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Making States Accountable for Deliberate Forced Displacement

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Making States Accountable for Deliberate Forced Displacement

Abstract

How should we respond to states that deliberately displace their own populations? While the international refugee regime is anchored in the 1951 Refugee Convention and the work of the United Nations High Commissioner for Refugees (UNHCR), the Convention is silent on the question of state culpability, and the UNHCR's Statute established its entirely non-political character. Although rarely applied, four forms of complementary enforcement mechanisms already exist that could be used to limit and deter deliberate displacement by states: the UN Human Rights Council's Universal Periodic Review mechanism; soft and regional law, such as the UN Guiding Principles on Internal Displacement; international criminal law at the individual level, where deportation and forcible transfers have been defined as potential war crimes and crimes against humanity; and the UN Security Council, which has progressively defined the movements of refugees and internally displaced persons as potential threats to regional and international peace and security. Critical to the Security Council response is the Responsibility to Protect doctrine, adopted by the UN member states in the 2005 World Summit Outcome Document. These four mechanisms provide a way to hold states and individuals accountable for displacement. Generating political will to expand their use provides a direct way of ensuring that refugees and other forced migrants are better protected.

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World Refugee Council Research Paper No. 17 – June 2019

Making States Accountable for Deliberate Forced Displacement

Phil Orchard



Centre for International
Governance Innovation

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World Refugee Council Research Paper No. 17 – June 2019

Making States Accountable for Deliberate Forced Displacement

Phil Orchard

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About the Series

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Phil Orchard is an associate professor of international relations at the University of Wollongong and a senior research fellow at the Asia-Pacific Centre for the Responsibility to Protect. His research focuses on international efforts to provide legal and institutional protections to forced migrants and war-affected civilians. He is the author of *A Right to Flee: Refugees, States, and the Construction of International Cooperation* (Cambridge University Press, 2014), which won the 2016 International Studies Association Ethnicity, Nationalism, and Migration Studies Section Distinguished Book Award, and *Protecting the Internally Displaced: Rhetoric and Reality* (Routledge, 2018). He is also the co-editor, with Alexander Betts, of *Implementation and World Politics: How International Norms Change Practice* (Oxford University Press, 2014) and, with Charles Hunt, of the forthcoming *Constructing the Responsibility to Protect: Consolidation and Contestation* (Routledge). He tweets @p_orchard.

Acronyms and Abbreviations

ACT	Accountability, Coherence, and Transparency
AICHR	ASEAN Intergovernmental Commission on Human Rights
ASEAN	Association of Southeast Asian Nations
AU	African Union
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPs	internally displaced persons
NGOs	non-governmental organizations
OAS	Organization of American States
OAU	Organization of African Unity
R2P	Responsibility to Protect
UNGA	UN General Assembly
UNHCR	United Nations High Commissioner for Refugees
UPR	Universal Periodic Review

Executive Summary

How should we respond to states that deliberately displace their own populations? While the international refugee regime is anchored in the 1951 Refugee Convention and the work of the United Nations High Commissioner for Refugees (UNHCR), the Convention is silent on the question of state culpability, and the UNHCR's Statute established its entirely non-political character. However, four forms of complementary enforcement mechanisms exist that could be used to limit and deter deliberate displacement by states: the UN Human Rights Council's Universal Periodic Review (UPR) mechanism; soft and regional law, such as the UN Guiding Principles on Internal Displacement; international criminal law at the individual level, where deportation and forcible transfers have been defined as potential war crimes and crimes against humanity; and the UN Security Council, which has progressively defined the movements of refugees and internally displaced persons (IDPs) as potential threats to regional and international peace and security. Critical to the Security Council response is the Responsibility to Protect (R2P) doctrine, adopted by the UN member states in the 2005 World Summit Outcome Document. Importantly, all four of these mechanisms already exist, but they have only rarely been used to hold states and individuals accountable for displacement. Thus, generating political will to expand their use provides a direct way of ensuring that refugees and other forced migrants are better protected.

Introduction

Accountability "implies that some actors have the right to hold other actors to a set of standards, to judge whether they have fulfilled their responsibilities in light of these standards, and to impose sanctions if they determine that these responsibilities have not been met" (Grant and Keohane 2005, 29). The concept of accountability, by its nature, is multi-faceted, raising a series of questions around both which actors should be held accountable and what processes should be used. When it comes to forced displacement, states are rarely held to account by the international community writ

large, individual international actors or other states. However, this paper argues that a range of mechanisms exist today that can be used to hold states directly accountable for deliberate actions that displace their own populations.

The international refugee regime is designed to provide legal status and international protection to those people who have fled from their own states "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, unwilling to avail himself of the protection of that country" (UNGA 1951, art. 1A(2)).

This regime is silent on the issue of state accountability for displacement.¹ The Convention established no treaty-monitoring body and, as Grant Dawson and Sonia Farber have noted, "it does not, and was not intended to, place any positive obligation on governments to *refrain* from displacing individuals within their borders or to apprehend those who commit forcible displacement within their borders" (Dawson and Farber 2012, 59; italics in the original). Similarly, the UNHCR's Statute specified that "the work of the High Commissioner shall be of an entirely non-political character; it shall be humanitarian and social and shall relate, as a rule, to groups and categories of refugees" (UNGA 1950, chap. 1, para. 2).

Further, creating an accountability mechanism within this regime might create more problems than it solves. Asylum is viewed as a neutral act. As Walter Kälin (2000, 423) has written, "In international law, the granting of asylum is traditionally regarded not as an unfriendly act vis-a-vis the country of origin, but as an exercise of territorial sovereignty allowing each State to decide freely about the admission of aliens. In contrast, the accountability view presupposes a violation of basic duties by the country of origin, turning every grant of asylum into an implicit accusation against that country."

Not only might a direct accountability mechanism affect states' willingness to provide refugees

1 The difference here in relation to other human rights treaties is quite stark. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, for example, explicitly notes that "each State Party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction" (UNGA 1987, art. 2(1)).

with asylum, but it could also undermine the UNHCR's efforts to operate within states-of-origin to both safeguard the rights of returnee refugees and IDPs. This could be an especially significant risk in cases where states are not signatories to the 1951 Convention.

At the same time, there are clear general prohibitions in international law against forced displacement. The Universal Declaration of Human Rights establishes that “everyone has a right to freedom of movement and residence within the borders of each state” and the right to leave any country and to return to one’s own country, as well as a right to seek asylum from persecution (UNGA 1948b, art. 13(1), (2), 14(1)). The International Covenant on Civil and Political Rights affirms the freedom of movement and residence within a country and to leave any country, although it does limit this for reasons of national security and other concerns (UNGA 1966, art. 12).

The Genocide Convention explicitly establishes that the forcible transfer of children from one group to another and that acts that are “deliberately inflicting on the groups conditions of life calculated to bring about its physical destruction in whole or in part” both constitute genocide (UNGA 1948a, art. 2(e)). This has led some legal commentators to suggest that forms of forcible displacement used in such a way could constitute genocide; however, it is unclear how wide this category may be (Dawson and Farber 2012, 57; Boot 2002, 451).

International humanitarian law² also prohibits a number of forms of displacement, including the “forced displacement of civilians and subsequent resettlement of the occupying power’s own population in occupied territory” (Jacques 2012, 79) through individual or mass forcible transfers, as well as deportations of protected persons to the territory of the occupying power or to another country (see Henckaerts and Doswald-Beck 2005, 458–60). And, as will be discussed further below, the Rome Statute of the International Criminal Court (ICC) finds that deportation and forcible transfers can qualify as both crimes against humanity and war crimes.

Thus, while direct accountability mechanisms do not exist within the international refugee regime, these other bodies of law provide for

four complementary accountability mechanisms that can be used in situations where either states or individuals — including senior state leaders and elites — deliberately displace their own populations.³ Further, two of these mechanisms can also be used as a means of enforcing current international law. While these mechanisms can also be used to hold state leaders accountable for wider atrocity crimes, my focus here is specifically on establishing direct accountability mechanisms for deliberate forced displacement.

The first mechanism is through the UN Human Rights Council’s UPR mechanism, under which member states’ human rights practices are reviewed every four and a half years and in which a number of countries have been criticized for their policies toward refugees and their own internally displaced populations.

The second mechanism is through established regional and soft law. While regional refugee law — including the 1969 Organization of African Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) and the 1984 Cartagena Declaration on Refugees (Cartagena Declaration)⁴ — expand the refugee definition, they do not create accountability mechanisms. By contrast, regional and soft law around issues of internal displacement have been much clearer, establishing both a legal definition of arbitrary displacement and viewing such forms of displacement as prohibited behaviour. The African Union’s (AU’s) 2009 Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), in particular, provides a potential model for other regionally based processes.

The third mechanism is through international criminal law, whereby individuals can be charged for violations of the Genocide Convention, for war crimes and for crimes against humanity. Two forms of forced displacement — deportation

2 See the Geneva Convention relative to the Protection of Civilian Persons in Time of War (International Committee of the Red Cross 1949, art. 49).

3 The term “complementary accountability mechanisms” is used deliberately here as an analogy to “complementary protection” for refugees, which, as Jane McAdam notes, “denotes protection granted to individuals on the basis of a legal obligation other than the principal refugee treaty. In contemporary practice, it describes the engagement of States’ legal protection obligations that are *complementary* to those assumed under the 1951 Refugee Convention (as supplemented by its 1967 Protocol), whether derived from treaty or customary international law” (McAdam 2007, 2-3; italics in original).

4 See, respectively, OAU (1969) and Regional Refugee Instruments & Related (1984).

and forcible transfers — can constitute both war crimes and crimes against humanity, including within the ICC’s Rome Statute and within the statutes and case law of a number of international tribunals and special and joint courts.

Finally, the fourth mechanism is through the UN Security Council, which has progressively defined refugee and IDP movements as potential threats to regional and international peace and security. Critical to the Security Council response is the R2P doctrine, adopted by the UN member states in the 2005 World Summit Outcome Document. It establishes that states have a responsibility to protect their own populations from four mass atrocity crimes — genocide, ethnic cleansing, war crimes and crimes against humanity — each of which can have displacement elements within it. The international community has a duty to assist states in fulfilling this responsibility. In situations where states are manifestly failing their responsibilities, the UN Security Council can take actions under chapter VII of the Charter of the United Nations (“Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression”).

The UPR Mechanism

Accountability for forced displacement sits uncomfortably within the United Nations’ human rights frameworks. Unlike the core human rights treaties, there are no existing committees to monitor implementation of the Refugee Convention. IDPs are protected only by the soft law Guiding Principles on Internal Displacement, and while there is a UN Special Rapporteur on the Human Rights of Internally Displaced Persons, Cecilia Jimenez-Damary, her mandate focuses primarily on dialogue with governments (UN Human Rights Council 2016).

The UN Human Rights Council has strong mechanisms for investigating potential human rights abuses on a case-by-case basis, including through its ability to adopt country-specific resolutions, to appoint independent fact-finding missions and to create commissions of inquiry. These can serve an important role in documenting abuses. For example, the Independent International Fact-Finding Mission on Myanmar tabled their

report on August 24, 2018, and found strong evidence that the Myanmar military, the Tatmadaw, had been “the main perpetrator of serious human rights violations and crimes under international law” (UN Human Rights Council 2018b, para. 90). These included acts of forced displacement that could constitute both crimes against humanity and war crimes. But the Mission also found that “the crimes in Rakhine State, and the manner in which they were perpetrated, are similar in nature, gravity and scope to those that have allowed genocidal intent to be established in other contexts” (ibid., para. 85). However, on the question of accountability for these crimes, the report could only conclude that the UN Security Council “should ensure accountability...by referring the situation to the International Criminal Court or, alternatively, by creating an ad hoc international criminal tribunal. Furthermore, the Security Council should adopt targeted individual sanctions, including travel bans and asset freezes, against those who appear most responsible for serious crimes under international law” (ibid., para. 105).

The Human Rights Council can also use special sessions to focus on specific protection issues. However, while these had been envisioned as addressing both thematic issues and country-specific situations, the “vast overwhelming majority” have focused on country-specific situations and have been subject to politicization (Freedman and Houghton 2017).

One avenue by which to raise accountability for forced displacement is through the UPR. The UPR has the goal of ensuring that all UN member states be subject to review on a cyclical basis every four and a half years. The basis for the UPR includes the Charter of the United Nations, the Universal Declaration of Human Rights and human rights instruments to which the reviewed state is a party. While the 1951 Refugee Convention is not included as a human rights treaty, it is included within the process as another “main relevant international instrument,” and, as noted above, a number of core human rights instruments include language-reaffirming freedom of movement and the right to seek asylum.

This mechanism is notable in three ways. First, it produces a wealth of information. Both the state under review and the Office of the High Commissioner for Human Rights produce reports as part of the process. It also allows for submissions from both non-governmental organizations

(NGOs) and national human rights institutions. Other states have the opportunity to participate in the review and to make recommendations to the state under review. Second, the state under review has an opportunity to indicate which recommendations it supports, and the state's implementation of these recommendations is tracked in the next review cycle (UN Human Rights Council 2007). Third, and perhaps most importantly, the UPR presumes universal coverage of all states. While only Human Rights Council members are required to be reviewed, so far all UN member states have participated in the process.

States have used this recommendation process in three ways. The first has been to specifically call out incidents of forced displacement. As part of Angola's first review cycle, Australia recommended that it "immediately cease, in accordance with the Guiding Principles on Internal Displacement 1998, all forms of forced displacement," a recommendation the Angolan government accepted but failed to implement; in its second review cycle, Australia repeated the recommendation: "Immediately cease all forms of forced displacement, in accordance with the applicable international humanitarian and human rights law and the Guiding Principles on Internal Displacement (1998)."⁵ Colombia similarly accepted recommendations from Austria, Canada, Italy, Ireland and Portugal that it prosecute forced displacements and take action to stop their occurrences.⁶

Second, states have also encouraged the adoption of relevant laws and standards, including the Guiding Principles on Internal Displacement. For example, in Myanmar's first review cycle in 2011, New Zealand recommended that the government "implement and enforce the right not to be arbitrarily displaced and the Guiding Principles on Internal Displacement."⁷ However, the UPR database only includes eight such recommendations, which suggests that such recommendations are not yet widely used. Recommendations have also been made around durable solutions, such as encouraging the return of refugees. Finally, states have frequently encouraged the return of refugees. For example,

Switzerland recommended that Bhutan "take the necessary measures to allow the Bhutanese refugees who wish to return to Bhutan to do so safely and in conditions that respect their rights."⁸

The third is that states have increasingly used information provided by non-state actors within the specific recommendation process.⁹ The concerns over the need to prosecute forced displacement in Colombia, for example, came directly out of a joint submission by a number of Colombian human rights and democracy organizations, which was included within the stakeholders summary created by the Office of the High Commissioner for Human Rights (2013, para. 85).

The UPR process is certainly not perfect. First, it offers only a longer-term accountability mechanism, since states are only examined once every four and a half years. Second, while all states are participating in the process, this does not mean they accept recommendations. In the first review cycle, North Korea did not accept a single recommendation, and Israel accepted only three (Kälin 2014, 31). Finally, while a number of states — including Australia, Austria, Canada, Ireland, Italy, New Zealand, Portugal and Switzerland — have made recommendations around forced displacement issues, this practice remains ad hoc and inconsistently applied.

The UPR process, therefore, is important both in the ways that it can bring forward information related to refugees and IDPs on a state-by-state basis, and for providing a venue for state-based recommendations and commitments to improve human rights practices within states. But it alone cannot provide for adequate accountability.

5 See UPR Database of Recommendations, www.upr-info.org/database/.

6 Ibid.

7 Ibid.

8 Ibid.

9 NGO reports are also filtering into other human rights processes. The US Department of State Annual Country Reports on Human Rights Practices, for example, now routinely include sections on the situation of refugees and IDPs within the state, drawing on reports from a range of human rights NGOs (see www.state.gov/j/drl/rls/hrrpt/2016/index.htm).

Regional and Soft Law Protections for IDPs

As noted above, the 1951 Refugee Convention does not provide accountability mechanisms for states that produce refugees. Regional measures for refugees similarly lack these accountability mechanisms. The 1969 OAU Convention expanded the refugee definition to include every person who was compelled to seek refuge outside their country of origin for reasons including “external aggression, occupation, foreign domination or events seriously disturbing public order” (art. I(2)) but stated that the granting of asylum “shall not be regarded as an unfriendly act by any Member State” (art. 2(2)). The 1984 Cartagena Declaration similarly expanded the refugee definition by including “generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order” (Regional Refugee Instruments & Related 1984, para. 3), but also confirmed the “non-political and exclusively humanitarian nature of grant of asylum” and noted that this should not “be interpreted as an unfriendly act towards the country of origin of refugees” (ibid., para. 4).

By contrast, the soft law United Nations Guiding Principles on Internal Displacement offers an alternative model that clearly indicates which forms of displacement should be prohibited. Principle 6 establishes that “every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.”

The Principles include five non-exhaustive situations in which displacement would be arbitrary:

- (a) When it is based on policies of apartheid, “ethnic cleansing” or similar practices aimed at or resulting in alteration of the ethnic, religious or racial composition of the affected population;
- (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
- (c) In cases of large-scale development projects that are not justified by compelling and overriding public interests;

(d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and

(e) When it is used as a collective punishment.

(Office for the Coordination of Humanitarian Affairs 1999, Principle 6)

The Kampala Convention has been ratified by 27 and signed by 40 of the 54 member states of the AU.¹⁰ The Kampala Convention adopts wholesale the arbitrary displacement definition of the Guiding Principles, but also requires that “State Parties shall declare as offences punishable by law acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity.”¹¹ The Convention also establishes that state parties have an obligation to protect the rights of IDPs by refraining from and preventing “genocide, crimes against humanity, war crimes and other violations of international humanitarian law against internally displaced persons.”¹² The Convention also reaffirms the powers of the AU to intervene in situations of war crimes, genocide and crimes against humanity, as established in the AU’s Constitutive Act, article 4(h).¹³ And the Convention introduces a remedies clause, establishing that “State Parties shall provide persons affected by displacement with effective remedies” including compensation and reparations frameworks at the domestic level “in accordance with international standards.”¹⁴

The Convention introduces several mechanisms to monitor implementation and compliance. The first is a Conference of State Parties, which is tasked to enhance cooperation. The Conference only met for the first time in April 2017 but has now committed to developing a five-year plan of action to strengthen regional and national measures to prevent internal displacement and improve durable

10 African Union, List of Countries which have signed/ ratified/acceded to the African Union’s Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 15 June 2017, https://au.int/sites/default/files/treaties/7796-sl-african_union_convention_for_the_protection_and_assistance_of_internally.pdf.

11 AU 2009, art. 4(6).

12 Ibid., art. 9 1(b).

13 Ibid., art. 8 (1).

14 Ibid., art. 12 (1) and (2). It also includes a further clause that “State Party shall be liable to make reparation...when such a State Party refrains from protecting and assisting internally displaced persons in the event of natural disasters.” Ibid., art. 12 (3).

solutions (AU 2017). The Convention also includes a requirement that state parties indicate any legislative and other measures when presenting their reports under the article 62 process of the African Charter on Human and Peoples' Rights (OAU 1981). However, this process has historically been poorly upheld, with a number of states having either never submitted a report or being decades behind on their reporting responsibilities. Since the Convention has come into force, only 11 of the 23 submitted reports mention IDPs; nine, however, do point to some forms of concrete legislative and policy changes toward IDPs. Finally, in the event of a dispute or difference arising from the interpretation or application of the Convention, states are encouraged to settle the matter amicably. Otherwise, it is possible for a state party to refer another state party to either the Conference or the African Court of Justice and Human Rights.¹⁵ However, neither process has yet been used (Orchard 2016, 311–14).

While these mechanisms are not yet in wide use, the Kampala Convention's use of regional hard law represents one approach to create better accountability mechanisms for state responsibility in situations of forced displacement. This model could be used in two ways. The first is that other regions could seek to strengthen their own regional hard law measures to ensure accountability. The Organization of American States (OAS) is the most likely regional organization to follow such a model. While the OAS has not drafted a specific instrument, article 22 of the American Convention on Human Rights establishes rights around freedom of movement and residence, including the right to seek and be granted asylum (OAS 1969). As the Inter-American Commission on Human Rights has noted, "the organs of the inter-American human rights system have found in their case law that this right creates an obligation upon the States to abstain from actions that will lead to the displacement of persons or aid third parties in perpetuating events that trigger internal displacement" (Inter-American Commission on Human Rights 2013, para. 537).

While hard law frameworks may not work in all regions, informal approaches can also provide at least a measure of accountability. Within the Association of Southeast Asian Nations (ASEAN), there is a lack of formal mechanisms

to address forced displacement. However, the 2012 ASEAN Human Rights Declaration, while limited, recognizes rights of "freedom of movement and residence within the borders of each State," and "the right to seek and receive asylum in another State in accordance with the laws of such State and applicable international agreements."¹⁶ And while bodies such as the ASEAN Intergovernmental Commission on Human Rights (AICHR) have only limited capabilities, organizations like the ASEAN Parliamentarians for Human Rights, composed of current and former parliamentarians, have used forced displacement situations to argue for mandate expansion.¹⁷

The Kampala Convention represents a clear path for accountability frameworks to be created at the regional level. While the Convention itself is only being limited slowly, it provides an important model that can be used to generate similar frameworks elsewhere. Given its existing human rights architecture, the OAS is most likely the next region that could adopt similar mechanisms. At the same time, linking accountability to forced migration can also work through more informal processes, such as the role of the AICHR.

International Criminal Law

The development of international criminal law also provides for both accountability and enforcement mechanisms against individuals who engage in some forms of forced displacement. As noted above, both international human rights law and international humanitarian law have introduced prohibitions against some forms of displacement.

When the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in May 1993, its Statute provided that the ICTY

¹⁵ AU (2009, art. 22 (1-2)).

¹⁶ ASEAN (2012, art. 10-11, 14-15).

¹⁷ In a 2015 report examining the ongoing persecution of the Rohingya in Myanmar, the organization argued that the crisis demonstrated the need to expand "the mandate of the ASEAN Intergovernmental Commission on Human Rights (AICHR) to include country visits, inquiries, complaints, and emergency protection mechanisms, and ensure adequate independence and staffing support for its members" (ASEAN Parliamentarians for Human Rights 2015, 4).

could prosecute individuals for grave breaches of the Geneva Conventions, including “unlawful deportation or transfer or unlawful confinement of a civilian” (UN 2009, art. 2(g)). It also provided for the prosecution of crimes against humanity, “when committed in armed conflict, whether international or internal in character, and directed against any civilian population:...(d) deportation... (h) persecutions on political, racial and religious grounds (i) other inhumane acts” (ibid., art. 5), where other inhumane acts were viewed to include forcible transfers.¹⁸ In order for these acts to be considered as crimes against humanity, they must be directed at a civilian population, be organized, systemic and of a certain scale and gravity.¹⁹

The Rome Statute of the ICC includes “deportation or forcible transfer of population” as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack” (UNGA 1998, art. 7(1)(d)).²⁰ It defines deportation or forcible transfer as “forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.”²¹

However, the record of criminal prosecutions is less well developed. While the ICTY had a number of successful convictions for these crimes, the majority of cases were linked directly to genocide, especially as a result of the events at Srebrenica, or to a range of crimes committed during the Kosovo War. The record at the ICC is similarly limited. No defendant has yet been charged with forcible transfers or deportations as a war crime. Further, only in three situations — the Democratic Republic of the Congo, Kenya and Sudan — have defendants been charged with deportation or forcible transfers as a crime against humanity. In two of these situations, either

none of the individuals have been brought before the court or the case has been withdrawn, while one trial (that of Bosco Ntaganda) is under way.²²

At the same time, a major shift is occurring in how the ICC understands deportation. On April 9, 2018, the Office of the Prosecutor requested a ruling on jurisdiction from the Court with respect to the deportation of the Rohingya from Myanmar to Bangladesh. The Rome Statute treats coercive acts as occurring within the territory of a particular state, and Myanmar is not a party to the Rome Statute. In this case, however, the prosecutor’s office argued that the Court may exercise jurisdiction “because an essential legal element of the crime — crossing an international border — occurred on the territory of a State which is a party to the Rome Statute (Bangladesh)” (ICC 2018, para. 2).

In September, the ICC’s Pre-Trial Chamber ruled in favour of the prosecutor’s request, agreeing that because the crime of deportation requires transport to another state and that deportation had an “inherently transboundary nature,” the prosecutor did have jurisdiction to investigate the situation. The nature of the decision means that a range of other situations of forced deportations could now be within the Court’s jurisdiction, providing one of the receiving states was a party to the Rome Statute, and so it may have indirectly created another referral mechanism for those states (Colvin and Orchard 2018). This question has already been raised around Syria, where Jordan has accepted hundreds of thousands of refugees and is a Rome Statute party (Vigneswaran and Zarifi 2018).

Thus, the ICC has an established capacity to ensure that individual perpetrators of some forms of forced displacement — deportations and forcible transfers, which constitute war crimes and crimes against humanity — are held accountable for their actions. However, there remains a gap between this capacity and the number of cases that have been pursued.

18 *Kupreskic et al*, IT-95-16, Judgment (14 January 2000) at para 566 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf.

19 *Nikolic*, T-94-2-R61, Review of Indictment (20 October 1995) at para 26 (International Criminal Tribunal for the former Yugoslavia, Trial Chamber), online: www.icty.org/x/cases/dragan_nikolic/tord/en/951020.pdf.

20 UNGA (1998, art. 7(1)(d)).

21 Ibid., art. 7(2)(d). It is important to note that individual perpetrators could also be held accountable for international crimes of deportation or forcible transfers under the principle of universal jurisdiction (Meron 2018, 437-38). The Canadian Crimes Against Humanity and War Crimes Act (SC 2000, c 24, s 6.1.3), for example, allows for the prosecution of individuals who have committed crimes against humanity or war crimes outside of Canada, where crimes against humanity specifically includes deportation.

22 With respect to the situation in Kenya, in two prosecutions — including *Ruto, Kosgey and Sang* (ICC-01/09-01/11-373) and *Muthaura, Kenyatta, and Ali* (ICC-01/09-02/11-382) — all defendants were charged with deportation or forcible transfer of population constituting a crime against humanity, but all charges have been withdrawn. In the situation of Sudan, three prosecutions — including *Al Bashir* (ICC-02/05-01/09-1) and *Harun and Abd-Al-Rahman* (ICC-02/05-01/07) and *Hussein* (ICC-02/05-01/12) — have led to charges of forcible transfer constituting a crime against humanity; none of the defendants are under arrest. See Colvin and Orchard (n.d.).

The R2P Doctrine

The R2P doctrine establishes that each state, as well as the international community as a whole, has the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. In situations when national authorities are manifestly failing to uphold this responsibility, the UN Security Council can take actions to protect those populations in accordance with the UN Charter, including through chapter VII (UNGA 2005; 2009, 17). There is a clear linkage between these mass atrocity crimes and forced displacement; not only does “displacement almost always [occur] as a result of the four crimes included in the R2P concept,” but displacement can serve as an early warning sign that mass atrocities are occurring (Ferris 2016, 394). The Secretary-General’s 2009 report on the R2P (UNGA 2009, 17) directly drew linkages between forced displacement and the R2P. It noted that asylum could provide one route for protection from mass atrocity crimes and also that the protection of refugees and IDPs was a direct goal of the R2P (ibid., 29).²³

In that report, the Secretary-General reformulated the R2P doctrine in line with three distinct pillars. The first pillar reflects “the enduring responsibility of the State to protect its populations, whether nationals or not, from genocide, war crimes, ethnic cleansing and crimes against humanity, and from their incitement.” The second pillar reflects the “commitment of the international community to assist States in meeting those obligations.” Finally, the third pillar articulates the “the responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection” (ibid., 8-9).

We have begun to see the R2P doctrine invoked to respond to forced displacement situations. While chapter VII of the UN Charter will be invoked rarely at best, the use of the second pillar represents another way in which the international community can take direct action to respond to forced displacement. Two cases highlight how this can function. The international response to the post-election violence and resulting humanitarian crisis in Kenya in December 2007, which saw 300,000 people displaced and up to 1,500 people killed, is

today widely seen as an excellent example of the second pillar at work (Welsh 2013, 389). In that case, a troika of eminent persons led by former UN Secretary-General Kofi Annan were able to convince the two political sides to agree to a power-sharing arrangement that ended the violence. Annan later noted he saw “the crisis in the R2P prism with a Kenyan government unable to contain the situation or protect its people. I know that if the international community did not intervene, things would go hopelessly wrong...Kenya is a successful example of R2P at work” (Bellamy 2011, 54). Therefore, such actions by a range of international actors — including the United Nations, other international organizations and NGOs — and by states can play an important role in preventing or stopping crises from contributing to widespread displacement.

Another successful use of the second pillar was in Côte d’Ivoire in March 2011. After President Laurent Gbagbo was unwilling to accept his electoral defeat and violence led to the creation of more than one million IDPs, the UN Security Council recognized the victor, Alanssane Ouattara, as forming the legitimate government. The UN Security Council (2011, 3) then reaffirmed Côte d’Ivoire’s responsibility to protect its own population and authorized the UN Operation in Côte d’Ivoire, an 8,000-person mission that had been in the country since 2003, “to use all necessary means” to protect civilians, including by preventing the “use of heavy weapons against the civilian population.” With French support, the mission defeated Gbagbo, who was charged with four counts of crimes against humanity, including rape, murder and persecution, although not with forcible transfers (ICC 2015; Bellamy and Williams 2011). He was tried at the ICC and acquitted in January 2019.

At the same time, efforts to use the third pillar in situations where forced displacement cross into mass atrocity crimes should not be ignored entirely. In the 1990s, multilateral interventions occurred in both Northern Iraq and Kosovo in order to respond to large-scale refugee flows triggered by atrocity crimes, neither of which were approved by the Security Council (Orchard 2010). The 2011 humanitarian intervention in Libya, while not undertaken to respond to forced displacement, represented the first and, so far, only use by the Security Council of chapter VII to respond to atrocity crimes. Concerns over the use of the R2P in that situation are widely seen to have limited the Council’s response to Syria, including

23 On the links between mass atrocities and asylum, see Barbour and Gorlick (2008).

through China and Russia's repeated use of the veto. And yet this is a case where the Independent International Commission of Inquiry has found that "in the majority of cases documented by the Commission, displacement was directly induced by the unlawful behaviour of warring parties. Such conduct included both unlawful attacks, which caused civilians to flee their homes in fear and desperation, and forced displacements pursuant to 'evacuation agreements' negotiated between warring parties and reached as part of local truces" (UN Human Rights Council 2018a, para. 64).

While the Council continues to regularly refer to R2P (Gifkins 2016, 157-60), these concerns have led to two initiatives to limit the use of the veto in situations of atrocity crimes. The Accountability, Coherence, and Transparency (ACT) Group initiative has proposed a Security Council code of conduct whereby signatory states would commit not to vote against resolutions aimed to prevent or respond to genocide, war crimes or crimes against humanity (ACT Group 2015). As of June 2018, the code of conduct has been signed by 115 member states (Permanent Mission of the Principality of Liechtenstein 2018). In 2013, the French government made a separate declaration to call for permanent members of the Security Council to agree to suspend their right to veto. The French proposal would see the UN Secretary-General investigate situations following a request from at least 50 member states. Where the Secretary-General determined that atrocity crimes were occurring, the permanent members would voluntarily regulate their right to exercise their veto (Fabius 2013; France and Mexico 2015). That declaration has received the support of 96 states, including the United Kingdom (Global Centre for the Responsibility to Protect, n.d.).

Consequently, the R2P doctrine can be used by the UN Security Council to respond to some situations of forced displacement that cross into mass atrocity crimes. While interventions under chapter VII will be rare, it also has the capacity to assist states to uphold their responsibilities to avoid such crimes and to stop them when they do commence.

Conclusions and Recommendations

While the international refugee regime lacks mechanisms to hold states accountable for the displacement of their own populations, this paper presents the argument that four complementary accountability mechanisms do exist: the UPR process, soft and regional law processes, international criminal law and, finally, action through the R2P doctrine. These mechanisms share the advantage that they already exist. They also provide linkages between issues of forced displacement and other areas of practice, including human rights, international criminal law, soft law, regional law and the R2P doctrine. These mechanisms would not be usable in all cases of forced displacement — in particular, international criminal law and the R2P doctrine would only apply in the gravest cases where mass atrocities occur. However, even simply by raising the profile of the issue, these mechanisms may have positive and lasting effect on state behaviour.

Therefore, the World Refugee Council can play an important role in advocating for the expanded use of these existing accountability mechanisms to respond to displacement situations.

The World Refugee Council should:

- Encourage governments to use the UPR's recommendation process to highlight the issue of accountability for refugees and IDPs with individual states.
 - States that have previously used the recommendation process in such a way — including Australia, Austria, Canada, Italy, Ireland, New Zealand, Portugal and Switzerland — are to be commended, but should be encouraged to both use the process systematically and to advocate for such recommendations to be normalized within the UPR process.
- Identify and encourage NGO and national human rights institutions' submissions to the UPR process that highlight refugee and IDP situations in specific country contexts.
- Encourage member states of the AU to sign and ratify the Kampala Convention

and encourage them to participate within its accountability mechanisms.

- Encourage other regional organizations such as the OAS to use the Kampala Convention as a model for developing regional-level legal mechanisms to assist and protect refugees and IDPs with the inclusion of clear state accountability mechanisms and linkages to other human rights processes; in contexts where legal conventions are unlikely to be advanced, advocate instead for more informal processes, such as inclusion of forced displacement within existing human rights mechanisms.
- Support ICC efforts to charge individuals with deportation and forcible transfers as crimes against humanity and war crimes, including by advocating for increased resources for the ICC.
- Encourage signatory member states to engage in referral of cases involving deportations to the Court in line with its jurisdiction interpretation.
- Advocate for the ICC's Office of the Prosecutor, states and the UN Security Council to pursue charges of deportation and forcible transfers through the Court's referral mechanisms.
- Advocate for ongoing efforts within the United Nations, including through the UN Office on Genocide Prevention and the Responsibility to Protect doctrine, to view displacement situations that cross the threshold of atrocity crimes to be viewed through the prism of the R2P doctrine, including its three pillars.
- Encourage UN actors, other international organizations and states to assist those countries that have displacement situations to ensure they uphold their responsibilities under the R2P doctrine.
- Support existing state efforts, including the ACT Code of Conduct and the 2015 French and Mexico Political Declaration, to limit the use of the veto in the Security Council in displacement situations that fall under the R2P doctrine.
- Suggest the creation of a resolution to guide UN Security Council responses under chapter VII of the Charter in situations with widespread displacement.

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About CIGI

We are the Centre for International Governance Innovation: an independent, non-partisan think tank with an objective and uniquely global perspective. Our research, opinions and public voice make a difference in today's world by bringing clarity and innovative thinking to global policy making. By working across disciplines and in partnership with the best peers and experts, we are the benchmark for influential research and trusted analysis.

Our research programs focus on governance of the global economy, global security and politics, and international law in collaboration with a range of strategic partners and have received support from the Government of Canada, the Government of Ontario, as well as founder Jim Balsillie.

À propos du CIGI

Au Centre pour l'innovation dans la gouvernance internationale (CIGI), nous formons un groupe de réflexion indépendant et non partisan doté d'un point de vue objectif et unique de portée mondiale. Nos recherches, nos avis et nos interventions publiques ont des effets réels sur le monde d'aujourd'hui car ils apportent de la clarté et une réflexion novatrice pour l'élaboration des politiques à l'échelle internationale. En raison des travaux accomplis en collaboration et en partenariat avec des pairs et des spécialistes interdisciplinaires des plus compétents, nous sommes devenus une référence grâce à l'influence de nos recherches et à la fiabilité de nos analyses.

Nos programmes de recherche ont trait à la gouvernance dans les domaines suivants : l'économie mondiale, la sécurité et les politiques internationales, et le droit international. Nous comptons sur la collaboration de nombreux partenaires stratégiques et avons reçu le soutien des gouvernements du Canada et de l'Ontario ainsi que du fondateur du CIGI, Jim Balsillie.

About the World Refugee Council

There are more than 21 million refugees worldwide. Over half are under the age of 18. As a growing number of these individuals are forced to flee their homelands in search of safety, they are faced with severe limitations on the availability and quality of asylum, leading them to spend longer in exile today than ever before.

The current refugee system is not equipped to respond to the refugee crisis in a predictable or comprehensive manner. When a crisis erupts, home countries, countries of first asylum, transit countries and destination countries unexpectedly find themselves coping with large numbers of refugees flowing within or over their borders. Support from the international community is typically ad hoc, sporadic and woefully inadequate.

Bold Thinking for a New Refugee System

The United Nations High Commissioner for Refugees (UNHCR) led a consensus-driven effort to produce a new Global Compact on Refugees in 2018. The World Refugee Council (WRC), established in May 2017 by the Centre for International Governance Innovation, is intended to complement its efforts.

The WRC seeks to offer bold strategic thinking about how the international community can comprehensively respond to refugees based on the principles of international cooperation and responsibility sharing. The Council is comprised of thought leaders, practitioners and innovators drawn from regions around the world and is supported by a research advisory network.

The WRC explores advances in technology, innovative financing opportunities and prospects for strengthening existing international law to craft and advance a strategic vision for refugees and the associated countries.

The Council will produce a final report grounded by empirical research and informed by an extensive program of outreach to governments, intergovernmental organizations and civil society.

À propos du Conseil mondial pour les réfugiés

Il y a en ce moment dans le monde plus de 21 millions de réfugiés, et plus de la moitié d'entre eux ont moins de 18 ans. En outre, de plus en plus de personnes sont forcées de quitter leur pays natal et partent à la recherche d'une sécurité, et elles sont alors confrontées aux limites importantes qui existent quant aux possibilités d'accueil et à la qualité de ce dernier. À cause de cette situation, les réfugiés passent maintenant plus de temps que jamais auparavant en exil.

En ce moment, le système de protection des réfugiés ne permet pas de réagir adéquatement à la crise des réfugiés d'une façon planifiée et globale. Quand une crise éclate, les pays de premier asile, les pays de transit et les pays de destination finale se retrouvent sans l'avoir prévu à devoir composer avec un grand nombre de réfugiés qui arrivent sur leur territoire, le traversent ou en partent. Et le soutien fourni dans ce contexte par la communauté internationale est en règle générale ponctuel, irrégulier et nettement inadéquat.

Des idées audacieuses pour un nouveau système de protection des réfugiés

Le Haut-Commissariat pour les réfugiés (HCR) des Nations Unies a dirigé des efforts découlant d'un consensus et visant à instaurer un nouveau « pacte mondial pour les réfugiés » en 2018. Mis sur pied en mai 2017 par le Centre pour l'innovation dans la gouvernance internationale (CIGI), le Conseil mondial pour les réfugiés (CMR) veut compléter ces efforts.

Le CMR vise à proposer une réflexion stratégique audacieuse sur la manière dont la communauté internationale peut réagir de façon globale aux déplacements de réfugiés, et ce, en se fondant sur les principes de la coopération internationale et du partage des responsabilités. Formé de leaders, de praticiens et d'innovateurs éclairés provenant de toutes les régions du globe, le CMR bénéficie du soutien d'un réseau consultatif de recherche.

Le CMR examine les progrès techniques, les occasions de financement novatrices ainsi que les possibilités pour ce qui est de renforcer le droit international et d'y intégrer une vision stratégique pour les réfugiées et les pays concernés.

Par ailleurs, le CMR produira un rapport final fondé sur des recherches empiriques et sur les résultats d'un vaste programme de sensibilisation ciblant les gouvernements, les organisations intergouvernementales et la société civile.

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