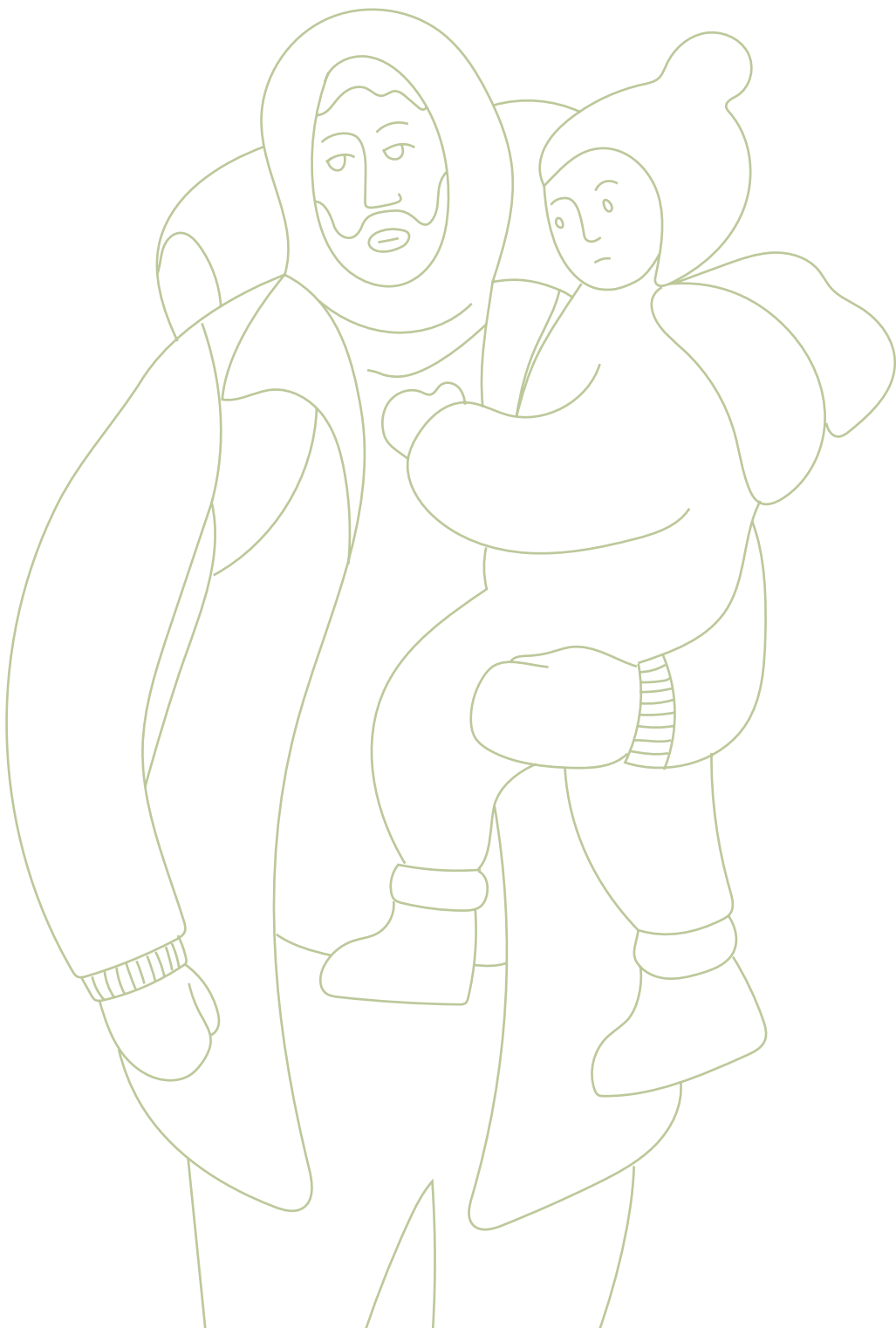


# Enhanced Understanding on Freedom of Movement in all Phases of the Conflict Cycle





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# Executive Summary

Since the Helsinki Final Act of 1975, the OSCE region has experienced a number of conflicts that have not only destabilized the region, but have also had a very negative impact on human rights and fundamental freedoms, triggering grave humanitarian consequences and human suffering. Unfortunately, the tensions, crises and conflict situations continue to this day. In 2023, according to UNHCR, displacement has reached approximately 27 million, including internal displacement within the OSCE region. This number includes those displaced from Ukraine since February 2022.<sup>1</sup>

At times of conflict, protection under International and Regional Human Rights Law and International Refugee Law is complemented by the protection offered under International Humanitarian Law, all mirrored in OSCE Commitments.

As the main institution dealing with the OSCE human dimension of security, ODIHR assists participating States in implementing their human dimension commitments. This includes supporting relevant field operations and civil society in documenting the situation of those affected by conflict. Freedom of movement is a right we often take for granted. The COVID-19 pandemic has shown that it should not be so. People caught up in conflict situations find their freedom of movement affected due to the dangers they face when trying to reach safety. This can impact on their right to education, shelter and housing, to food and sometimes to the right not to be subjected to torture or inhuman or degrading treatment or punishment or the right to life. Furthermore, despite clear international obligations, countries are often unwilling to provide them with the protection they should receive when seeking to cross international borders.

This guidebook seeks to clarify the legal standards that should apply in times of conflict, to assist practitioners in developing their monitoring tools on freedom of movement, in reporting on this important right in all phases of the conflict cycle, and in their advocacy activities. The right to freedom of movement includes the right to leave, the right to move internally within a territory and the right to return.

ODIHR has developed this guidebook in consultation with the OSCE Conflict Prevention Centre (CPC) and the United Nations High Commissioner for Refugees (UNHCR) under its mandate to provide international protection to refugees, to supervise states adherence to their obligations under the 1951 Refugee Convention, and, more generally, to assist states in the protection of and finding durable solutions for displaced populations (refugees, internally displaced persons (IDPs) and returnees). The guidebook is intended to be a reference tool for practitioners working on freedom of movement in conflict situations. Situations are often complicated and, while the guidebook does not seek to answer all questions, it highlights the complexities that arise and offers some case-law and jurisprudence that can be relied on.

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1 14 million forcibly displaced people in the OSCE region at the end of 2021, in addition to more than 8,207,977 million Ukrainian refugees as of May 2023 and 5,093,606 million IDPs within Ukraine as of January 2023. Please see [UNHCR Liaison Office of the OSCE and Vienna-Based UN Agencies Factsheet](https://www.unhcr.org/dach/wp-content/uploads/sites/27/2022/07/UNHCR-Liaison-Office-Vienna-Factsheet_July-2022.pdf), July 2022, <[https://www.unhcr.org/dach/wp-content/uploads/sites/27/2022/07/UNHCR-Liaison-Office-Vienna-Factsheet\\_July-2022.pdf](https://www.unhcr.org/dach/wp-content/uploads/sites/27/2022/07/UNHCR-Liaison-Office-Vienna-Factsheet_July-2022.pdf)>.

# Introduction

Freedom of movement is a right afforded to individuals and groups under international law<sup>2</sup> and which has been reiterated in OSCE human dimension commitments. In Vienna in 1989, participating States committed to “fully respect the right of everyone to freedom of movement and residence within the borders of each State” and “the right to leave and return to their country”.<sup>3</sup>

Preventing people from moving freely may have detrimental effects on a broad range of civil, political, economic, social and cultural rights, including non-derogable rights, such as the right to life, the right to be free from torture and other inhuman or degrading treatment or punishment.

During conflict and post-conflict situations, the risks become more acute. People may not be able to leave their country or return to it and may be displaced for protracted periods of time, unable to find a durable solution. They may not be able to move internally due to ongoing fighting, restrictions imposed by relevant authorities, or hostile conditions. They may not be able to access essential services, which impacts on their rights to health, access to services, their right to property, to a nationality, or even to life. As noted in UN Security Council Resolution 1325 (2000) on Women, Peace and Security, “civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons.”<sup>4</sup>

In addition to commitments to respect freedom of movement, OSCE participating States have recognized the need to protect the rights of people at risk of displacement or already impacted by it during all phases of the conflict cycle.<sup>5</sup> They recognized that “displacement is often a result of violations of CSCE commitments, including those relating to the Human Dimension” and welcomed and supported “unilateral, bilateral and multilateral efforts to ensure protection of and assistance to refugees and displaced persons with the aim of finding a durable solution.”<sup>6</sup>

International Human Rights Law and International Humanitarian Law, as well as several guidance documents and initiatives contain provisions that protect people’s right to freedom of movement, including their right to move internally, to leave and to return to their country. At the same time, pragmatic solutions are often sought on the ground and through various intermediaries to facilitate freedom of movement of people under difficult circumstances. ODIHR is mandated to support participating States, including in co-operation with OSCE field operations, to meet their human dimension commitments, including in the area of freedom of movement.

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2 Article 13 of [The Universal Declaration of Human Rights \(UDHR\)](https://www.un.org/en/about-us/universal-declaration-of-human-rights) refers to “the right to freedom of movement and residence within the borders of each state and to leave any country or return to your own state”, <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> while Article 12 of the [International Covenant on Civil and Political Rights \(ICCPR\)](https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights) reiterates this right <<https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>>.

3 OSCE Ministerial Council, “[Concluding Document of the Third Follow-up Meeting, Vienna, 4 November 1986 to 19 January 1989](https://www.osce.org/mc/40881)”, Vienna, 19 January 1989, <<https://www.osce.org/mc/40881>>.

4 United Nations Security Council, “[Resolution 1325 \(2000\)](https://peacemaker.un.org/sites/peacemaker.un.org/files/SC_ResolutionWomenPeaceSecurity_SRES1325%282000%29%28english_0.pdf)”, S/RES/1325 (2000), 31 October 2000, <[https://peacemaker.un.org/sites/peacemaker.un.org/files/SC\\_ResolutionWomenPeaceSecurity\\_SRES1325%282000%29%28english\\_0.pdf](https://peacemaker.un.org/sites/peacemaker.un.org/files/SC_ResolutionWomenPeaceSecurity_SRES1325%282000%29%28english_0.pdf)>.

5 MC Dec. 3/2011 affirmed “the rights of persons belonging to national minorities as well as the right of persons at risk of displacement or already affected by it, need to be effectively protected in all phases of the conflict cycle.” OSCE Ministerial Council, “[Decision No. 3/11 on elements of the conflict cycle, related to enhancing the OSCE’s capabilities in early warning, early action, dialogue facilitation and mediation support, and post-conflict rehabilitation](https://www.osce.org/ministerial-councils/86621)” (hereinafter Decision No. 3/11 on Elements of the conflict cycle), Vilnius, 27 December 2011, <<https://www.osce.org/ministerial-councils/86621>>.

6 CSCE “[Helsinki Document 1992 - The Challenges of Change](https://www.osce.org/files/f/documents/7/c/39530.pdf)”, Helsinki, 10 July 1992, <<https://www.osce.org/files/f/documents/7/c/39530.pdf>>.



## **Purpose**

The aim of this guidebook is to:

- Support OSCE field operations and practitioners in the OSCE region by deepening their knowledge about international legal standards on freedom of movement and the application of those standards in all phases of the conflict cycle; and
- Support OSCE field operations and civil society to monitor freedom of movement issues by providing them with a useful compilation of legal standards on freedom of movement in conflict situations.

This guidebook is structured so that practitioners can draw on international standards and how they may apply in complicated conflict situations, and includes relevant case law. This can help them to develop monitoring tools for documenting the situation on the ground.

The guidebook provides an overview of international norms and guidance documents on the right to freedom of movement and describes various interpretations and challenges in their implementation. It does not, however, seek to give clear interpretations of the norms for a given situation, nor does it define or classify the international or non-international nature of a specific conflict.

The legal and practical treatment of the freedom of movement of people is often contested by the various parties and states involved. While international legal standards do exist, it is important for those working on the ground to be aware of these contested issues, in order to monitor and report effectively. The overall objective is to protect the rights and immediate safety of all people involved, as well as safeguarding their longer-term living conditions.

## **Methodology**

The guidebook has been developed by ODIHR, in consultation and collaboration with the OSCE Conflict Prevention Centre (CPC) and the United Nations High Commissioner for Refugees (UNHCR) and takes into account the respective mandates of the OSCE executive structures.<sup>7</sup> It was inspired by two requests: one from the OSCE Mission to Moldova, to compare situations on the ground, and the other from the OSCE Special Monitoring Mission to Ukraine to develop human rights-compliant monitoring.<sup>8</sup> Consultations took place between OSCE and UNHCR including some field operations between October 2018 and November 2020. The drafting was supported by an external expert, Emeritus Professor, Tom Hadden, on International Humanitarian Law and International Human Rights and International Law as it applies in conflict situations. Consultations on International Humanitarian Law were also held with the ICRC legal team in Geneva in December 2019.

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7 The OSCE Office for Democratic Institutions and Human Rights (ODIHR) was established in 1991 and is mandated to assist OSCE participating States to ensure full respect for human rights and fundamental freedoms as well as meet their human dimension commitments. See <<https://www.osce.org/odihhr>>. The OSCE Conflict Prevention Centre (CPC) is mandated to help reduce the risk of conflict and promote peace and stability by supporting OSCE participating States in the fields of early warning, conflict prevention, crisis management and post-conflict rehabilitation. See [https://www.osce.org/files/f/documents/e/3/13717\\_0.pdf](https://www.osce.org/files/f/documents/e/3/13717_0.pdf). The United Nations High Commissioner for Refugees (UNHCR) has a protection mandate under the 1951 Refugee and also in certain instances the protection of IDPs. See <https://www.unhcr.org/>.

8 Democratization Department, ODIHR, Field Co-ordination Meeting, September 2019. Since then, ODIHR has organized a number of meetings between field operations to learn from each other's experiences on freedom of movement issues in the region.

### Definitions and limitations of the guidebook

The term 'Conflict' is not defined in the guidebook, but is rather understood in light of Ministerial Council decision (MC Dec.) 3/2011, which refers to "all phases of the conflict cycle" and clarifies that the principles which participating States agreed upon in the Decision are applicable to "all conflict and crisis situations in the OSCE area". The OSCE acknowledges that participating States are faced with diverse and complex conflicts which are often neither exclusively intra-state, nor inter-state. The OSCE's work in relation to conflict prevention therefore follows a 'tiered' approach. Primary prevention refers to preventing violent conflict by successfully applying early warning and early action instruments and by implementing long-term measures that address the root causes of conflict. Secondary prevention takes place when conflict escalates into violence and involves crisis management actions to stop the violence from spreading both in intensity and geographically. Tertiary prevention relates to post-conflict rehabilitation and measures to hinder the re-emergence of tensions and the recurrence of violent conflict.<sup>9</sup>

## Conflict Cycle



<sup>9</sup> Please see Michael Raith, "Addressing the Conflict Cycle: The OSCE's Evolving Toolbox", 2020, <<https://www.nomos-elibrary.de/10.5771/9783748922339-03.pdf>>.

# Applicable Legal Regimes

Freedom of movement is an essential right for those affected by conflict — for civilians who are caught up in active fighting and for those searching for a safe haven or place to live pending potential return or long-term resettlement. At a broad level, the right to freedom to leave your country and to seek asylum elsewhere is guaranteed in the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). There are similar provisions under the European Convention on Human Rights and Fundamental Freedoms (ECHR).<sup>10</sup> But in practice there are many constraints and difficulties along the way. This chapter provides an overview of the legal norms to which states have obligations under international law but also outlines some challenges relating to conflict situations.

Freedom of movement, including in conflict situations, is governed by a number of complementary legal regimes that overlap at times.<sup>11</sup> The most relevant are:

- International Human Rights Law
- Regional Human Rights Law
- International Humanitarian law
- International Refugee Law
- The United Nations Charter, as implemented by the UN Security Council
- Guidance documents including the Guiding Principles on Internal Displacement<sup>12</sup> and the Pinheiro Principles on Housing and Property Restitution<sup>13</sup>

These are supported by international bodies which are likely to have representatives monitoring, providing support or who are engaged on any ongoing conflict through Operations, Missions or staff on the ground, in line with their mandates. For example:

- The UN High Commissioner on Human Rights (UNHCHR) on human rights issues
- The International Committee of the Red Cross (ICRC) on humanitarian issues
- The UN High Commissioner on Refugees (UNHCR) on refugee/protection issues
- The UN Security Council in imposing its own prescriptions.

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10 There is no reference to asylum in either the ICCPR or the ECHR — this right, is reflected but not mentioned in the General Comments and ECHR case law.

11 Some situations might be exclusively regulated by IHL, some others may be exclusively regulated by IHRL and others might be regulated by both legal frameworks. Issues may therefore arise in terms of which norm prevails. The principle of the *lex specialis derogat legi generali*, which means that more specific rules (in many cases that would be IHL) will prevail over more general rules, is commonly used to solve the conflict. However, a case by case approach is generally recommended.

12 “Guiding Principles on Internal Displacement”, United Nations ESC, E/CN.4/1998, 11 February 1998, <<https://documents-dds-ny.un.org/doc/UNDOC/GEN/G98/104/93/PDF/G9810493.pdf?OpenElement>>.

13 “Pinheiro Principles”, United Nations ESC, E/CN.4/Sub.2/2005/17, 28 June 2005, <<https://www.unhcr.org/protection/idps/50f94d849/principles-housing-property-restitution-refugees-displaced-persons-pinheiro.html>>.

## International Human Rights Law

International Human Rights Law is clear on the right to freedom of movement for people affected by conflict, both to move to places of safety within their own country, including as internally displaced persons (IDPs), or to leave their own country as refugees, to seek and enjoy asylum in other countries and to return to their own country.

In the **UDHR** the right to freedom of movement and residence within the borders of each state and to leave any country or return to your own state is unrestricted (art. 13)<sup>14</sup> as is the right to seek asylum (art. 14).<sup>15</sup>

In the **ICCPR** the formulation is similar, covering

- The right of freedom of movement **within** your country and the right to **choose your place of residence** (but this is granted only to those lawfully resident);
- The right to **leave** your or any other country; and
- The right to **enter** your own country (art. 12).<sup>16</sup>

**General Comment No 27 on Freedom of Movement** by the UN Human Rights Committee provides useful interpretation of these rights.<sup>17</sup> It specifies that states must protect against forced displacement, mass expulsion and forced population transfers, and it offers an interpretation of the right to internal freedom of movement of refugees whose status has been regularized. In relation to the right to return, it states that the words 'own country' cover not only citizens of a country but also individuals who have developed informal ties to a country as well as to those stripped of their nationality following the dissolution of a state.

Freedom of movement under International Human Rights Law does not include an individual's right to enter a particular country (other than their own) and each state has the principal competence to govern the admission of third country nationals and stateless people to its territory, including through visa processes or bi- or multilateral agreements. However, the right of an individual to be admitted to a given territory may derive from international refugee law, in particular the principle of non-refoulement<sup>18</sup> codified in Art 33 of the 1951 Convention related to the Status of Refugees and also widely accepted as customary international law (please see more on this under the section on International Refugee Law). There is no express provision under the original **ECHR** in respect of freedom of movement. Therefore, the issue has often had to be dealt with under other articles, notably in cases concerning the lengthy detention of refugees who have entered a country

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14 "Universal Declaration of Human Rights (UDHR)", Art. 13(1): "Everyone has the right to freedom of movement and residence within the borders of each State."; art. 13(2): "Everyone has the right to leave any country, including his own, and to return to his country." Op cit., note 1

15 "Universal Declaration of Human Rights (UDHR)", Art. 14(1): "Everyone has the right to seek and to enjoy in other countries asylum from persecution."; art. 14(2): "This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations." Op cit., note 1.

16 "ICCPR", art. 12(1): "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence."; art. 12(2): "Everyone shall be free to leave any country, including his own"; art. 12(4): "No-one shall be arbitrarily deprived of the right to enter his own country." Op cit., note 1.

17 "General Comment No. 27 on art. 12 (Freedom of Movement) of the International Covenant on Civil and Political Rights", UN Committee on Civil and Political Rights, UN Doc CCPR/C/21/Rev.1/Add.9 (1999), <<https://www.refworld.org/pdfid/45139c394.pdf>>.

18 "Convention relating to the Status of Refugees 1951" (1951 Refugee Convention) <<https://www.unhcr.org/4ca34be29.pdf>>.

as asylum seekers<sup>19</sup>, interference with family life<sup>20</sup>, or deportation to a country where there is a risk of torture or inhuman treatment.<sup>21</sup> This is discussed in more detail below in respect of different categories of people requiring international protection.

Protocol 4, article 2 of the ECHR added an explicit right to freedom of movement. This says that those lawfully present in the territory have a right to freedom of movement and choice of residence. It also states that everyone has the right to leave any country, including their own.<sup>22</sup> In contrast to the UDHR however, there is no provision in either the ICCPR or the ECHR for the right to asylum, which must therefore be dealt with under the Refugee Convention.

In all these human rights documents, explicit reference is made to limitations and potential restrictions. National governments are entitled to introduce legislation they consider necessary in a democratic society for the protection of national security, public order, public health and morals, the prevention of crime or the rights of others.<sup>23</sup> Where there is serious inter-communal or armed conflict, governments may rely on these limitations or may temporarily suspend some but not all of the rights under a specific derogation provided the suspension is strictly necessary for its purpose, proportionate to the interest to be protected and non-discriminatory.<sup>24</sup> These limitations do not apply to the right to return to one's country, which is covered under article 12(4) of the ICCPR, which states, "No one shall be arbitrarily deprived of the right to enter his own country"<sup>25</sup>. Some limitations on the right to return could however derive from the term 'not arbitrarily deprived'.

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19 "European Convention on Human Rights and Fundamental Freedoms" (ECHR), Council of Europe, Rome, 4 November 1950, Art. 5(1): "Everyone has the right to liberty and security of person. No-one shall be deprived of his liberty [save in prescribed cases] and in accordance with a procedure prescribed by law", <[https://www.echr.coe.int/documents/convention\\_eng.pdf](https://www.echr.coe.int/documents/convention_eng.pdf)>. This has been relied on to require clear, precise and temporary legal provisions for the detention of asylum seekers and irregular entrants. (e.g., *Khlaifia and Others v Italy*, 15 December 2016 (detention of migrants arriving by boat in Lampedusa, <<https://hudoc.echr.coe.int/fre#%7B%22fulltext%22:%7B%22Khlaifia%22%22itemid%22:%7B%22001-170054%22%7D%7D>>).

20 ECHR, Art. 8: "Everyone has the right to respect for his private and family life, his home and his correspondence", *op.cit.*, note 18.

21 ECHR, Art. 3: "No-one shall be subjected to torture or to inhuman or degrading treatment or punishment", *op.cit.*, note 18. This has been relied on to prohibit deportation in cases where there is a risk of ill-treatment in the country of origin, for example in *M.S.S v Belgium and Greece*, 21 January 2011 (violation by Belgium for sending asylum seekers back to inhuman and degrading conditions in Greece), <<https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%7B%22001-103050%22%7D%7D>>.

22 "Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms", Council of Europe, Strasbourg, 16 September 1963, art. 2(1): "Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence"; art. 2(2): "Everyone shall be free to leave any country, including his own", <<https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168006b65c>>

23 Under the Universal Declaration of Human Rights there is a general limitation clause: art. 29(2): "In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society." *Op. cit.*, note 1. Under the ICCPR there is a specific limitation to the rights under art. 12(1)-(2) in art. 12(3): "the above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant." *Op. cit.*, note 1. Under the ECHR there are specific limitations to many relevant rights, including those under Protocol 4 art. 2, in the following wording: "No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law, and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others." *Op. cit.*, note 18. These tests require a balance to be struck between the rights of the individual on the one hand and State or community interests on the other. In all such cases the state is obliged to justify that an interference is necessary in a democratic society.

24 ICCPR, Art. 4, *Op. cit.*, note 1; ECHR, art. 14, *Op. cit.*, note 18. Any such derogation should be specific, temporary, limited to what is strictly required in the circumstances and consistent with other international obligations such as those under the 1951 Refugee Convention and the Geneva Conventions and Protocols; some rights, such as the right to life and to protection from torture and inhuman or degrading treatment, are, according to UN human rights conventions, non-derogable. General comment 27 of the ICCPR elaborates that restrictions must be provided for in law that specifies the conditions and duration under which the rights may be limited (the duration should in any case be 'expeditious') and the legal remedies that are available due to such restrictions. *Op. cit.*, note 16.

25 ICCPR *op.cit* note 1.

## ***Territories where states no longer exercise de facto control***

In conflict situations there are difficult issues surrounding the duties of states to recognize and implement human rights standards in areas of their territory over which they no longer exercise de facto control. The European Court of Human Rights (ECtHR) has found this difficult to resolve, as only recognized states are bound by human rights conventions and only within their own territory. The first major step has been for the Court to hold states which have invaded or otherwise taken control of the territory of other states responsible in those areas.<sup>26</sup>

### ***Loizidou v Turkey, ECtHR (1996)***

According to the ruling, a Cypriot National claimed that she owned some property, in the part of Cyprus that had been occupied by Turkish troops. She complained that her right to property under Protocol 1 of the ECHR had been infringed. The court held that Turkey was responsible for ensuring human rights in Northern Cyprus as it had deployed 30,000 troops there and was exercising effective control. The court ruled that Turkey was therefore violating the applicant's right to property and was liable to pay compensation for loss of income but was not required to permit her to return [Turkey had not ratified the provision in Protocol 4 on freedom of movement].

### ***Ilascu v Moldova and Russia, ECtHR (2004)***

Mr Ilascu was confined by the authorities in Tiraspol in the break-away territory of Transdniestria. He complained that Moldova was responsible for his prolonged confinement for failing to put a stop to the measures taken by the authorities in Transdniestria and that Russia was also responsible as it had forces on the ground and overwhelming influence in the area. The court held that Moldova was marginally responsible only for not taking sufficient steps to restore its control over the area and that Russia was fully responsible for not preventing the violations.<sup>27</sup>

### ***Chiragov & Others v Armenia, ECtHR (2015), to be read in conjunction with Sargsyan v Azerbaijan (2015)***

In *Chiragov & Others v Armenia*, six Azerbaijani citizens from Lachin district in Nagorno-Karabakh complained that they were unable to return to their homes and property which they were forced to leave in 1992, during the conflict between Armenians and Azerbaijanis. The Court ruled that Armenia had effective control over Nagorno-Karabakh and the surrounding territories and was in violation of the complainants' right to property under Protocol 1 and also their right to respect for private and family life under Art. 8 of the ECHR and the right to an effective remedy under Art. 13. Armenia was ordered to pay compensation. In *Sargsyan v Azerbaijan*, the Court ruled against Azerbaijan which encountered practical difficulties in exercising its authority in the village of Gulistan as a result of war, but was still found to be responsible for refusing a displaced person access to their property (violation of Article 1 of Protocol 1 to the Convention, as well as Articles 8 and 13). The Court ruled that this area still remained under the jurisdiction of Azerbaijan from a legal point of view, because it had failed to prove that Gulistan was occupied by the armed forces of another state or that it was under the control of a separatist regime.

26 In addition to the cases highlighted, the latest highly controversial judgement on this issue in *Georgia v Russia* (App No 38263/08 ECtHR 21 Jan 2021) restates the established rule on the responsibility for human rights violations by foreign states whose forces are in effective control of territory in other states, as was the case in respect of Russian forces in the break-away Georgian territories of South Ossetia and Abkhazia. But it also contains a worrying conclusion that they are not responsible for any violations of Human Rights Law, including their impact on freedom of movement for civilians, during "active hostilities" as that is covered by the law of armed conflict. The court acknowledged the concern that this would leave hundreds of victims without human rights protections and asked Contracting Parties to consider whether its jurisdiction should be extended. <<https://hudoc.echr.coe.int/fre#%7B%22itemid%22%3A%22001-207757%22%7D%3E>>.

27 *Ilascu v Moldova and Russia*, 8 July 2004 on the ill-treatment of the complainants in detention before and after the effective break-away of Transdniestria from Moldova and the ensuing dominance of Russian personnel in Transdniestria. <<https://www.refworld.org/cases,ECHR,414d9df64.html>>.

### ***Territories controlled by non-state forces***

There is a similar problem in respect of **territory controlled by non-state forces**. This has been only partially resolved by holding states responsible for break-away areas in which they exercise dominant influence over de facto governing forces that have declared independence. De facto authorities lack international recognition and, as such, cannot be party to the conventions because any international engagement could be associated with recognizing their political legitimacy. However, expert reports for the UN Human Rights Council have asserted that, in such cases, both state and non-state forces should be regarded as responsible for the protection of human rights in the areas they effectively control,<sup>28</sup> even though the question of enforceability of these rights remains difficult.



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28 Report of the Group of Eminent International and Regional Experts on Yemen to the Human Rights Council: “The Government retains positive obligations in areas where it has lost effective control. The de facto authorities control large swathes of territory, including Sana’a, and exercise a government-like function in that territory such that they are internationally responsible under human rights law.”, “Situation of human rights in Yemen, including violations and abuses since September 2014”, Human Rights Council 17 August 2018, UN Doc A/HRC/39/43, paras. 13-14, <[https://ap.ohchr.org/documents/dpage\\_e.aspx?si=A/HRC/39/43](https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/39/43)>.



## International Humanitarian Law (IHL)

IHL is a set of rules that seeks to limit the humanitarian consequences of armed conflicts. It is sometimes also referred to as the law of armed conflict or the law of war (*jus in bello*). The primary purpose of IHL is to restrict the means and methods of warfare that parties to a conflict may employ and to ensure the protection and humane treatment of persons who are not, or no longer, taking a direct part in the hostilities. Once an armed conflict exists, any action taken for reasons related to that conflict is governed by IHL. IHL treaties distinguish between two types of armed conflict (legally speaking, there are no other types of armed conflict):

- **International armed conflicts (IAC)**, which occur whenever recourse is had to armed force or belligerent occupation between two or more States; and,
- **Non-international armed conflicts (NIAC)**, which take place between States and non-governmental armed groups, or between such groups only.

Consequently, in order to apply IHL, it is important first to classify the nature of the conflict (whether it is international armed conflict or non-international armed conflict) in order to ascertain which provisions apply.<sup>29</sup> For the purpose of this guidebook, the basic rules are broadly the same in both forms of conflict.

IHL governing situations of **IAC** and of **belligerent occupation** is codified primarily in The Hague Regulations of 1907, the four 1949 Geneva Conventions and Additional Protocol I of 1977. The treaty law is supplemented by a rich body of customary IHL.<sup>30</sup> Treaty IHL governing **NIAC** consists, first and foremost, of common Article 3 to the 1949 Geneva Conventions and Additional Protocol II of 1977. Owing to the relative scarcity of applicable treaty IHL, customary IHL is of great importance for the regulation of NIAC.

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|--|---|
| <b>International Armed Conflict and Belligerent Occupation (IAC)</b> | Hague Conventions<br>Geneva I: Wounded sick on land<br>Geneva II: Wounded, sick shipwrecked at sea<br>Geneva III: Prisoners of War (POWs)<br>Geneva IV: Protection of civilians<br>Additional Protocol I<br>Customary Law |
| <b>Non-International Armed Conflict (NIAC)</b>                       | Article 3 of all Geneva Conventions (I-IV) governs the conduct of both sides in non-international armed conflict – this is known as ‘Common Article 3’.<br>Additional Protocol II<br>Customary Law                        |

<sup>29</sup> It should be noted here that there is no authoritative body that classifies each conflict situation, which often leads to differences among the belligerent parties on what provisions should apply.

<sup>30</sup> See ICRC Customary IHL study database at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>. The database is an online version of the ICRC’s study on “Customary International Humanitarian Law – Volume I: Rules” and “Customary International Humanitarian Law – Volume II: Practice”, published in 2005 by Cambridge University Press. <<https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf>>.



In all armed conflicts (both IAC and NIAC), the right of the belligerent parties to choose methods or means of warfare is not unlimited. Belligerent parties must at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives, and must direct their operations only against military objectives. Individual civilians enjoy protection against attack unless and for such time as they directly participate in hostilities. The parties also have a duty to avoid or, in any event, minimize the infliction of incidental death, injury or destruction on civilians and civilian objects. With regard to any new weapon, means or method of warfare, States must determine whether its employment would, in some or all circumstances, be prohibited by international law, most notably whether it would have indiscriminate effects, cause unnecessary suffering or superfluous injury, or widespread, long-term and severe damage to the environment, or otherwise be incompatible with the principles of international law as derived from established custom, the principles of humanity or the dictates of public conscience.<sup>31</sup>

Unlike Human Rights Law, treaty IHL (IAC and NIAC) does not contain a generic right of freedom of movement but several rules are movement-related, such as those on the displacement, evacuations or transfers of persons. Moreover, ensuring better respect for certain IHL rules can contribute to allowing or facilitating freedom of movement. For instance, the obligation to take all feasible precautions in the conduct of hostilities to protect civilians and avoid causing incidental harm to them might require the parties to the conflict to allow civilians to leave an area, or evacuate them, if they are endangered by hostilities. Customary IHL explicitly provides for freedom of movement for humanitarian relief personnel in IAC and NIAC (subject to certain conditions and limitations).<sup>32</sup> Below is a list of the main relevant treaty and customary IHL aspects related to the freedom of movement:

### ***Right to leave and repatriations***

In IAC and situations of occupation, all protected persons<sup>33</sup> who may desire to leave the territory at the outset of, or during a conflict, shall be entitled to do so, unless their departure is contrary to the national interests of the State. If they reside in an area particularly exposed to the dangers of war, they shall be authorized to move from that area to the same extent as the nationals of the State concerned. In no circumstances shall a protected person be transferred/repatriated to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs.<sup>34</sup>

### ***Deportations, displacement, transfers and evacuations***

In situations of occupation, individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when, for material reasons,<sup>35</sup> it is impossible to avoid such displacement. The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.<sup>36</sup> In NIAC,

31 To go further, see Nils. Melzer, "International Humanitarian Law, A Comprehensive Introduction", Geneva: ICRC, 2019, <<https://library.icrc.org/library/docs/DOC/icrc-4231-002-2019.pdf>>.

32 Rule 56, ICRC Customary IHL study, *op.cit.*, note 29.

33 Protected persons are those who, at a given moment and in any manner whatsoever, find themselves, in case of an IAC or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. "Geneva Convention relative to the Protection of Civilian Persons in time of War of 12 August 1949 (Fourth Geneva Convention)" (herein after Geneva IV), Art.4), ICRC, Geneva, 12 August 1949, <[https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33\\_GC-IV-EN.pdf](https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.33_GC-IV-EN.pdf)>.

34 "Geneva IV" Art.35-38, 45 and 48, *op. cit.*, note 32.

35 As per the ICRC's "Commentary of 1958" of Geneva IV, this means when it is impossible to do so. <<https://ihl-databases.icrc.org/ihl/COM/380-600056?OpenDocument>>

36 "Geneva IV" Art.49, *op. cit.*, note 32; ICRC Customary IHL study, Rules 129-131, *op. cit.*, note 29.

parties to the conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand.<sup>37</sup>

As far as 'sieges' are concerned, civilians may flee a besieged or otherwise encircled area or be voluntarily evacuated; they may also be evacuated against their will by a party to the conflict if they are endangered by hostilities or for imperative military reasons.<sup>38</sup> Shooting at or otherwise attacking civilians fleeing a besieged area would amount to a direct attack on civilians and is absolutely prohibited. The issue of forcible evacuation of a besieged area has raised questions with respect to forced displacement. To ensure that displacement is not forced or unlawful, it must last no longer than required by the circumstances. Displaced persons have a right to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist (see below). Although temporary evacuations may be necessary, and even legally required, sieges must not be used to compel civilians to permanently leave a particular area.

### **Right to return**

In IAC and NIAC, customary IHL contains the right to voluntary return as soon as the reasons for the displacement cease to exist.<sup>39</sup> The right to return applies to those who have been displaced, voluntarily or involuntarily, due to the conflict and not to non-nationals who may have been lawfully expelled. This rule is inspired by the IHL rules on occupation which provide that persons who have been evacuated in or from an occupied territory shall be transferred back to their homes as soon as hostilities in the area in question have ceased.<sup>40</sup> The right to return is also linked to the ability of a person to be able to return to their property which, as mentioned above, is protected under IHL under the basic principles of conduct of hostilities applicable in IAC and NIAC, such as the principle of distinction (between civilian and military objectives<sup>41</sup>). Another aspect of the right to return pertains to responsibility of authorities to take active measures to enable this. Measures may include mine-clearance; provision of assistance to cover basic needs (shelter, food, water, medical care); provision of construction tools, household items and agricultural tools, seeds, etc.; reconstruction of schools; skills training programmes; allowing visits prior to return; and amnesties (excluding, of course, serious violations of IHL).<sup>42</sup>

### **Protected zones**

'Protected zones' is a term under IHL applicable in both IAC and NIAC that refers to different types of areas designated to shelter civilians or the wounded and sick from the effects of hostilities. The Geneva Conventions develop and regulate these notions in detail, setting out rules for hospital and safety zones and localities, neutralized zones, non-defended localities and demilitarized zones. In both IAC and NIAC, customary IHL prohibits attacks against these zones. Thus, such zones are in theory safe for civilians to move freely within. What is vital about protected zones under IHL, whatever their type, is that they are established with the agreement of all the parties concerned, and they are demilitarized, i.e., do not harbour any able-bodied

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37 "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Art.17, Additional Protocol II, ICRC, 8 June 1977, <<https://www.refworld.org/docid/3ae6b37f40.html>>; ICRC Customary IHL study Rules 129-131, *op. cit.*, note 29.

38 A siege can be described as a tactic to encircle an enemy's armed forces, in order to prevent their movement or cut them off from support and supply channels.

39 ICRC Customary IHL study, Rule 132, *op. cit.*, note 29.

40 "Geneva IV" Art.49, *op. cit.*, note 32. Treaty law of NIAC does not contain such an explicit right to return.

41 For IAC: "Geneva IV" Art. 53, *op. cit.*, note 32, refers to the prohibition of destruction by the Occupying Power of real or personal property, "except where such destruction is rendered absolutely necessary by military operations." Article 51 of Protocol I clarifies the principle of distinction: "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)", ICRC, 8 June 1977, <<https://www.refworld.org/docid/3ae6b36b4.html>>. For NIAC: Protocol II, Art. 2 (which prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civil population"), Art.21 and Art.17(2), "Civilians shall not be compelled to leave their own territory for reasons connected with the conflict", *op. cit.*, note 36

42 ICRC Customary IHL study, Commentary Rule 132, *op. cit.*, note 29.

combatants or military material, and must not be used for military action. These conditions are fundamental to their ability to provide protection. IHL neither specifically authorizes nor prohibits the establishment of zones in this way, and the labels given to them should not be taken as an indication of their ability to fulfil their objective.<sup>43</sup>

### **Humanitarian access**

IHL prohibits the use of starvation of the civilian population as a method of warfare and obliges each belligerent party and non-belligerent States to allow and facilitate impartial humanitarian relief for civilian populations in need of supplies essential to their survival in situations of IAC and NIAC. This humanitarian assistance can be categorized into three distinct duties: the general duty of all States and each belligerent party to allow and facilitate the free passage of relief consignments intended for civilians in other States;<sup>44</sup> the particular duty of the Occupying Power to ensure provision of essential supplies to the civilian population of the occupied territory;<sup>45</sup> and the duty of belligerent parties to allow and facilitate the provision of humanitarian relief to other territories under their control.<sup>46</sup> IHL gives the civilian population and individual civilians the right to communicate their needs to relief organizations.<sup>47</sup> IHL also regulates the duties of belligerent parties with regard to humanitarian personnel participating in such relief operations: belligerent parties must, within the bounds of military or security considerations, grant such organizations freedom of movement, rights of access and other facilities necessary to visit protected persons wherever they may be, and to distribute relief supplies and educational, recreational or religious materials to them.<sup>48</sup>

### **Difficulties on the ground**

These clearly positive provisions in International Humanitarian Law are not always easy to implement on the ground. International Humanitarian Law recognizes the legitimacy of the military objectives of the warring parties: "... the object and purpose of IHL is not only to offer the best possible protection to individuals but also to find a balance between the principles of humanity and military necessity."<sup>49</sup> The obligation to comply with some of the provisions for the protection of civilians is explicitly stated to be subject to 'military necessity'.<sup>50</sup> And under certain circumstances some collateral civilian deaths and damage to civilian objects is tolerated, provided that it is proportional to the military advantage anticipated.<sup>51</sup> In addition, as already noted, the various provisions on 'safe zones' cannot be pursued without the consent of both sides and in practice are rarely able to be implemented.<sup>52</sup> Nor is there any obligation on either side to agree to a cease-fire to enable the safe

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43 "Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention)" (Geneva I), Art. 23, 12 August 1949, <<https://www.refworld.org/docid/3ae6b3694.html>>; "Geneva IV" Art.14-15, *op. cit.*, note 32; *Additional Protocol I*, Art.59-60, <<https://ihl-databases.icrc.org/en/ihl-treaties/geneva-conventions-1949additional-protocols-and-their-commentaries>>; ICRC Customary IHL study, Rules 35-37, *op. cit.*, note 29.

44 "Geneva IV", Art.23, 59 and 61 *op. cit.*, note 29; "Additional Protocol I", Art.70, *op. cit.*, note 40; ICRC Customary IHL study, Rule 55, *op. cit.*, note 29.

45 "Geneva IV", Art.55 and 60-62, *op. cit.*, note 29; "Additional Protocol I", Art.69, *op. cit.*, note 40.

46 "Additional Protocol I", Art.70, *op. cit.*, note 40; ICRC Customary IHL study, Rule 55, *op. cit.*, note 29.

47 "Geneva IV", Art.30, *op. cit.*, note 32.

48 "Geneva IV", Art.30 and 142, *op. cit.*, note 32; ICRC Customary IHL study, Rule 56, *op. cit.*, note 29.

49 Marco Sassoli, *"International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare (Principles of International Law)"*, Edward Elgar Publishing, 2019, para 9.32.

50 For example, in Art. 27 of Geneva IV: "However, the Parties to the conflict may take such measures of control and security in regard to protected persons as may be necessary as a result of the war." See also art.49 in Geneva IV respect of forcible transfer of protected persons in occupied territory: "...Nevertheless the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand."

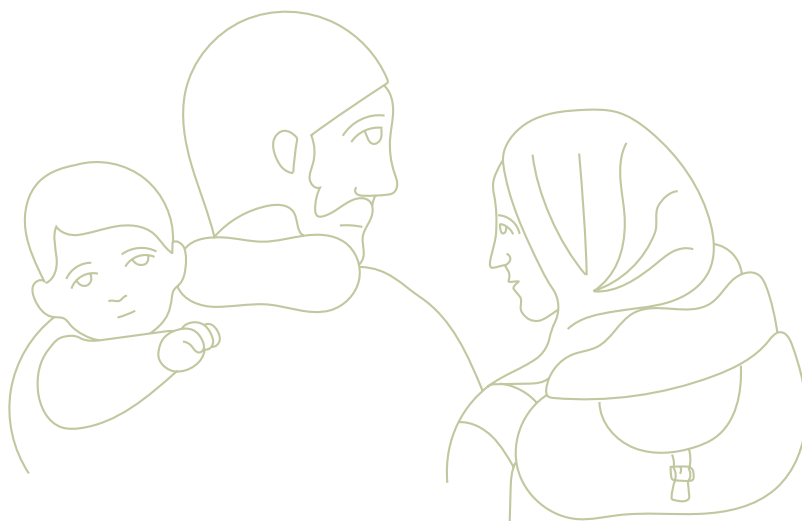
51 A significant provision in respect of collateral damage is art. 51(5)(b) of *Additional Protocol I*, *op. cit.*, note 40, which exemplifies the prohibition of indiscriminate attacks: "an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated."

52 "Geneva IV", *op. cit.*, note 32.

evacuation of trapped civilians.<sup>53</sup> Finally there is no easy way for those working on the ground to obtain an authoritative ruling on the status of any ongoing conflict — the significant distinction between international armed conflicts governed by the four main Geneva Conventions and Protocol I, and non-international armed conflicts governed by common article 3 to those Conventions and Protocol II.<sup>54</sup>

As a result, many of the protections<sup>55</sup> designed to facilitate free movement often can only be effectively delivered in negotiation with controlling military forces and other relevant actors.

Many challenges and failures have been documented regarding the ‘safe zones’ and ‘protected areas’ established by the United Nations Security Council Resolutions in Croatia and in Bosnia and Herzegovina (BiH) respectively.<sup>56</sup> In the case of BiH, whilst the aim of SC819<sup>57</sup> was to create a safe zone to protect people from armed attack and displacement, it was seen that there must be a willingness from the conflicting parties to respect the resolution for effective protection, as well as decisiveness by the UN to act when one of the parties does not respect the resolution. Failure to consider these factors when designating ‘safe zones’ and ‘protected areas’ may result in the opposite outcome to that intended, including forced displacement out of the zones. It also became evident that such zones/areas did not permit freedom of movement, in or out.



53 Under art. 17 of Geneva IV, Parties are encouraged but not required to make agreements for the evacuation of vulnerable people from besieged areas.

54 This is most important in respect of the status of state and non-state forces: in international conflicts, combatants on both sides have equal rights. In non-international conflicts, non-state combatants can be treated as criminals or terrorists under national law and are not entitled to prisoner of war status when captured.

55 “Geneva I”, Art.23, *op. cit.*, note 42; “Geneva IV”, Art.14-15, *op. cit.*, note 32; “Additional Protocol I”, Art.59-60 *op. cit.*, note 40; ICRC Customary IHL study, Rules 35-37, *op.cit.*, note 29.

56 “The Fall of Srebrenica and the Failure of UN Peacekeeping - Bosnia and Herzegovina”, Human Rights Watch, 15 October 1995, <<https://www.hrw.org/report/1995/10/15/fall-srebrenica-and-failure-un-peacekeeping/bosnia-and-herzegovina>>.

57 Resolution 819 demanded that all parties treat Srebrenica and its surroundings as a “safe area” which should be free from any armed attack or any other hostile act. It demanded the immediate withdrawal of Bosnian Serb paramilitary units from areas surrounding Srebrenica and the cessation of armed attacks against it. The Council requested the Secretary-General to take steps to increase the presence of UNPROFOR in Srebrenica and to arrange for the safe transfer of the ill and wounded, and demanded the unimpeded delivery of humanitarian assistance to all parts of Bosnia and Herzegovina, in particular to the civilian population of Srebrenica, <<http://unscr.com/en/resolutions/819>>. In addition, Resolution 836 (1993) authorized UNPROFOR to use force to protect the safe zones, <<https://www.nato.int/ifor/un/u930416a.htm>>.

## Guiding Principles on Internal Displacement

The Guiding Principles on Internal Displacement were produced within the UN system in the 1990s to clarify the status and treatment of “persons forced or obliged to flee or leave their homes. [...] in order to avoid the effects of armed conflict ... and who have not crossed an internationally recognized state border”, now commonly referred to as internally displaced persons (IDPs).<sup>58</sup> The Guiding Principles, while not legally binding, are largely built on existing human rights standards and obligations which are binding in nature. The Guiding Principles seek to clarify obligations and to resolve any differences in approach between International Human Rights Law and IHL and thus to provide good practice for all concerned. They make it clear that freedom of movement is a key element in the protection of those at risk: “Every internally displaced person has the right to liberty of movement [...] In particular [...] to move freely in and out of camps or other settlements” (Principle 14) and “to seek safety in another part of the country, (...) to leave their country” or “seek asylum in another country and (...) to be protected against forcible return (...)” (Principle 15). They also stress the obligation to establish conditions for voluntary return or resettlement in other parts of the country (Principle 28). The Principles affirm the right of humanitarian agencies to offer their services and that consent to do so shall not be arbitrarily withheld by national or other authorities (Principles 24-27). They also emphasize the duty of authorities to establish conditions and provide means that allow IDPs to return voluntarily in safety and in dignity, **or** to resettle voluntarily in another part of the country (Principles 28-30) The concept of ‘durable solutions’ (return, local integration and integration outlined in the Principles are further elaborated by the Inter-Agency Standing Committee guidelines<sup>59</sup> which emphasize that the option of return should be **informed and voluntary**.

**In South-Eastern Europe**, the Regional Housing Programme (RHP)<sup>60</sup>, launched in 2012 following a donors’ conference in Sarajevo, is a joint regional initiative agreed upon by Bosnia and Herzegovina, Croatia, Montenegro and Serbia (the “Partner Countries”). The RHP is supported by the OSCE, in close co-operation with UNHCR, in the selection of RHP beneficiaries. The RHP is an integral part of the “Sarajevo Process on refugees and displaced persons” initiated in 2005 at the Regional Ministerial Conference on Refugee Returns and provides durable housing to the most vulnerable refugees and displaced persons in the region. One of the core aims of the RHP is to contribute to the resolution of the protracted displacement situation of the most vulnerable refugees and displaced persons following the 1991-1995 conflicts on the territory of former Yugoslavia, including displaced persons in Montenegro in 1999. This internationally supported initiative, funded by approximately EUR 260 million in donor funds, has been extended until June 2023 to ensure that all of the roughly 34,000 identified beneficiaries receive adequate housing solutions. This common effort has enabled the delivery of approximately 10, 500 housing units to date, aiding approximately 28,000 vulnerable people.<sup>61</sup> The conclusion of the RHP will be marked by a high-level closing conference in Sarajevo in 2023.

58 Prepared at the request of the UN Commission on Human Rights and the UN General Assembly by Dr Francis Deng and adopted by the Commission in 1998: “Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum Guiding Principles on Internal Displacement” (herein after Guiding Principles on Internal Displacement), Commission on Human Rights, 11 February 1998, UN Doc E/CN.4/1998/53/Add.2, <<https://www.refworld.org/docid/3d4f95e11.html>>.

59 “Durable Solutions for Internally Displaced Persons, Framework Project on Internal Displacement”, Inter-Agency Standing Committee (IASC), Washington, The Brookings Institution – University of Bern Project on Internal Displacement, April 2010, <<https://interagencystandingcommittee.org/system/files/2021-03/IASC%20Framework%20on%20Durable%20Solutions%20for%20Internally%20Displaced%20Persons%2C%20April%202010.pdf>>.

60 See the Regional Housing Programme website, [accessed 16 May 2023], <<http://regionalhousingprogramme.org/>>.

61 Some of the good practices under this initiative include the monitoring, in close co-operation with UNCHR, of the vulnerability of those applicants to the programme (returnees or DPs); The “complementary measures” included for beneficiaries, from packages of practical help to settle in (furniture, etc.) to programmes to help reintegrate (scholarships for children of returnees or DPs, access to health care and health insurance). These complementary measures were introduced to ensure the sustainability of the durable solutions provided.

Finally, Principle 20 obliges authorities to issue all documents necessary to IDPs. These, and the many other more detailed provisions, provide an internationally approved set of standards that can be relied on to protect the rights of IDPs.

There are, however, some limitations to these positive principles. In order to take account of the law of armed conflict, the Guiding Principles accept that, while arbitrary displacement of civilians is prohibited, it may be legitimate if “the security of the civilians involved or imperative military reasons so demand” (Principle 6), and that IDPs are not to be interned or confined to a camp unless “absolutely necessary” (Principle 12).

The Guiding Principles start from the assumption that the national authorities “have the primary (...) responsibility to provide protection and humanitarian assistance” to all IDPs (Principle 3). But they state that “these Principles shall be observed by all authorities, groups and persons irrespective of their legal status” (Principle 2). This obligation, that ‘all authorities’ are responsible for the delivery of human rights is also emphasized in the Human Rights Council expert report on Yemen.<sup>62</sup>

UNHCR has been granted authority under an expansion of its Statute to deal with formal legal and policy issues and to provide practical assistance on the ground both for those seeking or entitled to formal refugee status and also for internally displaced persons (IDPs) and others who have crossed borders but are not entitled to status as refugees.<sup>63</sup> However, the primary responsibility for internally displaced persons rests with state governments which may choose to request or refuse support from UNHCR.



62 UN Human Rights Council, *op. cit.* note 27.

63 The Statute of UNHCR adopted in 1950 covers only refugees as defined under the 1951 Refugee Convention and stateless persons, but a series of resolutions by the UN General Assembly has encouraged UNHCR to extend its operations to include IDPs (A/RES/41/105) (1992), <<https://undocs.org/en/A/RES/41/105>>, and returnees (A/RES/51/75) (1997), <<https://undocs.org/en/A/RES/51/75>>; for a full account see, “Protecting Refugees and the Role of UNHCR”, UNHCR, 2014, <<http://www.unhcr.org/509a836e9.pdf>>.



## International Refugee Law

International refugee law, under the 1951 Convention relating to the Status of Refugees and the 1967 Protocol thereto,<sup>64</sup> comes into play only when those fleeing conflict or persecution approach an international border and seek entry to another territory. Once a border is crossed the legal duties pass from the country, or de facto authorities of the home territories of those seeking refuge, to those of the receiving state or territory.

The Refugee Convention is designed to protect those who flee their country as a result of a “well-founded fear of persecution” in their own country and seek asylum in other countries.<sup>65</sup> While their applications are being assessed they are ‘asylum seekers’. While detention of asylum-seekers should normally be avoided or alternatives to detention be sought, detention may exceptionally be applied on grounds prescribed by law “to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order”.<sup>66</sup> Those who are established to meet one of the definition criteria under Article 1 of the 1951 Refugee Convention (sometimes referred to as ‘status refugees’) will enjoy extensive rights granted under the Convention, including free movement and choice of residence<sup>67</sup>, until refugee status ceases<sup>68</sup> and it is safe for them to return home in safety and dignity. There are also people in need of international protection who flee conflicts or situations of generalized violence who do not meet the refugee definition under Article 1(A)(2) of the 1951 Convention and are eligible for complementary or subsidiary protection<sup>69</sup>

**Non-refoulement**, one of the basic principles of refugee law, means a ban on sending people back to territories where they may face danger or persecution.<sup>70</sup> In conflict situations, there is often a dispute as to whether states have a right to prevent the entry of those seeking to cross into their territory by closing their borders. The position adopted by UNHCR is that practices of this kind, including non-admission at the border, are a denial of the fundamental rights of refugees to seek and enjoy asylum and constitute a form of refoulement.<sup>71</sup> This is based on the view that the right of refugees to seek asylum includes a right to have the validity of their claim assessed which is denied by a blanket border closure.<sup>72</sup> Additionally, International Humanitarian Law and the law of the sea prohibit refoulement at sea and impose obligations on states to

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64 “1951 Refugee Convention”, *op. cit.* note 17) as amended by the Protocol relating to the Status of Refugees 1967, <<https://www.ohchr.org/Documents/ProfessionalInterest/protocolrefugees.pdf>>.

65 The definition of a refugee entitled to seek asylum under art. 1(A)(2) of the 1951 Refugee Convention is a 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; or who, not having a nationality and being outside the country of his former habitual residence ... is unable, or, owing to such fear, is unwilling to return to it.”

66 Executive Committee of the High Commissioner’s Programme, “Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) – 1986”, 13 October 1986, No. 44 (XXXVII), <<https://www.refworld.org/docid/3ae68c43c0.html>>.

67 1951 Refugee Convention, art. 26, *op. cit.*, note 17.

68 1951 Refugee Convention, art. 1c, *op. cit.* note 17.

69 UNHCR Note on International Protection, UNGA, A/AC.96/830, 7 September 1994, <<https://www.unhcr.org/uk/3f0a935f2.pdf>>.

70 1951 Refugee Convention, art. 33, *op. cit.* note 17: “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his [or her] life or freedom would be threatened on account of his [or her] race, religion, nationality, membership of a particular social group or political opinion.”

71 “Advisory Opinion on the Extra-Territorial Application of ‘Non-Refoulement’ Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol”, UNHCR, 26 January 2007, <<https://www.refworld.org/docid/45f17a1a4.html>>; “Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept”, UNHCR, 23 March 2016, <<https://www.refworld.org/docid/56f3ee3f4.html>>.

72 The same would apply to citizens seeking to return under Protocol 4 of the ECHR.

implement search and rescue operations. But many states, particularly in Europe, assert a more general right to control access to their territory, particularly in respect of large scale refugee flows.<sup>73</sup>

Once a person who has fled has gained access to another state's territory, the state is not permitted to treat this person as criminal and is required to assess the validity of the asylum claim, provided this is made without delay.<sup>74</sup> The state is also required to guarantee human rights to all within their jurisdiction.<sup>75</sup> Those whose asylum claims are rejected may be deported, provided this can be done in compliance with International Human Rights law. Treaty bodies<sup>76</sup> and human rights courts have developed a number of important protections, similar to those of non-refoulement, to prevent the deportation of failed asylum seekers to any territory where there would be a serious risk of persecution or ill-treatment.

### ***MSS v Belgium and Greece, ECtHR (2011)***

An Afghan refugee travelled through Greece to Belgium, which then returned him to Greece as it was the first EU country he had entered. He claimed that the detention conditions in Greece were insalubrious. The Court held that Greece had violated his rights to be protected from inhuman or degrading treatment under art. 3 of the ECHR and that Belgium had also violated his rights by deporting him to a place where it should have known he would be subjected to such treatment.

### ***NA v United Kingdom, ECtHR (2009)***

The UK authorities sought to deport back to Sri Lanka an asylum seeker from Sri Lanka whose claim had been rejected. He claimed that he was likely to be arrested and ill-treated there. The Court held that the deportation of any refugee to a place where there was a serious risk that he might be ill-treated was in itself a violation of art. 3 of the ECHR and ordered that it should not be carried out.

## **Detention**

States are, under certain circumstances, permitted under International Human Rights Law to detain asylum seekers entering their territory in an irregular manner until it has been established whether they are entitled to be accepted as refugees under the Refugee Convention, whether they are to be granted temporary right to remain or whether they are to be deported back to their country of origin has been determined.<sup>77</sup> However, under refugee law individuals may not be prosecuted or punished for the irregularity of their entry and, once they have made a formal claim for asylum, they may be entitled to accommodation, support and freedom of movement as asylum seekers. In many states, however, there is a widespread practice to hold and detain

73 Though both the Inter-American and African Union formulations of human rights include the right to asylum, neither the European Convention on Human Rights nor the International Covenant, as explained above, do so.

74 1951 Refugee Convention, art. 31, *op. cit.* note 17.

75 See also "General Comment 31 [80] The Nature of the General Legal Obligation Imposed on States Parties to the Covenant", Human Rights Committee, 26 May 2004, paragraph 10, <<https://www.refworld.org/docid/478b26ae2.html>>: "States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction."

76 *Ibid.* paragraph 12, which reads: "Moreover, the article 2 obligation requiring that States Parties respect and ensure the Covenant rights for all persons in their territory and all persons under their control entails an obligation not to extradite, deport, expel or otherwise remove a person from their territory, where there are substantial grounds for believing that there is a real risk of irreparable harm, such as that contemplated by articles 6 and 7 of the Covenant, either in the country to which removal is to be effected or in any country to which the person may subsequently be removed. The relevant judicial and administrative authorities should be made aware of the need to ensure compliance with the Covenant obligations in such matters."

77 ECHR, art. 5(1)(f), *op. cit.* note 18.



them in detention centres while their identities or cases are processed. In 2012 UNHCR, complementing its Executive Committee Conclusion 44 which emphasizes that “in view of the hardship which it involves, detention should normally be avoided”<sup>78</sup>, produced its *Detention Guidelines on the Applicable Criteria and Standards on the Detention of Asylum-seekers and Alternatives to Detention* in support of the principle that detention should be regarded as a measure of last resort.<sup>79</sup> These guidelines make it clear that the right of freedom of movement applies to asylum seekers (Guideline 2); that any form of detention must be authorized by clear national legislation (Guideline 3); that it cannot be indefinite (Guideline 6); and that other alternatives<sup>80</sup> should be adopted wherever possible (Guideline 4.3). UNHCR has also raised concerns over the practice of some states to impose restrictions on entry to, or exit from, temporary camps established to accommodate major refugee flows or on onward travel from islands to which refugees arrive by sea.

These guidelines have been given added force in decisions of the European Court of Human Rights whereby the detention of refugee children cannot be justified.<sup>81</sup> There is a parallel obligation under the UN Convention on the Rights of the Child.<sup>82</sup> It has also been established, under both the ICCPR and the ECHR, that undue delay in dealing with particular cases may render continued detention disproportionate.<sup>83</sup>

### **Popov v France, ECtHR (2009)**

A married couple from Kazakhstan arrived in France in 2002 and their two children were born in France. Their application for asylum was eventually refused. In 2007, the French authorities sought to deport them and detained the whole family in a detention centre for several months. The Court held that the detention of the young children was a violation of the right to liberty under art. 5 of the European Convention on Human Rights because no alternative arrangements were properly considered.

### **A v Australia, UN Human Rights Committee (1993)**

A group of Cambodian refugees arrived by boat in Australia. They were detained in various detention centres for four years while their claims for refugee status were considered and eventually rejected. The Human Rights Committee held that this amounted to an arbitrary denial of the right to liberty and was a violation of art. 9 of the ICCPR. It decided that compensation should be paid which the Australian government refused.

- 78 Executive Committee of the High Commissioner’s Programme, “Detention of Refugees and Asylum-Seekers No. 44 (XXXVII) - 1986”, 13 October 1986, No. 44 (XXXVII), <<https://www.refworld.org/docid/3ae68c43c0.html>>.
- 79 “Detention Guidelines on the applicable criteria and standards relating to the detention of asylum-seekers and alternatives to detention”, UNHCR, 2012, <<https://www.unhcr.org/uk/publications/legal/505b10ee9/unhcr-detention-guidelines.html>>. “Beyond Detention: A Global Strategy to support governments to end the detention of asylum-seeker and refugees 2014-2019”, UNHCR, 2014, <<https://www.unhcr.org/media/32463>>. “Beyond Detention Toolkit - Guiding Questions for the assessment of Alternatives to Detention”, UNHCR, May 2018, <<https://www.unhcr.org/us/media/guiding-questions-assessment-alternatives-detention>>, “UNHCR Detention Checklist”, UNHCR, July 2017, <<https://www.refworld.org/docid/59a4111e4.html>>. See also “Safety and Dignity for Refugee and Migrant Children: Recommendations for alternatives to detention and appropriate care arrangements in Europe”, UNHCR et al, 5 July 2022, <<https://data.unhcr.org/en/documents/details/94034>>.
- 80 Please also see “Building on Recent Experience to Promote the Use of Alternatives to Immigration Detention”, ODIHR, 31 March 2021, <<https://www.osce.org/odihr/482679>>.
- 81 “Popov v France”, European Court of Human Rights, Strasbourg, 19 January 2012, (detention of a family with young children in a detention centre held a violation in respect of the children because no alternative properly considered), <[https://hudoc.echr.coe.int/FRE#%22itemid%22:\[%22001-108710%22\]](https://hudoc.echr.coe.int/FRE#%22itemid%22:[%22001-108710%22])>.
- 82 UN General Assembly, “Convention on the Rights of the Child”, 20 November 1989, Art. 37(b), <<https://www.refworld.org/docid/3ae6b38f0.html>>: “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”
- 83 “A v Australia”, UN Human Rights Committee, CCPR/C/59/D/560/1993, 3 April 1997 (detention of illegal immigrant for four years held arbitrary under the International Covenant on Human Rights), <<https://www.refworld.org/cases,HRC,3ae6b71a0.html>>; “A and others v United Kingdom”, European Court of Human Rights, 9 February 2009 (lengthy indefinite detention of suspected terrorists a violation of art.5(1)(f) as no active consideration of their cases), <<https://www.refworld.org/cases,ECHR,499d4a1b2.html>>.

## International law in relation to personal documentation and statelessness

In conflict situations, moving freely is often a challenge due to physical and administrative barriers, including the non-recognition of documents between conflicting parties or other states. While the authorities in charge may issue documentation to people living in a given territory — such as a passport, identification card, birth certificate, death certificate, marriage certificate, divorce certificate, adoption certificate, driving licence, car registration, licence plates, education certificates, proof of property — the fact that those documents may not be recognized by the conflicting party or internationally, may impede the rights of conflict-affected populations, including their right to freedom of movement. Without personal documents, it is impossible to move within a territory if boundary lines are set up, or across borders. People rendered stateless face an even more difficult predicament as they are left in limbo, often unable to move internally or to cross international borders.

Sometimes practical solutions to the challenges outlined above can be found, often assisted by the international community. In Moldova, an administrative boundary line marks the Transdniestria-controlled territory. People who do not have Transdniestrian identification documents or residence permits are required at the Transdniestrian checkpoints to fill in a migration card to cross into Transdniestria. However, residents of Moldova-controlled settlements close to the administrative line, including on the left bank of the Dniester/Nistru River, can cross the administrative boundary line by showing their registration address in their Moldovan identity documents. Staff and pupils of the eight Moldova-administered Latin-script schools can cross by showing their identity cards issued by the Moldovan Agency for Public Services (negotiated as part of the Berlin-plus package).<sup>84</sup> In addition, in Moldova, the agreements on the Berlin-plus package issues resolved access to agricultural land for farmers resident in Moldova-controlled territory, allowing them to work their fields in Transdniestrian-controlled territory. The agricultural land can be accessed with a special certificate that farmers need to show the Transdniestrian authorities at crossing points.<sup>85</sup>

It is well-established, under the 1961 Convention on the Reduction of Statelessness, that states may not render their citizens stateless by cancelling their citizenship unless they have some other citizenship.<sup>86</sup> In relation to the freedom of movement of persons crossing an international border, article 28 of both the 1951 Refugee Convention and the 1954 Convention relating to the Status of Stateless Persons provide that states may, under certain conditions, issue travel documents to non-citizens. States are not obliged, but have a discretion

84 The Package of 8 includes: (1) Apostilization of Transdniestrian university diplomas by Moldova; (2) Participation of Transdniestrian vehicles in international road traffic with neutral-design license plates; (3) the regulation of telecommunications between the Sides; (4) how to dispose of criminal cases brought against Transdniestrian officials; (5) how to ensure operation of Latin-script schools under the jurisdiction of the Moldovan Ministry of Education, Culture and Research in territory under the control of Transdniestrian authorities; (6) how to ensure access for some farmers resident in Moldovan territory to sow and harvest on their lands under Transdniestrian control; and (7) how to ensure freedom of movement between the two sides of people, goods, and services (already guaranteed in many joint declarations and agreements between the sides), and 8) the opening of the Gura Bicului-Bychok Bridge, damaged by the fighting in 1992, repaired by 2001, but never reopened to traffic. Six agreements also been reached in the *Berlin Protocol* (2016), <<https://www.osce.org/moldova/244656>>.

85 It is important to note that the Ukrainian authorities did not extend its policy to allow Transdniestrian-plated vehicles to enter Ukraine from 1 September 2021.

86 The OSCE-UNHCR Handbook on Statelessness provides guidance on international standards and good practices in dealing with issues related to statelessness. “*Handbook on Statelessness in the OSCE Area: International Standards and Good Practices*”, OSCE-UNHCR, 2017, <<https://www.osce.org/handbook/statelessness-in-the-OSCE-area>>.

to recognize, for admission into their territory, a travel document issued by a non-state entity, however, such recognition of the document, does not imply recognition of that entity as a state.<sup>87</sup>

In some cases, an annexing or emergent state may seek to claim current and perhaps past residents as their nationals, granting them passports, whether or not those affected wish to accept this new status. There is little legal guidance on this issue, which is often dealt with bilaterally at the diplomatic level and it is at the discretion of third states to recognize or reject such passports.<sup>88</sup> This, of course, creates problems on the ground in relation to freedom of movement of people across borders and/or boundary lines.

Two decisions from the International Court of Justice (ICJ) and the ECtHR respectively can be relied on in relation to the issuance of personal documentation by de facto authorities and the difficulties this presents for freedom of movement for persons affected by conflict. Both courts have stated, in general terms, that official acts, such as the registering of births, marriages and deaths, produced by territories not under direct control of a legitimate government should be considered valid to the extent that they benefit the residents of those territories. It is important to note that the examples below refer only to registration of births, deaths and marriages and are not exhaustive but merely illustrative and that other acts adopted by these territories can also be considered valid.

**ICJ Advisory Opinion on Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), (1971).**<sup>89</sup>

The Opinion states that certain acts, which, if ignored, would be to the detriment of the inhabitants of the territory of the area not under direct control of the government, should be considered valid: the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.

**European Court of Human Rights. Application n. 15318/89 (Case of *Loizidou v. Turkey*), 18 December 1996.**<sup>90</sup>

This judgement cites the landmark ICJ decision and concludes that international law recognizes the legitimacy of certain legal arrangements and transactions in such a situation, for instance as regards the registration of births, deaths and marriages, "the effects of which can be ignored only to the detriment of the inhabitants of the [t]erritory".

87 For example, in the "Allgemeinverfügung für die Anerkennung ausländischer Pässe vom 18.02.2005, veröffentlicht im Bundesanzeiger, Nr. 11, S. 746-758 vom 18.02.2005", the German authorities state under Section 8 that the listing of an issuing authority in the annex of the "general decree" does not imply that the Federal Republic of Germany is recognizing the body as a state under international law. The recognition of passports and replacement documents does not mean recognition of a body or administration as a state in any shape or form.. Please also see cases referred to in footnotes 77 and 78.

88 This is addressed to some extent in HCNM recommendations: see Rec. 11 in the Bolzano recommendations. States may take preferred linguistic competencies and cultural, historical or familial ties into account in their decision to grant citizenship to individuals abroad. States should, however, ensure that such a conferral of citizenship respects the principles of friendly, including good neighbourly, relations and territorial sovereignty, and should refrain from conferring citizenship en masse, even if dual citizenship is allowed by the State of residence. If a State does accept dual citizenship as part of its legal system, it should not discriminate against dual nationals.

89 "Summary of the Advisory Opinion of 21 June 1971", ICJ <<https://www.icj-cij.org/public/files/case-related/53/5597.pdf>>.

90 ECtHR. "Application n. 15318/89 (*Case of Loizidou v. Turkey*)", 18 December 1996, <<https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58201%22%5D%7D>>.

## Post-conflict return and property restitution

In addition to documentation, there are further issues, surrounding return across established or new de facto boundaries, or returning to previously occupied properties, that may have to be dealt with over the longer term. Some of these are addressed in the Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons, adopted within the United Nations in 2005.<sup>91</sup> These assert a number of key principles of relevance both to freedom of movement and restitution and/or compensation for the lost property of all those displaced whatever their formal status. The underlying objective is to assist all national and international actors in addressing legal and technical issues to deliver the rights of all refugees and displaced persons to have restored to them any housing, land and/or property of which they were arbitrarily or unlawfully deprived, or to be compensated for it (Principles 1 and 2). The Principles also address the rights to freedom of movement (Principle 9), to voluntary return in safety and dignity (Principle 10), to the preservation of relevant documentation (Principle 15), and to accessible national procedures for the delivery of and adjudication on these rights (Principles 11-18). General Comment No. 27 on Freedom of Movement under the ICCPR makes it clear that article 12 must be interpreted to permit everyone to return to their country of habitual residence, regardless of any change in their nationality imposed by others.<sup>92</sup> Furthermore, the ECtHR has made several rulings on the compensation for lost property to applicants denied the right to return.

In **BiH** the Property Legislation Implementation Programme (PLIP) was introduced as part of Annex 7 of the Dayton Peace Agreement as a specialist operation designed to ensure that all citizens of Bosnia and Herzegovina who had been dispossessed of their property in the course of the conflict could repossess it.<sup>93</sup> It focused on the rule of law and followed a rights-based approach to property rights. The PLIP reversed wartime legislation on abandoned property which started war-profiteering in the form of illegal occupancy, often in the form of multiple occupancy. It did however provide alternative accommodation to occupants without solutions and enforced the eviction of multiple occupants and paid compensation. The right to property and repossession was embedded in the laws and the administrative authorities in 140 municipalities across the country were responsible for implementing the laws.<sup>94</sup>

91 "The Pinheiro Principles", *op. cit.* note 12

92 General Comment on Freedom of Movement, *op. cit.* note 16, at para. 20: "The scope of 'his own country' is broader than the concept 'country of his nationality'. [...] This would be the case, for example, of 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 in or transferred to another national entity, whose nationality is being denied them."

93 The PLIP dealt solely with the restoration of property rights and not destroyed houses.

94 According to the OSCE Mission to BiH, during the PLIP implementation, there have been 211,790 property repossession claims filed in BiH, resulting in return of 197,688 properties to their pre-war owners (99%).

## International Law on State Recognition and Obligations under the UN Charter

There are no clear rules in international law on the recognition by established states of annexed or newly emergent territories claiming independence. While the UN Charter, the ICCPR and the ICESCR all protect the right to self-determination of all peoples, it is left to each established state to decide whether or not to accept or deny the legitimacy of changed boundaries or effective control over particular areas. The result is that there are an increasing number of unrecognized or only partially recognized territories whose residents face considerable difficulties in respect of their national status: they may be treated as continuing nationals of their previous state, or as nationals of a neighbouring state which controls or has annexed the territory, or as of uncertain or contested nationality.

Under the United Nations Charter: Article 4 permits UN membership for any emergent state that is committed to the Principles of the United Nations, but only on the recommendation of the Security Council.

Where the UN Security Council has passed resolutions under Chapters VII or VIII of the Charter,<sup>95</sup> all member states and international agencies may be required to follow whatever view of the conflict has been adopted by the Security Council, because, under Article 103 of the Charter, such resolutions take precedence over all other international conventions.<sup>96</sup> This may affect issues surrounding the recognition of break-away territories, if for example, the Security Council requires either acceptance or rejection of de facto boundaries, or adopts binding requirements in respect of the designation of parties to the conflict and whether or not they are designated as negotiating parties to include issues related to freedom of movement. Where the deployment of UN peacekeepers has been authorized, with a mandate that extends to the protection of free movement, their presence may assist in implementing or enforcing free movement rights.

During active conflict or a post-conflict status quo in territories where de facto authorities are not internationally recognized or when action by the Security Council is blocked by vetoes, alternative mechanisms may be negotiated on an ad hoc basis, such as military technical agreements between force commanders or collective decisions or peace agreements by groups of neighbouring or concerned states along with other international bodies.

This can enable practical arrangements to be developed for the protection of civilians, their free or protected movement and their access to services, for example, in relation to local cease-fires, safe crossing points across lines of control, mutually accepted documentation or recognition of vehicle registration plates.

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95 Chapter VII of the UN Charter allows the UN Security Council to determine threats to international peace and security and take non-military (Article 41) as well as military action (Article 42). Chapter VIII of the UN Charter authorizes and tasks regional organisations with resolving disputes.

96 "Charter of the United Nations", UN, San Francisco, 1945, art. 103, <<https://treaties.un.org/doc/publication/ctc/uncharter.pdf>>: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

## Accountability for violations of freedom of movement under international law

Under International Human Rights Law, states are responsible for guaranteeing the rights of individuals or groups of persons within their jurisdiction. Under the ECHR, individuals may lodge an application to the ECtHR if they consider that they have personally and directly been a victim of a violation of the Convention and its Protocols. Nevertheless, they must first exhaust all domestic legal remedies before lodging a complaint with the Court. The decisions of the Court typically emerge several years after the events and normally result only in the award of compensation to individual victims rather than any immediate change in the situation on the ground or measures to assist in finding a durable solution.

Under IHL, it is the responsibility of the parties to an armed conflict to respect the laws set out in The Hague and Geneva Conventions and their Protocols in all locations under their control, and to search for war criminals within their jurisdiction and bring them to court or extradite them as soon as possible.<sup>97</sup> States Parties must investigate all grave breaches and serious violations and must actively pursue cases against their own forces. Persons who aid, order, supervise and jointly perpetrate international crimes can be held individually responsible.

Given that states involved in armed conflict are often reluctant or do not have the necessary capacities or resources to take action, the International Criminal Court (ICC) was established, under the Rome Statute of 1998, to provide a more effective and independent international structure to ensure individual accountability for genocide, crimes against humanity, war crimes and crimes against peace. The ICC has its own prosecutor with the power to bring charges against suspects anywhere in the world. However, the ICC is only partly able to bridge the accountability gap, because its jurisdiction is subject to acceptance of the Court's jurisdiction by a given state or referral by the UN Security Council. Moreover, the ICC's jurisdiction is complementary, which means it only has jurisdiction if the national authorities are "unable or unwilling" to bring and pursue charges effectively. The Court has the resources to consider only the most high profile cases and, as with human rights courts, is unable to act fast during an active conflict. It may also be possible to establish ad hoc international courts, such as the International Criminal Tribunals for the Former Yugoslavia and Rwanda, or hybrid courts — comprised of national and international judges — that may be able to deal with larger numbers of cases.

There is no specific court with the role of investigating and adjudicating, on breaches of international refugee law. The UN High Commissioner for Refugees in the exercise of its mandate issues general guidance on the interpretation of the 1951 Convention and on international principles governing the treatment of refugees and internally displaced populations, for example through Executive Committee (EXCOM) conclusions and other forms of guidance. Moreover, UNHCR assists states in the drafting of national asylum legislation and the establishment of asylum authorities and procedures and offers advice in their implementation.<sup>98</sup> While UNHCR enjoys a broad range of tools in exercising its supervisory function and to address shortcomings identified, ranging from quiet diplomacy to public interventions, which it can pair with practical support<sup>99</sup>, it has no authority to impose sanctions on specific incidents.

In 1992, a Special Rapporteur on the Human Rights of IDPs was appointed by the UN Secretary General to strengthen the international response to internal displacement and to enhance their protection through inter-governmental, regional and non-governmental cooperation and actions.

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97 "Geneva IV" art. 146, *op. cit.* note 32; Additional Protocol I, Art. 80, *op. cit.* note 40.

98 As stipulated in article 35 (1) of the 1951 Convention "The Contracting States undertake to co-operate with the Office of the United Nations High Commissioner for Refugees, ..., in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of this Convention

99 See also Walter Kälin, "Supervising the 1951 Convention on the Status of Refugees: Article 35 and Beyond", UNHCR, 1 June 2001, <<https://www.unhcr.org/media/supervising-1951-convention-status-refugees-article-35-and-beyond>>.



The Special Rapporteur is mandated to:

- i. Address the complex problem of internal displacement, in particular by mainstreaming the human rights of the internally displaced into all relevant parts of the United Nations system;
- ii. Work towards strengthening the international response to the complex problem of internal displacement due to reasons including armed conflict, generalized violence, human rights violations and disasters; and
- iii. Engage in co-ordinated international advocacy and action for improving protection and respect of the human rights of internally displaced persons, while continuing and enhancing inclusive dialogue with governments, intergovernmental, regional and non-governmental organizations and other relevant actors.<sup>100</sup> The Special Rapporteur conducts country visits, provides recommendations and also promotes the application of the Guiding Principles on Internal Displacement.

From the point of view of those working on the ground during a conflict, these official structures for investigation and legal action are not immediately available. In practice, the work of collecting and processing evidence on alleged violations falls to national and international organizations, NGOs and the UN Special Representative. This work also usually takes considerable time. OSCE field staff and other field workers can assist in this by drawing the attention of all those involved to the requirements of the various legal regimes and where possible recording or facilitating the collection of relevant evidence of breaches, within the mandates of OSCE field operations and executive structures. Efforts to support freedom of movement may include joint advocacy, quiet diplomacy, raising public awareness and informing possible court proceedings.

**The OSCE Kosovo<sup>101</sup> Verification Mission (OSCE-KVM)<sup>102</sup>** had a mandate to monitor, investigate and document allegations of human rights violations committed by all parties to the conflict. Collecting and documenting human rights and humanitarian rights violations, including on forced expulsion and the deliberate destruction of property — as shown in the OSCE **As Seen As Told** reports<sup>103</sup> — can help establish base-line information on populations in villages, changes in demographics and consequent return processes, as well as grass-roots dialogue processes that can help return processes at the village level after conflicts.

100 “Special Rapporteur on the Human Rights of Internally Displaced Persons”, OHCHR, [last accessed 16 May 2023], <<https://www.ohchr.org/en/issues/idpersons/pages/idpersonsindex.aspx>>.

101 There is no consensus among OSCE participating States on the status of Kosovo and, as such, the Organization does not have a position on this issue. All references to Kosovo, whether to the territory, institutions or population, in this text should be understood in full compliance with United Nations Security Council Resolution 1244.

102 This Mission was created in October 1998 and terminated its mandate in June 1999.

103 “KOSOVO / KOSOVA As Seen, As Told”, OSCE, 1999, <<https://www.osce.org/files/f/documents/d/d/17772.pdf>>.

# Summary of international legal regimes related to freedom of movement and internationally agreed standards

(Applicable with minor variations to both international/internationalized and internal conflicts)

| Legal regime   | Formal rights   | Restrictions  | <p><b>International Guidelines for Best Practice</b></p> <p>No clear guidelines on procedures for assessment of claims or adjudications on state compliance.</p> <p>Human rights courts &amp; CCPR General Comment No. 27 set standards on implementation.</p> <p>The UN Guiding Principles on Internal Displacement combine the principles of human rights and Humanitarian Law; they stress the duty of state governments and other de facto authorities to protect all those displaced by conflict and to co-operate with international humanitarian agencies.</p> <p>The mandate of the UNHCR covers both those who have crossed an internationally recognized border (refugees), and those who are displaced within their own country (IDPs). While UNHCR's supervisory functions derive from Article 35 of the 1951 Refugee Convention, consensus from the host state is required for humanitarian assistance operations; UNHCR's Detention Guidelines set standards for the free movement of asylum seekers.</p> <p>The UN Pinheiro Principles on Housing and Property Restitution for Refugees and Displaced Persons set standards on documentation and access; CCPR General Comment 27 and the OSCE-UNHCR Handbook on Statelessness outline good practice.</p> |
|--|---|---|---|
| Universal Declaration of Human Rights  | General freedom of movement and right to seek asylum  | By law for national security, public order etc.   |   |
| European Convention on Human Rights/ International Covenant on Civil and Political Rights  | Freedom to leave and return to your state; freedom of choice of residence within the state for citizens   | By law in the interests of national security, public order etc., but no indefinite detention  |   |
| International Humanitarian Law (Geneva Conventions + Additional Protocols)   | Key duty to protect civilians within the territory of conflict; prohibited to attack civilian evacuation and destroy civilian property; no forced displacement; duty to allow free access to humanitarian aid | Military commanders on both sides can restrict free movement on grounds of military necessity but must permit return to occupied territory            |   |
| International Refugee Law and the right to asylum  | Applies only after crossing an international border for those fleeing due to a well-founded fear of persecution and/or the impact of internal conflict; does not cover migrants <sup>104</sup>                | Receiving states may detain all entrants (but not children) while status is assessed; may temporarily detain or deport those not accepted as refugees |   |
| International Law on statehood, recognition of states, citizenship, status of stateless persons, and prevention and reduction of statelessness | States are required to protect national populations, recognize citizenship and refrain from making anyone stateless   | No rules on recognition of other states, of disputed territories, nor on the status of their residents  |   |

104 UNHCR - UNHCR viewpoint: 'Refugee' or 'migrant' – Which is right?, <<https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html>>.



# Conclusion

People affected by conflict face many challenges to their freedom of movement and many risks to their safety. They can become trapped where there is fighting or be forcibly displaced and unable to reach safety in a third country or in the same country due to movement restrictions. Freedom of movement may also be impacted by the level of security that exists or is perceived to exist. Movement may be limited or self-limited due to fear of being targeted for being a member of a particular community/minority. Resolving personal documentation issues is intrinsically linked to freedom of movement; without the documentation it may be impossible to travel, cross checkpoints, boundary lines, or return, remain in a territory or find another durable solution.

During conflicts, particularly protracted ones, enabling freedom of movement across conflict lines, 'dividing lines', 'front lines' and 'administrative boundary lines' is vital to mitigate the suffering of the population. People may be able to get (better) access to social, health and other services, and to assistance programmes. Freedom of movement can improve livelihoods, by improving people's access to markets, to work and other income-generating opportunities. Freedom of movement allows people to preserve family ties and it can, more generally, contribute to confidence-building and, thereby, to post-conflict reconciliation. For these reasons, issues related to freedom of movement have been and are given high attention and are somehow addressed in all the conflict resolution and mitigation processes in which the OSCE has been or is involved.

This guidebook provides an overview of international standards, case law and guidelines on freedom of movement and how they apply to conflict situations. It aims to help practitioners develop a deeper understanding of the legal framework and use it in their advocacy and monitoring work.

International Human Rights Law, International Humanitarian Law and refugee law contain extensive provisions to protect the right to freedom of movement to which parties must adhere. However, in conflict situations, there are inevitable problems, often due to the complexity of the situation on the ground and divergent interpretations of the rules on the ground and how they may be applied in practice.

These arise from a number of issues:

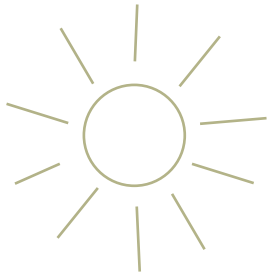
- Under IHL there may be differences in the interpretation by the parties on which rules should apply depending on whether they believe it is an internal or an international armed conflict. Often a party to a conflict may dispute the fact that there is an 'armed conflict', as opposed to 'terrorist' or criminal activity. Since there is no mechanism that determines the nature of each conflict, difficulties arise in relation to assessing which rules apply in each situation
- Likewise, it can be difficult to determine whether the Refugee Convention or the IDP Guidelines should apply, since the provisions differ, depending on the understanding of an 'international border'.
- Guidance documents are just that; they come with no enforcement mechanism other than moral suasion and the offer of practical assistance which, in turn, is dependent on negotiation with the authorities in charge.
- When a country loses control of some of its territory, it becomes difficult for it to continue to guarantee the rights of people there, despite its ongoing human rights obligations.
- There is a corresponding difficulty over the obligations of de facto authorities in break-away territories. Given that these authorities are not internationally recognized, there are political complications in seeking to make them responsible for human rights compliance.

- Enforcement mechanisms may take a long time and may not offer immediate practical solutions on the ground.

This guidebook illustrates the relationships between the various international legal regimes and practical guidelines (summarized in the table on p. 32). Given the practical challenges to applying the formal rules of international law and enforcing the obligations of states to protect human rights in conflict situations, the UN and other international organizations have produced international guidelines on best practice in addressing refugee protection, internal displacement, detention, property restitution and statelessness. Beyond the law and these guidelines, those working in the field may find it important to develop skills in dialogue facilitation, mediation and negotiation to achieve practical solutions to issues that are not addressed or cannot be resolved under established legal principles. Equally useful is knowledge about the experience of international agencies in dealing with similar situations and the practices introduced during conflicts to facilitate people's freedom of movement.

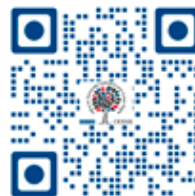
Together with its partners, including UNHCR, ODIHR strives to support OSCE and UNHCR field staff and other practitioners in extending their knowledge about these legal standards and guidelines, in monitoring freedom of movement in different conflict settings and in learning from current and past experiences within the OSCE region.





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