohibition of torture and cruel and inhuman treatment. The right to protection of the family is particularly important since it prohibits expulsions in cases where the family cannot be expected to follow its expelled member abroad and where the family’s interest in continuing to live together outweighs the public interests served by the removal measure. The expulsion of foreigners for the purpose of confiscating their property and assets or to circumvent an ongoing extradition procedure is also forbidden.

Third, the person concerned is, even if domestic law does not provide such guarantees, allowed to submit the reasons against his or her expulsion, to have the case reviewed by an administrative authority or a court, and to be represented in the proceedings. These rights may be withheld, however, where compelling reasons of national security so require. These procedural requirements were breached, for example, when the French lawyer Maître Hammel, who had lived in Madagascar for many years, was driven without warning to his home by the local police, given two hours to pack his belongings and deported to France on the same day.

These procedural provisions are purely formal and contain no substantive rights against expulsion. Nevertheless, the right to present a defence and to have the case reviewed means that a decision must be rendered in each individual case; it follows that collective expulsions, whereby members of a particular group are collectively required to leave a country without an individual examination of each case, are incompatible with human rights law. This requirement was violated in the case of the expulsion of a substantial number of Haitians from the Dominican Republic in 1999 and 2000 and from Russia to Georgia in 2006, as well as in the case of a group of Roma families who were deported from Belgium to Slovakia after their requests for asylum had been rejected. However, if the members of a group of foreigners are subject to similar decisions, there is no “collective expulsion if each person concerned has been given the opportunity to put arguments against his expulsion to the competent authorities on an individual basis.”

The right under ICCPR, Article 12(4) to enter one’s own country has also acquired implications for foreigners since the HRCttee extended the scope of this provision in Stewart v Canada. It held that the concept “his own country” is broader than the notion of “country of his nationality” and decided that “it embraces, at the very least, an individual who, because of his special ties to or claims in relation to a given country cannot be considered to be a mere alien.” Examples include “nationals of a country who have there been stripped of their nationality in violation of international law and of individuals whose country of nationality has been incorporated into or transferred to another national entity whose nationality is being denied them.” The provision also affords protection against expulsion to foreigners who, having few ties to the country of their nationality, have lived in a country of residence since early childhood without the opportunity to become a citizen. The HRCttee held in one case that Australia was the “own”
country of a foreigner who, except for the first twenty-five days of his life, had always lived there believing he was an Australian until the time when authorities wanted to expel him because of his criminal record. The case of Stewart who had spent most of his life in Canada demonstrates, however, that this rule does not apply to those who had the possibility to become citizens but did not avail themselves of this opportunity. The extended protection against expulsion as provided by the Committee’s interpretation of Article 12 is particularly important for second or third-generation foreigners in countries where legal or factual impediments to the acquisition of nationality continue to exist even after a very long period.

Under international humanitarian law (IHL), individual or mass forcible transfers of the civilian population or deportations of protected persons from or to an occupied territory or to any other country is prohibited unless either the security of the affected population or military reasons so demand.

4. The prohibition of inhuman treatment as an absolute limitation on expulsion, deportation, and extradition

Are there restrictions on a state’s freedom to decide on a person’s expulsion, deportation, or extradition where the individual concerned is threatened with serious violations of human rights in the country of destination? This question arises not only in connection with the death penalty but also where a threat of torture or similarly serious human rights violations such as disappearances exists.

CAT, Article 3(1) answers the question in the affirmative by stating that “[n]o State Party shall expel, return (‘refouler’) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.” CED, Article 16 prohibits return in cases of danger of disappearances under the same conditions.

The CtteeAT has stressed that CAT, Article 3 requires assessing the risk of torture “on grounds that go beyond mere theory or suspicion” and, while recognizing that “the risk does not have to meet the test of being ‘highly probable’ . . . , the burden of proof generally falls on the complainant, who must present an arguable case that he faces a ‘foreseeable, real and personal’ risk.” While in its earlier jurisprudence, the Committee was rather generous in accepting the existence of such risk, the insistence that the burden of proof is with the author of the complaint has led to a more restrictive practice, particularly in cases where the person concerned had not experienced torture before leaving the country of origin. While it is certainly correct that it is up to the alleged victim to present relevant arguments why in his or her case a real risk exists, to conflate this requirement with the burden of proof seems problematic insofar as future events cannot be proven in a strict legal sense.

According to Article 3(2), in assessing the risk of torture “all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights” must be taken into account. In this regard the Committee held that

the aim of such determination is to establish whether the individual concerned would be personally at risk in the country to which he would return. It follows that the existence of a consistent pattern of gross, flagrant or mass violations of human rights in a country does not as such constitute a sufficient ground for determining that a particular person would be in danger of being subjected to torture upon his or her return to that country; additional grounds must exist to show that the individual concerned would be personally at risk. Similarly, the absence of a consistent pattern of gross violations of human rights does not mean that a person
cannot be considered to be in danger of being subjected to torture in his or her specific circumstances.57

The HRCttee derives a prohibition of forcible return from ICCPR, Articles 6 and 7. It maintains that “States Parties must not expose individuals to the danger of torture or (p. 529) cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion, or refoulement.”58 The Committee also holds that forcible return may be prohibited if the individual concerned risks a violation of the right to life.59 This was first recognized in extradition cases60 and later extended to deportation.61

The Committee assesses whether “there are substantial grounds for believing that there is a real risk of irreparable harm such as those contemplated by articles 6 and 7 of the covenant” in the country of destination; the risk must be “personal” and the threshold for establishing its existence is high.62 The HRCttee requires the author of a complaint to substantiate his or her claims but, unlike the CtteeAT, does not put the burden of proof on the person concerned. Rather, it examines such cases ex officio, considering “all relevant facts and circumstances (…), including the general human rights situation in the author’s country of origin” or destination63 “at the time of the removal.”64 At the same time, the Committee stresses that it gives important weight to the assessment of the risk by competent domestic authorities, unless it finds that the evaluation was arbitrary or amounted to a manifest error or a denial of justice.65

Based on these principles, the Committee found, for instance, that the life of a Somali would be at risk in his war-torn country of citizenship as he had never lived there, did not speak the Somali language and was unlikely to get any family support and clan protection there.66 A real risk of torture was identified in the case of a policeman from Tunisia who had refused to participate in ill-treatment of detainees and as a consequence experienced harassment.67

In light of the prevalence of female genital mutilation in Guinea, the Committee considered the risk of a juvenile to be submitted to such treatment to be too high to justify the planned deportation.68 In the case of a Chinese citizen who had come to the Netherlands as an unaccompanied minor, the Committee concluded that his rights as a child in accordance with ICCPR, Article 24 had been (p. 530) violated in conjunction with Article 7 as the Dutch authorities had not examined carefully enough whether the juvenile would end up living as a beggar due to the absence of personal documentation and family ties.69 In another case, the Committee found a violation of Article 7 as the authorities had not sufficiently examined whether the Nigerian authorities would be able to protect the author who had been trafficked to Denmark from revenge by the traffickers.70 Due to the fact that the sexual orientation of the author was in the public domain and known to the authorities after a newspaper article, the Committee held that the deportation of a lesbian to her country of origin would put her at risk in a context of legal provisions prohibiting homosexuality as well as widespread discrimination of the LGBTI community.71

CAT, Article 3 as well as the case law of the HRCttee are inspired by an approach developed within the framework of the ECHR. Acknowledging that the act of knowingly surrendering a person to his or her torturers is in itself inhumane, the ECtHR has long derived from the right to protection against inhuman treatment under ECHR, Article 3 a prohibition on the forcible transfer of a person to a state where he or she risks to be exposed to certain very serious human rights violations.72

According to the settled jurisprudence of the Court,73 the sovereign right of states “to control entry, residence and expulsion of aliens” is limited by the prohibition of deporting an individual to another state
where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Article 3 in the destination country. In these circumstances, Article 3 implies an obligation not to deport the person in question to that country.\textsuperscript{74}

The same standard applies not only to expulsion but also extradition cases.\textsuperscript{75} The treatment of the individual concerned “if returned must attain a minimum level of severity if it is to fall within the scope of Article 3”.\textsuperscript{76} While “the assessment of this level is relative, depending on all the circumstances of the case”\textsuperscript{77} the threshold is reached where an individual would face a real risk of torture, of inhuman or degrading treatment or (p. 531) punishment\textsuperscript{78} or of being killed\textsuperscript{79} or executed.\textsuperscript{90} Article 3 also prohibits the extradition of offenders risking a life sentence unless they are provided, in the country of destination with an effective review mechanism allowing for early release based on “objective, pre-established criteria.”\textsuperscript{81}

This prohibition can be invoked by everyone, including deserters,\textsuperscript{82} criminal offenders,\textsuperscript{83} and suspected terrorists,\textsuperscript{84} as well as asylum-seekers and refugees.\textsuperscript{85} The prohibition is applicable not only in cases where the government of the country of destination is involved in torture and ill-treatment, including where, for example, security forces act \textit{ultra vires},\textsuperscript{86} but also where the risk emanates from non-state actors in an internal armed conflict\textsuperscript{87} or even from private groups or individuals,\textsuperscript{88} provided “the risk is real and . . . the authorities of the receiving State are not able to obviate the risk by providing appropriate protection.”\textsuperscript{89} Therefore, Article 3 may provide protection against deportation if a woman would risk genital mutilation\textsuperscript{90} or serious domestic violence\textsuperscript{91} in her country of origin.

The IACtHR’s approach is similar to that of the ECtHR.\textsuperscript{92} According to its case law, the risk “must be real; in other words, it must be a foreseeable consequence” of the deportation which is the case when the explanation of the person concerned “that he could face a situation of risk is credible, convincing and coherent.”\textsuperscript{93}

The prohibition of expulsion, extradition, or deportation to a country where there are substantial grounds to believe that an individual would face a real risk of serious harm is absolute.\textsuperscript{94} This means that it is also applicable to cases in which refugee law (p. 532) would allow sending a person back to his or her country of persecution.\textsuperscript{95} The ECtHR explicitly acknowledged that in such cases relevant human rights standards provide stronger protection than refugee law.\textsuperscript{96} Due to its absolute character, these provisions also protect alleged terrorists.\textsuperscript{97} The ECtHR has repeatedly stressed “that it is not possible to weigh the risk of ill-treatment against the reasons put forward for the expulsion in order to determine whether the responsibility of a State is engaged under Article 3, even where such treatment is inflicted by another State.”\textsuperscript{98}

\textbf{Issue in focus: Diplomatic assurances in situations of torture risks}

In the context of actions taken against international terrorism, states have repeatedly resorted to extraditing or deporting suspected terrorists to countries where there exists a high risk of torture. States have justified such action with the argument that they received diplomatic assurances from the country of destination that its authorities would not resort to torture. Experience shows that such promises are not always kept.\textsuperscript{99}

Such incidences raise the question as to whether international human rights law allows extradition or deportation to countries where a serious risk exists if diplomatic assurances are given. Despite certain criticism,\textsuperscript{100} present case law indicates that extradition or deportation in such cases is neither automatically permissible nor entirely prohibited; rather, admissibility of such acts depends on the quality of the assurances in each specific case and the context in which they were provided. In this sense, the ECtHR accepts that “assurances are not in themselves sufficient to ensure adequate protection against the risk
of ill-treatment” and highlights that they do not absolve it from the “obligation to examine whether assurances provide, in their practical application, a sufficient guarantee that the applicant will be protected against the risk of ill-treatment. The weight to be given to assurances from the (p. 533) receiving state depends, in each case, on the circumstances prevailing at the material time.”

In line with this approach, the CtteeAT concluded in the case of Agiza v Sweden that Sweden had violated CAT, Article 3 because, based on the circumstances of the case and given the lack of effective supervision of the given assurances by the Swedish Embassy in Cairo, a high risk of torture was discernible in advance. The absence of any possibility for an alleged terrorist to contest the decision of deportation in front of an independent authority under Swedish law was also found to be incompatible with the procedural requirements flowing from CAT, Article 3.

The other victim of this deportation case, Mr Alzery, turned to the HRCttee which also found a violation, mainly because Sweden had failed to make arrangements for timely and regular visits by Swedish authorities and thus not ensured that the implementation of Egypt’s assurances would be effective.

The criteria developed by the HRCttee focus on effective supervisory mechanisms and thus impose on the extraditing or deporting state an extraterritorial duty to protect continuing for a potentially prolonged period of time after the handover of the individual concerned. In practice, this burden on the sending country is rather heavy, thus creating a high threshold for the admissibility of extradition or deportation based on diplomatic assurances to a country with a generally high risk of torture.

ECHR, Article 3 can be invoked against a state party even if the person concerned is to be sent to a country outside Europe. While, according to the ECtHR, “there is no question of adjudicating on or establishing the responsibility of the receiving country . . . liability [is] incurred by the extraditing Contracting State by reason of its having taken action which has as a direct consequence the exposure of an individual to proscribed ill-treatment . . . “

This reasoning, in essence, rests on the idea that the acts of deportation, extradition, or expulsion amount to inhuman acts in the sense of Article 3 if a state returns a person to a country where his or her most basic human rights would be seriously violated. In other words: The sending state is responsible under the Convention because the return measure constitutes a crucial element in the chain of events leading to the human rights violation in the receiving state. Thus, a violation of human rights in the form of killing or torture by the receiving country will also entail a human rights violation by the sending state for the act of rendering the individual. Similarly, the HRCttee has stressed that ICCPR, Articles 6 and 7 are violated where the human rights violation in the country of destination would be “the necessary (p. 534) and foreseeable consequence” of the expulsion, deportation, or extradition of the person concerned.

Thus, it is not the accountability of the country of destination that is at issue but rather the fact “that the State party itself may be in violation of the Covenant.” In other words, not the duty to protect which is not absolute but rather the violation of the duty to not commit the inhuman act of knowingly handing over an individual to torture or death lies at the core of this jurisprudence.

This doctrinal foundation explains why the prohibition of forcible return as derived from ICCPR, Articles 6 and 7 and ECHR, Article 3 also covers risks emanating from non-state actors. The situation is more complex for CAT, Article 3, as it is applicable only where there is a threat of torture carried out by or with at least the acquiescence of the state within the meaning of CAT, Article 1. Hence, in principle, torture and severe mistreatment by private actors fall outside the scope of protection of this article. In the Elmi v Australia case, the CtteeAT held, however, that the de facto authorities in a country where the central government had collapsed (as in Somalia at that time) came within the scope of the concept of “public officials or other persons acting in an official capacity” under CAT,
Article 1.\textsuperscript{110} The same must be true for \textit{de facto} authorities in parts of a country no longer under the authority of the central government.\textsuperscript{111}

What about risks in the country of destination emanating not from acts of violence but \textit{situations} such as the lack of health services for returned individuals? The ECtHR found that returning a convicted criminal who had served his sentence and was in the final stages of HIV/AIDS to the Caribbean would amount to inhuman treatment as he would be unable to rely on family, social, medical, or financial support and would be likely to spend the final months of his life on the street.\textsuperscript{112} In later cases, the Court clarified that this was an exceptional case and concluded that ECHR, Article 3 does not, in principle, prohibit deportations even if the state of health and life expectancy of a person would sharply diminish.\textsuperscript{113} Recently, the Court has, however, revisited its case law and opted for a less restrictive approach. Now, the notion of “other very exceptional cases” should, in addition to situations of imminent death, be understood to refer to situations involving the removal of a seriously ill person in which substantial grounds have been shown for believing that he or she, although not at imminent risk of dying, would face a real risk, on account of the absence of appropriate treatment in the receiving country or the lack of access to such treatment, of being exposed to a serious, rapid and irreversible decline in his or her state of health resulting in intense suffering or to a significant reduction in life expectancy.\textsuperscript{114}

The Court also accepts that Article 3 is applicable in a situation where conditions of detention imputable to the state of destination would seriously undermine the health of a person who already suffered from a serious and acute mental illness.\textsuperscript{115} The ECtHR also recognizes that forcible return of asylum-seekers may amount to inhuman treatment in situations where they would suffer because they have neither family or community support nor access to humanitarian assistance.\textsuperscript{116} Despite acknowledging that Article 3 does not “entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living,”\textsuperscript{117} the Court even prohibits forcible return to (European) countries of first asylum, where vulnerable and destitute persons would be forced to live on the streets due to a lack of support by authorities.\textsuperscript{118}

5. Acquisition of nationality and the legal status of stateless persons

International law neither recognizes an explicit right to acquire a particular nationality nor establishes specific criteria for the granting of citizenship.\textsuperscript{119} States are therefore free to a large extent to take sovereign decisions on who should be recognized as their citizens.

Only IACHR, Article 20 and ArCHR, Article 29 deviate from this principle by enshrining a right to nationality, a right to be protected against arbitrary deprivation of one’s nationality, and a right to change it. In addition, IACHR, Article 20(2) guarantees the right to claim citizenship of the territory on whose soil a person is born on condition that the person has no claim to any other citizenship. The IACtHR found the Dominican Republic to have violated the right to citizenship on these grounds. The Court based its ruling on the country’s failure to justify its refusal to deliver birth certificates to children of Haitian descent born within its territory notwithstanding its adherence, in domestic law, to the principle of \textit{ius soli}. The children consequently remained stateless for several years. The court considered this behaviour both arbitrary and discriminating and concluded that IACHR, Article 20 read in conjunction with (p. 536) the principle of equal protection of the law (IACHR, Article 24), the right to juridical personality (IACHR, Article 3), the right to a name (IACHR, Article 18) and the rights of the child (IACHR, Article 19) had been violated.\textsuperscript{120} In a later case it stressed that, according to Article 20(2), a state can only
refuse to grant its nationality to a child born on its territory if it is certain that he or she
acquires the nationality of another state immediately after birth. It stressed

that the jus cogens principle of equal and effective protection of the law and non-
discrimination requires States, when regulating the mechanisms for granting
nationality, to abstain from establishing discriminatory regulations or regulations
that have discriminatory effects on different groups of a population when they
exercise their rights. . . . States have the obligation to guarantee the principle of
equality before the law and non-discrimination irrespective of a person’s migratory
status, and this obligation extends to the sphere of the right to nationality. In this
regard, the Court has established, when examining a case with regard to the
Dominican Republic, that the migratory status of the parents cannot be transmitted
to their children.

In Africa, ACRWC, Article 6(2) protects the right of children to acquire a nationality which,
according to the African Committee of Experts on the Rights and Welfare of the Child,
provides a right to be granted a nationality as of the time of birth.

States not parties to the IACHR and ArCHR, despite their sovereignty in matters of
citizenship, do not possess unfettered discretion over the granting of citizenship and must
refrain from discrimination when taking such decisions. Thus, CEDAW, Article 9 stipulates
that states parties must “grant women equal rights with men to acquire, change or retain
their nationality.” Discrimination occurs, for instance, where women, but not men, lose their
nationality when they marry a foreigner, where “change of nationality by the husband
during marriage shall automatically change the nationality of the wife, render her stateless
or force upon her the nationality of the husband” or where, conversely, only foreign
husbands can acquire the nationality of a particular country through marriage but
not foreign wives. Similarly, CERD, Article 5(d)(iii) prohibits distinctions in the area of
nationality rights based on race, colour, or national or ethnic origin. The HRCttee’s views
deal in particular with stateless persons whose application for citizenship in their country of
habitual residence was rejected. As the Committee has stressed, the principle of equal
protection of the law embodied in ICCPR, Article 26 implies the prohibition of the denial of
citizenship on arbitrary grounds. However, if the state has legitimate grounds, it may refuse
citizenship even if the person concerned remains stateless. For instance, it is not arbitrary
for a country that has recently become independent to invoke national security as a reason
to refuse granting citizenship to a senior military officer, now stateless, who was a citizen of
the country that formerly controlled the territory concerned. Similar to the HRCttee, the
ACmHPR bases a prohibition of arbitrary denial of citizenship on ACHPR, Article 3(2)
enshrining the right to equal protection of the law. The ECtHR found a violation in the
case of a law that excluded children born out of wedlock from access to citizenship when,
unlike the biological father, the mother did not possess the nationality of the state
concerned. It held that despite the impact of such a denial on the private life, ECHR,
Article 8 does not provide a right to nationality. However, where a state has created “a
right to citizenship by descent and has established a procedure to that end, that State
consequently must ensure that the right is secured without discrimination.”

Some human rights provisions aim at preventing cases of statelessness. For instance, CRC,
Article 7 requires states to enact legislation securing a child’s right from birth to acquire a
nationality. The Convention on the Reduction of Statelessness of 30 August 1961 obliges
every contracting state to grant its nationality to persons born in its territory and regulates
in detail the conditions on which nationality should be granted in other cases.
The rights of stateless persons are set out in the Convention relating to the Status of Stateless Persons, a treaty ratified by a relatively small number of states. The treaty specifies the areas in which stateless persons who are lawfully in the territory of a state must be accorded the same treatment either as foreigners in the same circumstances or as the state’s own citizens. For instance, stateless persons must be given access to the labour market under no less favourable conditions than foreigners admitted to employment in the country, and stateless children must be accorded the same treatment as nationals in primary education.

(p. 538) IV. Internally Displaced Persons (IDPs)

1. Basic principles

Internally displaced persons (IDPs) are persons who are forced or obliged to flee or leave their homes and places of residence but remain at a (relatively) safe location within their country. Thus, unlike refugees, IDPs remain within their own country and are therefore not in need of international protection replacing the protection of their country of origin. This explains the fundamental differences in the way in which the two groups are treated in international law.

While the Refugee Convention creates a separate legal regime for people who have fled to another country, no specific convention governing the circumstances of IDPs exists at the international level. As citizens or long-term residents of their state, they are entitled in principle to invoke all human rights recognized in the country concerned as well as the applicable norms of IHL during armed conflicts. However, the fact that they have left their homes involuntarily or even under coercion and are unable to return makes them particularly vulnerable and creates special needs that differentiate them from those who can remain in their homes. Unlike non-displaced people, IDPs need to be able to leave danger zones and find shelter at a safe location while away from their homes as well as protection against being forcibly returned to areas where they would be at risk. IDPs also need protection against discrimination on account of their being displaced, for instance regarding access to basic services, education, or the labour market. They have to deal with the loss of livelihoods and property and the subsequent difficulties encountered in trying to regain them, the challenges of replacing documents that can only be obtained from the authorities at the place of habitual residence, and in some countries the inability to register as voters at locations where they are not recognized as residents. Finally, only IDPs face the challenge of finding a durable solution to their being displaced (i.e. durable return to their homes, integration at their new location, or settlement in another part of the country) allowing them to rebuild their lives in sustainable ways.

The absence of specific norms addressing the specific protection needs of IDPs prompted the former Representative of the UN Secretary-General for internally displaced persons, Francis Deng, to submit a text drafted by a group of experts to the UN Commission on Human Rights in 1998 listing the rights of IDPs. These Guiding Principles on Internal Displacement (Guiding Principles) reflect, and are based upon, international human rights and humanitarian law and spell out in greater detail relevant guarantees as they are inherent in and can be derived from these bodies of law. Thus, the Guiding Principles, although legally non-binding “soft law,” derive legal authority from their underlying norms. They have been “recognize[d] . . . as an important international framework for the protection of internally displaced persons” by the Heads of State and Government gathered in New York in September 2005 for the World Summit. They play an important practical role in a number of countries where they have been incorporated into national laws and policies.
At the regional level, binding treaty law exists in Africa. The so called Kampala Convention\textsuperscript{139} covers all causes (conflict, disasters triggered by natural hazards, and development projects) and all phases (prevention, situations during displacement, and durable solutions) of internal displacement. The Convention builds on the Guiding Principles but highlights the obligations of states rather than the rights of the displaced.

The Guiding Principles describe IDPs as persons “who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”\textsuperscript{140} The core components of this definition are: (1) the coercive character of the flight or displacement; and (2) the fact that the IDPs remain in their home country. The coercive element differentiates IDPs from persons who leave their homes for economic and similar reasons based essentially on a predominantly voluntary decision. The fact that no border is crossed accounts for the difference between IDPs and refugees.

What rights are enjoyed by IDPs? As already mentioned, they are entitled to invoke all applicable human rights as well as relevant IHL guarantees during armed conflicts.\textsuperscript{141} However, some rights are of key importance for IDPs because of the specific vulnerabilities and needs created by their displacement. Such guarantees are relevant for the stages before, during, and after displacement.

2. Protection from displacement

Steps must be taken in the first place to protect people from being displaced. In this sense Principle 6 of the Guiding Principles states that everyone has the right to be protected against being arbitrarily displaced and provides the following as examples of causes for protection: ethnic cleansing; forced evacuation during armed conflicts that is not necessary for the security of the civilians involved or imperative military reasons; forced resettlement in cases of large-scale infrastructural and development projects (p. 540) that are not justified by compelling and overriding public interests; evacuation in cases of disasters, unless the safety and health of those affected so requires; and displacement as a form of collective punishment. This list indicates that there are cases of displacement that, although forced, are lawful. Such cases include evacuations from danger zones in the event of an armed conflict or a major natural disaster in order to protect people from harm or relocations in accordance with the law and applicable human rights standards as a consequence of development projects such as dams, highways, airports, and the like. Even where displacement is not arbitrary, those concerned remain IDPs entitled to protection of their rights during and after displacement.

The prohibition of arbitrary displacement is forged from a synthesis of three sets of norms. In the area of human rights, ICCPR, Article 12(1) guarantees everyone not just freedom of movement but also the “freedom to choose residence,” which includes the right to remain in the place of one’s choice and not be displaced.\textsuperscript{142} As the ACmHPR put it: “Displacement by force, and without legitimate or legal basis . . . , is a denial of the right to freedom of movement and choice of residence.”\textsuperscript{143} The IACtHR also deduces the prohibition of forced displacement from the right to freedom of movement.\textsuperscript{144} Internal displacement caused by violent acts of agents of states may also, among others, amount to inhuman treatment.\textsuperscript{145} IHL contains more specific guarantees. According to Article 17 of Additional Protocol II, in internal armed conflicts “[t]he displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand” (paragraph 1).\textsuperscript{146} Article 49(2) of GC IV contains a similar
provision concerning occupied territories in international armed conflicts. These provisions have acquired the status of customary law.\textsuperscript{147}

Lastly, displacement has been declared a criminal act under international criminal law.\textsuperscript{148} Violations of the prohibitions of displacement under IHL are prosecuted as war crimes.\textsuperscript{149} Regarding crimes against humanity, Article 7(1)(d) of the Rome Statute of the International Criminal Court defines the systematic or widespread “deportation or forcible transfer of population” as “forced displacement of the persons concerned (p. 541) by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”\textsuperscript{149} An example of such crime is ethnic cleansing, that is, the forced displacement of a particular ethnic group from a given territory in order to create an ethnically homogenous area which, in addition, also contains elements of the crime of “persecution” on racist, religious, political, or other grounds.\textsuperscript{150}

3. Protection during displacement

Principle 1 of the Guiding Principles reaffirms that people who are displaced but have not left their country enjoy the protection of all the guarantees of human rights and IHL applicable to the population of the country concerned. In addition to rights that are also vital for non-displaced persons, such as the prohibitions of torture and arbitrary killing, three categories of guarantees are of special importance for IDPs:

(1) Prohibitions of discrimination: As experience shows, IDPs are frequently confronted in the areas where they seek refuge with prejudice or downright hostility on the part of authorities and local populations. The risk of discrimination is particularly acute in situations of internal armed conflict if the IDPs belong to, or are suspected of politically supporting, the same ethnic or religious group as the insurgents.\textsuperscript{151} Displaced women often suffer multiple discriminations based on displacement as well as gender. In such cases protection is afforded by the general prohibition of discrimination based not only on race, ethnic origin, religion, political opinion, or sex but arguably also on their status as IDPs. In this regard, Guiding Principle 1 stipulates that displaced persons may not be discriminated against “on the ground that they are internally displaced.”\textsuperscript{152} Protection against discrimination is of practical importance in this context in connection with, for example, the exercise of political rights,\textsuperscript{153} since IDPs are often prevented from participating in ballots on the ground that the right to vote and to stand for election may be exercised only in one’s place of residence. (p. 542)

(2) Freedom of movement: The right to freedom of movement guarantees IDPs the right to flee from danger zones and seek safety in another part of the country; but it also gives them the right to leave the country and seek asylum in another state.\textsuperscript{154} IDPs enjoy protection against forcible return to zones where their life, safety, liberty, or health would be at immediate risk.\textsuperscript{155} IDPs living in camps have the right to move freely in and out of their camp.\textsuperscript{156} Closed camps are prohibited unless internment is unavoidable on important grounds; and in such cases, internment should not last any longer than is absolutely necessary.\textsuperscript{157} As stressed by the Inter-American and European Courts of Human Rights, the right to freedom of movement creates positive obligations for states to ensure the return of displaced persons to their original place of residence as quickly as possible if they had to flee because of acts of violence committed by, or imputable to, the state.\textsuperscript{158}

(3) Protection in respect of special needs: As IDPs are unable to attend to their own needs during flight or evacuation and while in displacement, they are particularly dependent on humanitarian assistance in order to obtain food, shelter and housing, medical care, and other necessities. They may therefore invoke the corresponding social rights guaranteeing access to such goods and services.\textsuperscript{159} The same is true for
the educational needs of the displaced given that they are often excluded from
schools while in displacement. Particularly important are measures to address the
specific needs of women as well as other vulnerable groups such as children, persons
with disabilities, those suffering from HIV/AIDS, or older persons.

(4) Documentation: A special problem that often besets IDPs is the fact that they no
longer possess official papers such as identity cards, passports, or marriage or birth
certificates and cannot obtain new papers as, under the laws of the country
concerned, such documents may be issued only at a person’s habitual place of
residence, to which IDPs are by definition unable to return. The right of every human
being under ICCPR, Article 16 to recognition as a person before the law may be
interpreted as implying that the *de facto* exercise of this right in the case of IDPs
cannot be inhibited by requirements, such as those just mentioned, which they are
unable to meet.

States have not only to refrain from violating these rights. As the IACtHR has highlighted,
the condition of IDPs “can be understood as a *de facto* situation of lack of protection” due to
the fact that internal displacement affects a “broad range of human rights” which “obliges
the States to adopt measures of a positive nature to reverse the effects of [this] situation of
weakness, vulnerability and defenselessness, even in relation to the actions and practices of
private third parties.”

4. Protection after the end of displacement

When the causes of flight or displacement have ceased, IDPs have the right either
voluntarily to return to their original place of residence, to begin a new life in the area to
which they were displaced (local integration) or to settle in another part of the country.
This freedom of choice is derived from the right to liberty of movement and freedom to
choose one’s residence. Return, in particular, is often only possible if safety and security
are restored and where conditions are created that, like access to livelihoods and basic
services including health and education, allow the resumption of normal life in sustainable
ways. The IACtHR held that a state whose authorities have caused the displacement
violates the right to liberty of movement and freedom to choose one’s residence if it does
not take measures necessary for durable solutions allowing IDPs to rebuild their lives.
The ECtHR highlighted that “the authorities have the primary duty and responsibility to
establish conditions, as well as provide the means, which allow the applicants to return
voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to
resettle voluntarily in another part of the country.” Of importance, too, is the obligation
of authorities to assist IDPs in recovering their property or, if this is not possible, obtaining
compensation.

(p. 544) V. Refugees

1. The notion of refugee

Rather than characterizing everyone who has been forced to flee from his or her home as a
refugee, international refugee law has established its own narrower definition. According to
Article 1(A)(2) of the 1951 Convention relating to the Status of Refugees (CSR), a refugee is
any person who “owing to a well-founded fear of being persecuted for reasons of race,
religion, nationality, membership of a particular social group or political opinion, is outside
the country of his nationality and is unable or, owing to such fear, is unwilling to avail
himself of the protection of that country.” A core component of the definition of a refugee
under international law is the concept of *being persecuted for specific reasons*. The
definition comprises three key elements: (1) a stay outside of one’s country of origin; (2) the
severance of relations between the applicant and the persecuting state; and (3) a well-founded fear of persecution on racial, religious, political, or other relevant grounds.

The requirement that the refugee should be outside his or her own country does not mean that the person concerned must have fled, that is, left his or her home country on account of persecution. A refugee in the legal sense can also be someone who as a tourist, a student, or a gainfully employed person was caught unexpectedly while abroad by a change of regime in his or her home country (objective reasons subsequent to flight). The same applies to those who take an active stance against their country’s government only after leaving the country and must therefore fear persecution on return (subjective reasons subsequent to flight). 171

The criterion of severance of relations with the persecuting state reflects the belief that refugees need special protection under international law because their home country will neither allow them to enjoy the rights available to the population at large back home nor offer them diplomatic protection abroad if their rights are disregarded in the country of refuge. This is clearly reflected in the wording of CSR Article 1(A)(2), which requires that a refugee should be “unable, or . . . unwilling to avail himself of the protection of” his or her country of origin. Refugees are unable to avail themselves of the protection of their home country if the country of persecution itself, as in the case of withdrawal of citizenship, severs relations with the persecuted person. More frequently, the severance is initiated by the individual, who refuses to return home on account of the risk of persecution. In both cases, the legal status afforded to refugees and the fact that the Office of the High Commissioner for Refugees (UNHCR) is mandated 172 to intervene on their behalf with the authorities of the country of refuge, if necessary, create a certain degree of international protection substituting the protection no longer available from the country of origin. (p. 545)

The subjective will to break off relations is not sufficient for the acquisition of refugee status. Rather, it must be based on objective grounds arising out of previous persecution or the threat of future persecution. Thus, the “well-founded fear of being persecuted” 173 is a core component of the definition of a refugee. This requirement is met under the following (cumulative) circumstances: 174

1. The person has already suffered serious adverse treatment or has reason to fear such treatment in the future. The term “serious” denotes, in particular, killing, torture, inhuman treatment, and long-term detention. In contrast, mere discrimination or the violation of economic, social, and cultural rights do not usually reach the threshold of persecution unless a person’s physical integrity is thereby endangered, for instance through the denial of basic medical care in a life-threatening situation.

2. The adverse treatment is intentionally inflicted on the person concerned, that is, the effect may not be merely fortuitous. Thus, a person who happens to get caught between the fronts in an internal armed conflict is in many cases not considered to be a refugee. However, civilians who are targeted because they are on the “wrong” side of the conflict or are suspected of supporting the adverse party would qualify as refugees.

3. The adverse treatment must be inflicted for specific reasons, that is, because of the race, religion, nationality, membership of a particular social group, or political opinions of the persecuted person. Human rights violations do not qualify as persecution where they are perpetrated for other reasons. Sometimes it is difficult to draw the line between relevant and other motives, for example, in the case of women who are victims of domestic violence. The refusal of the police or the judiciary to intervene on their behalf may amount to persecution if such refusal is based on the
assumption that women are second-class citizens not deserving the full protection of the law. 175

(4) The persecution must either have already occurred and have a causal link with a person’s flight, or the fear of future persecution must be real and objectively well-founded. 176

(5) As regards the agent of persecution, relevant persecution is usually inflicted by the state and its authorities. The acts of private perpetrators are relevant if the state condones their activities or is otherwise unwilling to protect the victim. The large majority of states also recognize as refugees persons persecuted by private actors where the state of origin is unable to protect them. If, however, a person falling victim to private persecution can get protection from state authorities, refugee status will not be granted even if all the other elements of persecution are present.

This definition of a refugee does not cover everyone who is compelled to seek protection abroad. While people fleeing from armed conflict or other situations of generalized violence may also be refugees in the legal sense, many among them may not be individually at risk of persecution but seeking refuge from the general dangers associated with armed conflicts. They are protected by the broader refugee definition found in the Convention Governing the Specific Aspects of Refugee Problems in Africa of 1969, 177 which covers, in addition to refugees as defined by CSR, Article 1(A)(2) victims of external aggression, occupation, foreign domination, or events seriously disturbing public order. The same is true for the so-called Cartagena Declaration on Refugees. 178

Based on CSR, Article 1(F) those who have committed war crimes, crimes against humanity, or serious non-political crimes are excluded from refugee protection even if they are persecuted as defined above.

2. Asylum

There is no human right to asylum. Article 14 of the UDHR guarantees only the right “to seek and to enjoy in other countries asylum from persecution” but not the right to obtain it. 179 This right, which in treaty law has only been included in ArCHR, Article 28 but arguably enjoys customary law status, is important inasmuch as it gives persecuted persons the right to leave their home country and seek protection abroad. This right is given concrete substance in CSR, Article 31 according to which refugees may not be punished for illegal entry if they come directly from the persecuting state and present themselves without delay to the authorities of the state of refuge.

The granting of asylum is a sovereign right of states. As such, it allows a state to admit refugees at its own discretion without rendering itself culpable of a hostile act or inadmissible interference vis-à-vis the state of origin. This right is a necessary precondition for enabling refugees to find a safe haven and remain beyond the reach of their home state. (p. 547)

From a negative perspective, this understanding of asylum as a right of states means that they are free to deny admission to refugees whenever they see fit. This freedom, however, is limited by the principle of non-refoulement, that is, the prohibition on forcibly returning refugees to their country of persecution (see section 3).

Thus, asylum is the status granted to refugees on the basis of domestic law. Such status normally includes the right to remain in the country of asylum (including protection against expulsion and deportation) as well as specific rights regarding different aspects of life
(economic activities, education, access to property) that can go beyond but must not fall below the status rights afforded by the CSR (see section 4).

As a rule, asylum is granted only to persons who have been recognized as refugees. This leaves persons fleeing the dangers of armed conflict who are not individually at risk of persecution often without protection, especially in Europe. The EU has therefore established an instrument detailing the minimum standards for giving temporary protection, which provides temporary protection through the granting of admission and support without detailed examination of individual cases for a maximum period of three years in the event of mass influx of persons fleeing the dangers of a particular armed conflict.

Neither the CSR nor any other international treaty contains provisions governing asylum procedures. It may, however, be inferred from the right to an effective remedy that persons with a well-founded fear of torture and similar ill-treatment in the state to which they are to be returned by deportation of extradition have a right to have access to an effective remedy “allowing the competent national authority both to deal with the substance of [such] complaint and to grant appropriate relief.” Such remedy must ensure “independent and rigorous scrutiny of a claim that there exist substantial grounds for believing that there is a real risk” of prohibited treatment in the country of destination and have “automatic suspensive effect.” Such remedy cannot be withheld even if domestic law excludes someone from accessing the asylum procedure.

3. Non-refoulement

The principle of non-refoulement is the cornerstone of refugee law. Although it does not establish a right to asylum, it lays the basis for an internationally guaranteed right of refugees to remain beyond the reach of the persecuting state as long as their fear of persecution remains well-founded. The principle does not preclude states from denying refugees asylum and sending them to another state, provided that third states refrain from sending them to the country of persecution. If no other safe country is prepared to admit the refugees, they must be allowed to stay, even when denied asylum.

The proscription of forcible return is not only embodied in the human rights prohibition of inhuman treatment but also in refugee law under the notion of “non-refoulement.” CSR, Article 33, whose content has now acquired customary international law status, prohibits to send a refugee “in any manner whatsoever” to a country “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” There need not be irrefutable proof but evidence of a high probability of such threat. This provision can be invoked only by persons who are refugees in the legal sense. Moreover, the protection afforded is not absolute, since CSR, Article 33(2) permits the return of a refugee “whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” The exception under Article 33(2) CSR is without effect, however, where prohibitions of refoulement under human rights law are applicable, since these provisions take precedence in cases where the CSR as such would permit refoulement.

Article 33 of the CSR is supplemented in the case of refugees who are lawfully in the territory of a contracting state by Article 32 of the Convention on expulsion, which guarantees them the same due process rights as those enjoyed by foreigners in general under the human rights treaties and furthermore limits the grounds for expulsion to those of national security and public order.
4. Status rights

Refugees, as foreigners who are often unwelcome in the state of refuge but who must be admitted owing to the prohibition of refoulement and the absence of a welcoming third state, often find themselves in particularly difficult circumstances. This is why the CSR (p. 549) and regional instruments have created a special legal status for refugees. They enjoy specific rights that must be guaranteed by the state of refuge and, as mentioned above, they benefit from the ability of the UNHCR to intervene on their behalf where these rights, including the right to be protected against refoulement, are violated or where refugee status is denied to them although they fulfil all conditions under the CSR.

The status rights afforded to refugees under the CSR include, for example, the right to protection of property (CSR, Articles 13 and 14), the right of access in principle to wage-earning employment, though subject to certain limitations (CSR, Articles 17–19), the unrestricted right to primary education for refugee children (CSR, Article 22(1)), certain housing and social welfare rights (CSR, Articles 20, 21, 23, and 24), and the right to a travel document (refugee passport, CSR, Article 28).

Refugee status can be withdrawn when the reasons justifying refugee protection have ceased to exist, for example, there is a profound change of circumstances in the country of origin that led to the persecution or the person concerned is granted citizenship of the country of refuge.

Issue in focus: Persons displaced in the context of disasters and adverse effects of climate change

One of the big humanitarian challenges of the twenty-first century is the fact that every year millions of people are forced to leave their homes in the context of disasters linked to natural hazards and adverse effects of climate change. This reality creates specific protection needs for displaced persons. If they remain within their own country, they can receive protection as internally displaced persons. If they cross borders to find refuge abroad, they normally do not qualify as refugees per se, although forms of persecution and violence relevant under international or regional refugee law may also occur in disaster contexts. Similarly, international human rights law provides in most cases no protection.

Nevertheless, the international community is starting to address the issue. The Nansen Initiative, a state-led consultative process, developed an “Agenda for the (p. 550) Protection of Cross-Border Displaced Persons in the Context of Disasters and Climate Change” which was endorsed by more than 100 states in October 2015. The Agenda compiles and analyses key principles and existing effective practices from around the world to protect cross-border-disaster displaced-persons and provides a toolbox of policy options that states, regional organizations, and other actors could integrate in their own laws, policies, and frameworks.

At the UN level, the “Sendai Framework for Disaster Risk Reduction 2015–2030” addresses prevention of and responses to disaster displacement, including across borders. In 2015, negotiators at the UN climate conference in Paris agreed to create a Task Force to develop recommendations for integrated approaches to climate change. Particularly important is the Global Compact for Safe, Orderly and Regular Migration. Its Objective 2 and the accompanying commitment lists, inter alia, the integration of human mobility aspects into climate change adaptation, resilience, and disaster management strategies and the development of “coherent approaches to address the challenges of migration movements in the context of sudden-onset and slow-onset natural disasters” and adverse effects of climate change as important measures to address drivers of migration. Objective 5 on migration pathways calls for developing or building "on existing national and
regional practices for admission and stay of appropriate duration based on compassionate, humanitarian or other considerations for migrants compelled to leave their countries of origin, due to sudden-onset natural disasters and other precarious situations, such as by providing humanitarian visas, private sponsorships, access to education for children, and temporary work permits, while adaptation in or return to their country of origin is not possible. It also calls for solutions "for migrants compelled to leave their countries of origin due to slow-onset natural disasters, the adverse effects of climate change, and environmental degradation, such as desertification, land degradation, drought and sea level rise, including by devising planned relocation and visa options cases, in cases where adaptation in or return to their country of origin is not possible." While the Compact is legally non-binding, the envisaged follow-up process with an International Migration Review Forum to take place every four years provides an institutional framework to build on these commitments in the coming years and decades.

Footnotes:
1 This is the legal terminology as derived from existing treaty law as well as soft law instruments. Social sciences distinguish between forced and voluntary migration with IDPs and refugees belonging to the first and persons moving inside their country as well as migrants belonging to the second category. To call all these persons "migrants" risks confusing the profound legal differences between the categories and is therefore not suitable for legal analysis.
5 See, e.g., ACmHPR, Law Offices of Ghazi Suleiman v Sudan, Communication No 228/1999 (2003), para 64, finding that prohibiting a lawyer to travel to a certain location to speak to a group of human rights defenders not only violated his freedom of expression but also ACHPR, Art 12. On the other hand, according to HRCTtee, Gorji-Dinka v Cameroon, Communication No 1134/2002 (2005), para 5.5, house arrest that amounts to arbitrary deprivation of liberty, also violates ICCPR, Art 12.
7 See section IV.2.
11 HRCTtee, Batyrov v Uzbekistan, Communication No 1585/2007 (2009), para 8.3, and Orazova v Turkmenistan, Communication No 1883/2009 (2012), para 7.3. According to ECtHR, Battista v Italy, Reports 2014-VI, para 48, it is not proportional to impose a travel
ban automatically and “for an indeterminate period without any regard to the individual circumstances” of a person who has to make maintenance payments for a son.


13 ECtHR, Popoviciu v Romania, Application No 52942/09 (2016), paras 82 ff. For an overview of the Courts case law on restrictions to the right to leave one’s country see ECtHR, Battista v Italy, Reports 2014-VI, para 36.

14 HRCttee, González del Río v Peru, Communication No 263/1987 (1992), para 5.3. See also ECtHR, Popoviciu v Romania, Application No 52942/09 (2016), para 89, where the Court recalls its case law according to which the duration of an obligation not to leave the territory of more than five years in criminal cases is usually disproportionate.

15 ECtHR, Battista v Italy, Application No 43978/09 (2015), paras 35 ff.

16 ECtHR, Stamose v Bulgaria, Reports 2012-VI, paras 29 ff.

17 HRCttee, Sayadi and Vinck v Belgium, Communication No 1472/2006 (2008), paras 10.5 ff. For an assessment of such travel bans under ECHR, Art 8 see ECtHR (Grand Chamber), Nada v Switzerland, Reports 2012-V, paras 156 ff.

18 HRCttee, General Comment No 27 (1999), para 19.

19 HRCttee, General Comment No 27 (1999), para 21.


21 CtteeERD, General Recommendation No 30 (2004), para 9. See also ECtHR, Abdulaziz and Others v The United Kingdom, Series A, No 94 (1985).

22 See, e.g., ECtHR, Gül v Switzerland, Reports 1996-I, and Chapter 12, section III.2.

23 Global Compact for Migration for Safe, Orderly and Regular Migration, adopted on 10 December 2018, UN Doc A/CONF/231/3.

24 For a detailed analysis, see IACtHR, Juridical Condition and Rights of Undocumented Migrants (Advisory Opinion), Series A, No 18 (2003), paras 111 ff.

25 ECtHR, Tatishvili v Russia, Reports 2007-I, para 45.


27 See ECHR, Art 16 allowing contracting states to impose restrictions on the political activity of foreigners.


29 See, however, ICRMW, Arts 7–35.


31 See, in particular, Joint General Comment No 3 (2017) of the CtteeRMW and No 22 (2017) of the CtteeRC on the general principles regarding the human rights of children in the context of international migration; CtteeRC, General Comment No 6 (2005); IACtHR, Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection (Advisory Opinion), Series A, No 21 (2014).

32 The Convention only entered into force in 2003, i.e. thirteen years after its adoption, and no industrialized country that is mainly a destination state has ratified it yet.
Accordingly, protection under ICCPR, Art 13 ceases if a person remains in a state after the expiry of his or her permit (see HRCttee, General Comment No 15 [1986], para 9). However, ICRMW, Art 22 goes beyond this limitation by granting rights to all migrant workers regardless of whether or not their stay is regular according to domestic law.

ICCPR, Art 13 is applicable to all kinds of removal measures, including extradition (see HRCttee, Kindler v Canada, Communication No 470/1991 [1993], para 6.6).

Draft articles on the expulsion of aliens, adopted by the International Law Commission at its sixty-sixth session, Yearbook of the International Law Commission, 2014, vol. II, Part Two, Art 2 defines expulsion as “a formal act or conduct attributable to a State, by which an alien is compelled to leave the territory of that State; it does not include extradition to another State, surrender to an international criminal court or tribunal, or the non-admission of an alien to a State”.

ArCHR, Art 26(2) does not grant the right to be represented. IACHR, Art 22(6) embodies a guarantee against being expelled based on a decision that is not in accordance with law, but does not contain the procedural guarantees contained in the ICCPR.


See in this Chapter, section III.4. See also ILC Draft articles on the expulsion of aliens (n 35), Arts 16 and 17. Art 32 obliges states to not expel a refugee lawfully in their territory save on grounds of national security or public order and prohibits forcible return to the country of origin (non-refoulement; see this Chapter, section V.3).

See Chapter 12, section III.2 (Issue in focus).

ILC Draft Articles on the expulsion of aliens (n 35), Arts 11 and 12.

ICCPR, Art 13 and P 7/ECHR, Art 1 confer no right of access to a court, so that the designation of a competent authority is left to domestic legislation. However, according to HRCttee, General Comment No 31 (2007), para 62, if domestic law provides for a decision by a court in expulsion and deportation cases, “the guarantee of equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee are applicable.”


IACtHR, Expelled Dominicans and Haitians v Dominican Republic, Series C, No 282 (2014), paras 381 ff.

ECtHR (Grand Chamber), Georgia v Russia, Reports 2014-IV, para 178.

ECtHR, Čonka v Belgium, Reports 2002-I, paras 59 ff.
47 ECtHR, MA v Cyprus, Reports 2013-IV, para 246.


50 Ibid.

51 HRCttee, Nystrom v Australia, Communication No 1557/2007 (2011), paras 7.4 ff. Similarly, in HRCttee, Warsame v Canada, Communication No 1959/2010 (2011), paras 8.4 ff, the Committee found a violation when Canada decided to deport a person of Somali origin to Somalia despite the fact that he had lived in Canada since he was four years old, had no contacts whatsoever to Somalia and was unlikely to be recognized as a Somali citizen there. See also HRCttee, Deepan Budlakoti v Canada, Communication No 2264/2013 (2018), paras 9.2 ff.

52 HRCttee, Stewart v Canada, Communication No 538/1993 (1996), para 13.5. In HRCttee, Ilyasov v Kazakhstan, Communication No 2009/2010 (2014), the Committee declared admissible a claim by the author that after fifteen years of living there Kazakhstan had become “his own” country (para 6.10) but refrained from pronouncing itself on a possible violation of Art 12 (para 7.8). Several separate opinions annexed to the views warn against extending the scope of application of this notion to such cases, inter alia by highlighting that the drafters of the Covenant introduced the notion of “his own country” instead of “country of his nationality” in order to prevent states from stripping citizens of their nationality and then expulsing them as “foreigners” (see General Assembly, Third Committee, Official Record of the Fourteenth Session, 12 November 1959, UN Doc A/C.3/ SR.954, para 35).

53 GC IV, Art 49. See also AP I, Art 78 on limitations with respect to the evacuation of children. According to Art 8(2)(a)(vii) and 8(2)(b)(viii) of the Rome Statute, the unlawful deportation or transfer of the population of an occupied territory constitute a war crime.

54 See Chapter 9, section II.2.c.iii.


60 HRCttee, Ng v Canada, Communication No 469/1991 (1993), para 15.3.


See, e.g., HRCttee, *HA v Denmark*, Communication No 2328/2014 (2018), para 9.2. In *Byahuranga v Denmark*, Communication No 1222/2003 (2004), para 11.3, the Committee held that not only Byahuranga’s earlier activities but also his activities in exile had to be taken into account in assessing the danger.


Although the former ECmHR had held since the 1960s that such a prohibition of deportation could be derived from ECHR, Art 3 (*Amekrane v The United Kingdom*, Application No 5961/72, *Yearbook* 16 (1973), 357), the Court had its first opportunity to endorse this approach in an extradition case in ECtHR, *Soering v The United Kingdom*, Series A, No 161 (1989).

ECtHR (Grand Chamber), *JK and Others v Sweden*, Application No 59166/12 (2016) (key case), paras 78 ff provides an extensive overview on the Court’s case law.

ECtHR (Grand Chamber), *FG v Sweden*, Application No 43611/11 (2016) (key case), para 111. Regarding the standards used by the court to assess the risk see ibid, paras 113 ff.


ECtHR (Grand Chamber), *FG v Sweden*, Application 43611/11 (2016) (key case), para 112.

Ibid.
This is the Court’s standard formula. See, e.g., ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V, para 74, and for a recent case ECtHR, Mamazhonov v Russia, Application No 17239/13 (2014), paras 127 and 128. See also ECtHR, Saadi v Italy, Reports 2008-II, para 125. Sometimes, the Court uses the notion of “treatment contrary to Article 3,” e.g. in ECtHR, X v Sweden, Application No 36417/16 (2018), para 46. In Babar Ahmad and Others v The United Kingdom, Applications Nos 24027/07, 11949/08, 36742/08, 66911/09, and 67354/09 (2012), para 176, the Court explicitly stated that this applies not only to torture but all forms of ill-treatment prohibited by ECHR, Art 3.


See Chapter 9, section II.2.c.iii.

See Chapter 9, section II.2.c.iii.

ECtHR, Trabelsi v Belgium, Reports 2014-V, para 137. See also para 115.

ECtHR, Said v The Netherlands, Reports 2005-VI.

E.g., ECtHR, Soering v The United Kingdom, Series A, No 161 (1989), HLR v France (Grand Chamber), Reports 1997-III, D v The United Kingdom, Reports 1997-III, and Mamazhonov v Russia, Application No 17239/13 (2014).

E.g., ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V, and Saadi v Italy, Reports 2008-II.

E.g., ECtHR, Cruz Varas v Sweden, Series A, No 201 (1991), Ahmed v Austria (Grand Chamber), Reports 1996-VI, Ismoilov and Others v Russia, Application No 2947/06 (2008), Hirsi Jamaa and Others v Italy (Grand Chamber), Reports 2012-II; LM and Others v Russia, Applications Nos 40081/14, 40088/14, and 40127/14 (2015), JK and Others v Sweden (Grand Chamber), Application No 59166/12 (2016) (key case).

ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V.

ECtHR (Grand Chamber), Ahmed v Austria, Reports 1996-VI.

ECtHR (Grand Chamber), HLR v France, Reports 1997-III, as well as ECtHR, N v Finland, Application No 38885/02 (2005), para 163, and Salah Sheekh v The Netherlands, Application No 1948/04 (2007), paras 139 ff.

ECtHR (Grand Chamber), JK and Others v Sweden. Application No 59166/12 (2016) (key case), para 80.

ECtHR, Izevbekhai and Others v Ireland (dec), Application No 43408/08 (2012), para 73.

ECtHR, N v Sweden, Application No 23505/09 (2010), para 55.

IACtHR, Wong Ho Wing v Peru, Series C, No 297 (2015), paras 155 ff.

Ibid, para 155.

ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V, para 80, and Saadi v Italy, Reports 2008-II, para 127.

CRS, Art 33(2) allows forcible return to the country of persecution in the case of “a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country.” According to CSR, Art 1F, refugees who are considered to have committed certain categories of crimes are excluded from the protection provided by the Convention, including its Art 33(1).
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96 ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V, para 80, and Saadi v Italy, Application No 37201/06 (2008), para 138.

97 E.g., ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V, and Saadi v Italy, Reports 2008-II.

98 ECtHR (Grand Chamber), Saadi v Italy, Reports 2008-II, para 138. See also ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V, para 80.

99 This happened, for instance, in the case of two alleged terrorists, Mr Agiza and Mr Alzery, who were handed over by Sweden to Egyptian authorities and subsequently tortured. See CtteeAT, Agiza v Sweden, Communication No 233/2003 (2005), and HRCttee, Alzery v Sweden, Communication No 1416/2005 (2006).

100 Taking into account all the difficulties inherent in diplomatic assurances, UN Special Rapporteur on Torture, Manfred Nowak concluded that they “are not legally binding, undermine existing obligations of States to prohibit torture and are ineffective and unreliable in ensuring the protection of returned persons, and therefore shall not be resorted to by States”; Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc A/61/259 (2006), para 2, referring to his 2006 Report to the Human Rights Commission, UN Doc E/CN.4/2006/6, paras 28–33.

101 ECtHR, Mamazhonov v Russia, Application No 17239/13 (2014), para 134. Similar, ECtHR (Grand Chamber), Saadi v Italy, Reports 2008-II, para 148; as well as ECtHR, Othman (Abu Qatada) v The United Kingdom, Reports 2012-I, para 187, Ismoilov and Others v Russia, Application No 2947/06 (2008), para 127, and Soldatenko v Ukraine, Application No 2440/07 (2008), para 73.


104 ECtHR, Cruz Varas v Sweden, Series A, No 201 (1991), para 69.


107 See Part I, Chapter 3, Section III.3.


109 See Chapter 10, Section II.1.a.

110 CtteeAT, Elmi v Australia, Communication No 120/1998 (1999), para 6.5. This is in line with DASR, Art 9 stating that conduct carried out in the absence or default of the official authorities of a state “shall be considered an act of [that] State under international law.”

111 Without providing any reasons, however, the CtteeAT recently found in the case of a young woman risking female genital mutilation (FGM) by private actors in her country of origin that in light of, inter alia, the lack of capacity of the authorities in Guinea to implement the legal prohibition of FGM and “to provide her with protection so as to guarantee her physical and mental integrity” her deportation would violate CAT, Art 3; CtteeAT, FB v The Netherlands, Communication No 613/2014 (2015), para 8.8.
112 ECtHR, *D v The United Kingdom*, Reports 1997-III.

113 ECtHR (Grand Chamber) *N v The United Kingdom*, Application No 26565/05 (2008), paras 42 ff.

114 ECtHR (Grand Chamber), *Paposhvili v Belgium*, Application No 41738/10 (2016) (key case), para 183.


117 ECtHR (Grand Chamber), *MSS v Belgium and Greece*, Reports 2011-I, para 249.

118 Ibid, para 366, and ECtHR (Grand Chamber), *Tarakhel v Switzerland*, Reports 2014-VI, paras 93 ff.


121 IACtHR, *Expelled Dominicans and Haitians v Dominican Republic*, Series C, No 282 (2014), para 259. Similarly, HRCttee, General Comment No 17 (1989), para 8; African Committee of Experts on the Rights and Welfare of the Child, *Decision on the Communication submitted by the Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v Kenya* (2011), para 51 (the Committee observed that the Government of Kenya had made no efforts to ensure that children of Nubian descent acquired the nationality of another state, in this case Sudan); UNHCR Executive Committee, *Guidelines on Statelessness* No 4 (2012), para 25. The UNHCR Executive Committee only considered it acceptable that states do “not grant nationality to children born in their territory if the child concerned can acquire the nationality of a parent immediately after birth and the State of nationality of the parent does not have discretion to refuse the grant of nationality.” It is recommended to “States that do not grant nationality in such circumstances” that they “assist parents in initiating the relevant procedure with the authorities of their State or States of nationality.”


124 CEDAW, Art 9(1), second sentence.

125 See HRCttee, General Comment No 28 (2000), para 31.


128 ECtHR, *Genovese v Malta*, Application No 53124/09 (2011), paras 43 ff


130 Ibid, para 74.
Convention relating to the Status of Stateless Persons of 28 September 1954 (CSSP, ninety-one states parties as of 22 December 2018). The content and structure of this Convention are based to a large extent on those of the 1951 Convention relating to the Status of Refugees.

As of 1 August 2018, seventy-one states had ratified the convention.

CSSP, Arts 17–19, 22, and 24.

See section V.1.

Convention relating to the Status of Refugees of 28 July 1951; see section V.


On this concept, see Chapter 2, section IV.


African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa of 22 October 2009 (Kampala Convention). See also the Protocol on the Protection and Assistance to Internally Displaced Persons adopted by the Member States of the International Conference on the Great Lakes in 2006 which contains, as basic obligation, the duty to incorporate the Guiding Principles into domestic law.

Similarly Kampala Convention, Art 1.

Despite the similarity of the factual circumstances, refugee law is not relevant as it is based on the principle that refugees are foreigners and thus, in many regards are accorded lower levels of rights than those guaranteed to the citizens of the state of refuge (e.g., CSR, Arts 13, 15, 17–19, 21, and 22(2)), whereas in the case of IDPs all rights protecting a state’s citizens remain fully applicable.

Explicitly stated in HRCttee, General Comment No 27 (1999), para 7.


See ECtHR, Yöyler v Türkei, Application No 26973/95 (2003), paras 74 f and 79, finding that the burning of houses and subsequent displacement amounted to violations of ECHR, Arts 3 and 8. The ECtHR puts the emphasis on the right to protection of property in situations where, as a consequence of state action, people have to flee and leave their land, houses, and other possessions behind and cannot access them for prolonged periods of time nor receive compensation for lost property. See, e.g., ECtHR (Grand Chamber) (merits), Chiragov and Others v Armenia, Reports 2015-III, paras 192 ff, and Loizidiu v Turkey (merits), Reports 1996-VI, para 63.

Even where displacement is permissible under this provision, civilians must, according to AP II, Art 17(2) not be forced to leave their “own territory” (which is commonly understood as their own country) for reasons connected with the conflict.

148 Rome Statute, Art 8(2)(b)(viii) and (e)(viii).

149 Rome Statute, Art 7(2)(d).

150 Rome Statute, Art 7(1)(h) includes among crimes against humanity “[p]ersecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender . . . or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.” See also ICTY, *The Prosecutor v Kupreskic et al*, Case No IT-95-16-T (2000), where the crime of persecution was the basis of a conviction for ethnic cleansing based on the Statute of the International Criminal Tribunal for the Former Yugoslavia (SICTY), Art 5(h).

151 For a case of discrimination in the allocation of pension funds to returning IDPs to an area where they belong to an ethnic minority see ECtHR, *Šekerović and Pašalić v Bosnia and Herzegovina*, Applications Nos 5920/04 and 67396/09 (2011), paras 34 ff.

152 Although the prohibitions of discrimination under human rights treaties (especially ICCPR, Arts 2(1) and 26) do not include displacement among the relevant characteristics, they can be subsumed under the “other status” characteristic in the treaties concerned.

153 Principle 22(d) of the Guiding Principles on Internal Displacement.

154 Principle 15(a)–(c) of the Guiding Principles on Internal Displacement. This provision is based, *inter alia*, on ICCPR, Art 12 and UDHR, Art 14.

155 Principle 15(d) of the Guiding Principles on Internal Displacement. This is based on an analogous application of the jurisprudence under ECHR, Art 3 and under ICCPR, Art 7 and CAT, Art 3 regarding the inhumanity of forcible return where there is a risk of torture or death (see section III.4).

156 Principle 14(b) of the Guiding Principles on Internal Displacement. This entitlement is derived from the right to freedom of movement under ICCPR, Art 12.

157 Principle 12(2) of the Guiding Principles on Internal Displacement, which is based, *inter alia*, on ICCPR, Art 9.


159 Forced evictions from accommodations, camps, and settlements sheltering IDPs may amount to a violation of the right to the peaceful enjoyment of one’s possessions and the right to respect of one’s home: See ECtHR, *Sagrinadze and Others v Georgia*, Application No 18768/05 (2010), paras 103 ff and 119 ff.

160 See Principles 18 and 19 of the Guiding Principles on Internal Displacement.


164 IACtHR, *Case of the Afro-descendant Communities displaced from the Cacarica River Basin (Operation Genesis)*, Series C, No 270 (2013), para 315.

165 The ECtHR derived a right of return of IDPs to their homes from ECHR, Art 8: ECtHR (Grand Chamber), *Cyprus v Turkey*, Reports 2001-IV, para 175.
Principle 28 of the Guiding Principles on Internal Displacement. The right to return has been confirmed by the UN Security Council on occasion. See, e.g., UN Security Council Resolutions 2217 (2015), preambular paragraphs, 1808 (2008), para 9 (Georgia), 1795 (2008), para 7 (Côte d’Ivoire), 1770 (2007), para 2(b)(i) (Iraq), and 1756 (2007), para 2(b) (Democratic Republic of Congo), and UN General Assembly Resolution 69/286 (2015), para 1. The right to return is also guaranteed in several peace agreements, e.g. Dayton Peace Agreement for Bosnia and Herzegovina (1995), Annex 7, Art I(1), Comprehensive Peace Accord for Nepal (2006), para 7.3.3. The Security Council has mandated some peacekeeping operations under Chapter VII of the UN Charter to work towards facilitating the voluntary return of IDPs to their former homes: See UN Security Council Resolution 1925 (2010) (MONUSCO), para 12(g), and 2149 (2014), para 28(c) (MINUSCA).

ICCPR, Art 12.


ECHR, Doğan and Others v Turkey, Reports 2004-VI, para 154. The Court concluded that the lack of support for IDPs to find a durable solution violated their right to protection of property as the state authorities had ordered them to leave their villages and prohibited return to their houses during a prolonged period of time.

Principle 29(2) of the Guiding Principles on Internal Displacement. ECHR (Grand Chamber), Sargsyan v Azerbaijan, Reports 2015-IV, paras 219 ff, and Loizidou v Turkey (merits), Reports 1996-VI, paras 48 ff.

A number of states do not grant asylum in the second case but respect the prohibition on forcible return.

See CSR, Art 35, requiring the contracting parties to cooperate with the UNHCR in the exercise of its functions and to facilitate its duty of supervising the application of the Convention and UN General Assembly Resolution 428(V) (1950), Statute of UNHCR, para 2.

CSR, Art 1(A)(2).


In this sense House of Lords, Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP) (Conjoined Appeals), 25 March 1999.

Lastly, according to the case law in many states there must be no internal flight alternative, i.e. it must be impossible or at least an unreasonable alternative for the person concerned to obtain effective protection against persecution and acceptable living conditions in another part of his or her home country. However, in such cases, “as a precondition of relying on an internal flight alternative . . . the person to be expelled must be able to travel to the area concerned, gain admittance and settle there, failing which an issue under ECHR, Art 3 may arise, the more so if in the absence of such guarantees there is a possibility of his ending up in a part of the country of origin where he may be subjected to ill-treatment” (ECHR, Sufi and Elmi v The United Kingdom, Applications Nos 8319/07 and 11449/07 [2011], para 266).


This effectively limits the guarantee to a dubious “right to flee”; see Otto Kimminich, Der internationale Rechtsstatus des Flüchtlings (Heymann: Cologne, 1962), 81.

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (OJ L 212/12, 7 August 2001). The Directive has not been applied yet.

See, however, EU Directive 2013/32/EU of 26 June 2013 on common procedures for granting and withdrawing international protection.

ICPR, Art 2(3); ACHPR, Art 7(1)(a); ArCHR, Art 9; ECHR, Art 13; IACHR, Art 25.

ECtHR, MSS v Belgium and Greece, Reports 2011-I, para 291.

ECtHR, AM v The Netherlands, Application No 29094/09 (2016), para 66. See also ECtHR (Grand Chamber), de Souza Ribeiro v France, Reports 2012-VI, para 82, Hirsi Jamaa and Others v Italy, Reports 2012-II, para 197 ff, and ECtHR, Abdolkhani and Karimmia v Turkey, Application No 30471/08 (2009), paras 107 ff. On the requirement of suspensive effect see also ECtHR, MA v Cyprus, Reports 2013-IV, para 133 with further references.

ECtHR, Jabari v Turkey, Reports 2000-VIII, and Gebremedhin [Gaberamadhien] v France, Reports 2007-II, paras 53 ff. The right to an effective remedy also guarantees the right in appeal proceedings to review of the legal presumption of the safety of a third state to which the refugee is to be returned; however, this right exists only if the objections concerned are sufficiently arguable to justify review by an appellate body (ECtHR, TI v The United Kingdom, Reports 2000-III).

See section III.4.


See explicitly ECtHR (Grand Chamber), Chahal v The United Kingdom, Reports 1996-V, para 80, and Saadi v Italy, Reports 2008-II, para 127.

See section III.3.

For regional instruments with provisions concerning refugee law, see: Convention Governing the Specific Aspects of Refugee Problems in Africa of 10 September 1969; Convention on Territorial Asylum (Caracas) of 28 March 1954; Convention on Diplomatic Asylum (Caracas) of 28 March 1954; Art 18 of Charter of Fundamental Rights of the European Union; Arts 61–9 of the European Community Treaty and the various directives of the Council of the European Union relating to asylum (e.g. directive on asylum procedures, status directive, admission directive, directive on temporary protection); IACHR, Art 22(7) and (8); ACHPR, Art 12(3).

CSR, Art 35.

For these and other circumstances see the cessation clauses contained in CSR, Art 1(C).

In this chapter, section IV.
In exceptional cases, human rights protection derived from the right to life and the prohibition of inhuman treatment may apply (in this chapter, section III.4) but thus far international human rights bodies and courts did not have an opportunity to examine cases of cross-border disaster-displaced persons.

On the relevance of international refugee and human rights law see the rich New Zealand case law, e.g., AF (Tuvalu) [2015] NZIPT 800859; AD (Tuvalu) [2014] NZIPT 501370; AC (Tuvalu) [2014] NZIPT 800517-520; Teitiota v The Chief Executive of the Ministry of Business Innovation and Employment [2013] NZHC 3125; Teitiota v The Chief Executive of the Ministry of Business, Innovation and Employment [2014] NZCA 173.


Adoption of the Paris Agreement, Decision 1/CP.21, UN Doc FCCC/CP/2015/L.9/Rev.1, 12 December 2015, para 49.

Global Compact for Migration for Safe, Orderly and Regular Migration (n 23).

See ibid, para 18(h)–(l).

Ibid, para 21 (g) and (h).

Ibid, para 49.