

Reference Paper for the 70th Anniversary of the 1951 Refugee Convention

International, Regional, and Domestic Mechanisms to Hold States to Account for the Causes of Forced Displacement

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Abstract:

Preventing forced displacement is a significant challenge for states and the wider international community. A key aspect of this is holding states and individual members of governments to account when they either deliberately displace their own populations or are unable or unwilling to protect those that are already displaced. The Refugee Convention is silent on state accountability for forced displacement. However, this reference paper argues that there are eight complementary accountability mechanisms which already exist at the international, regional, and domestic levels that can be used instead. These eight mechanisms include, at the international level, the International Criminal Court, the UN Human Rights Council's Universal Periodic Review, and the Responsibility to Protect doctrine; at the regional level, specific elements within the African Union's Kampala Convention for the Protection and Assistance of Internally Displaced Persons in Africa as well as the human rights mechanisms of the Organization of American States and the Council of Europe; and, at the domestic level, the role played by universal jurisdiction and Magnitsky sanctions acts.

Biography

Phil Orchard is an Associate Professor of International Relations at the University of Wollongong and the Co-Director of its Centre for Critical Human Rights Research. His research and teaching interests focus on international efforts to provide legal and institutional protections to internally displaced persons, refugees, and war-affected civilians. He is the author of *Protecting the Internally Displaced: Rhetoric and Reality* (Routledge, 2018) and 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. He is also the co-editor, with Alexander Betts, of *Implementation in World Politics: How Norms Change Practice* (Oxford University Press, 2014) and the co-editor, with Charles Hunt, *Constructing the Responsibility to Protect: Contestation and Consolidation* (Routledge, 2020).

1. Introduction: Establishing Accountability for the Causes of Forced Displacement

Preventing forced displacement is a significant challenge for States and the wider international community. The number of people who are forcibly displaced has grown significantly in the past decade, and in 2019 included 26 million refugees and 45.7 million internally displaced persons (IDPs) (UNHCR 2020: 2). There is widespread academic consensus that violence is a critical factor that leads to flight (Cohen and Deng 1998, Moore and Shellman 2007, Schon 2015, Weiner 1996, Zolberg et al. 1989). This can take two pathways. In the first, state weakness – including authoritarianism, economic underdevelopment, unequal access to resources, border disputes, and ethnic and religious conflicts – can play a triggering effect for the outbreak of violent conflict. The onset of conflict can then increase the likelihood of human rights abuses, including genocide and political mass murder (Davenport et al. 2003, Schmeidl 1997, Schmeidl and Jenkins 1998, Melander and Öberg 2006, Moore and Shellman 2006, Rubin and Moore 2007). In particular, Moore and Shellman (2007: 815) argue that the coercive or violent activities of combatants will influence “people’s expectations about their chances of victimization,” and lead them to flee, especially when political institutions are weak. Therefore, weak institutions leaves the State unable to adequately protect its own population, which leads to displacement. The second pathway is when States take more deliberate actions to displace elements of their own populations as a way of cleansing specific political or ethnic groups who are seen to be aligned with rebel elements or who could otherwise challenge government authority (Adhikari 2013, Lichtenheld 2020, Moore and Shellman 2004, Orchard 2010a).

This has led to repeated calls to hold States which produce refugees accountable for their actions through sanctions and through criminal prosecution (Goodwin-Gill and Sazak 2015, Doyle 2018). The independent World Refugee Council has recently recommended that “governments of countries hosting refugees to pursue criminal charges against political leaders who deport or forcibly expel their citizens or habitual residents from their territory...” (World Refugee Council 2019: 62). How to hold States to account for causing forced displacement either directly through their own actions or indirectly through a failure to protect their own populations is therefore a critical international issue.

Accountability itself is a wide concept. It is generally viewed as establishing “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, Buchanan and Keohane 2006: 426). A range of different approaches to establish accountability exist. Grant and Keohane (2005:35-37), for example, list no fewer than seven: hierarchical, supervisory, fiscal, legal, market, peer, and public reputational, with legal accountability referring “to the requirement that agents abide by formal rules and be prepared to justify their actions in those terms, in courts or in quasi-judicial arenas” (Grant and Keohane 2005: 36).

At the international level, accountability is generally seen to take place through a legal model, exercised both through a range of international courts (which can establish either state or individual accountability) as well as through quasi-judicial agencies (Koenig-Archibugi 2010: 1149). Other forms of accountability can also play a role at the international level. Peer accountability is based on the “mutual evaluation of organizations by their counterparts,” which is equally applicable to states. Public reputational accountability refers “to situations in which reputation, widely and publicly known, provides a mechanism for accountability even in the absence of other mechanisms as well as in conjunction with them” as States will adapt their behaviour to maintain positive reputations (Grant and Keohane 2005: 37). Koenig-Archibugi also notes that even less formal relationships of social accountability can also occur, driven by soft law and other, less formal, mechanisms (Koenig-Archibugi 2010: 1150). These mechanisms allow State behaviour to be monitored, and when breaches of either hard or soft law occur they can be highlighted. Rarely, however, do international accountability mechanisms allow for enforcement actions against States that are in breach (I will discuss the exceptions below). Instead, they tend to rely on more indirect effects through publicizing information and supporting States to improve their conduct or in extreme cases providing a way to name and shame persistent violators.

However, as opposed to other international conventions, direct accountability is difficult to establish in terms of the causes of forced displacement. The 1951 Refugee Convention is not designed to hold States that displace their own populations accountable for these acts. Because of this issue, this reference paper instead examines eight complementary accountability mechanisms that it argues can be used in situations where States or individuals engage in actions that lead to forced displacement of their own populations. These mechanisms vary on three dimensions: 1) whether they apply at the international, regional, or domestic levels; 2) whether they are based in formal treaties and laws, or in principles and soft law; and 3) whether they provide individual or state accountability (see Table 1 below).

Table 1: Accountability Mechanisms

Legal Status Level	Formal Treaty or Law	Principle Norm/ Soft Law
International	1. International Criminal Court (1998) <i>Individual Accountability</i>	2. Universal Periodic Review Mechanism (since 2005) <i>State Accountability</i>
		3. Responsibility to Protect Doctrine (since 2005) <i>State Accountability</i>
Regional	4. Kampala Convention (since 2012) <i>State Accountability</i>	5. Inter-American Commission on Human Rights <i>State Accountability</i>
	6. European Convention on Human Rights	

	<i>State Accountability</i>
Domestic	7. Universal Jurisdiction <i>Individual Accountability</i>
	8. Magnitsky Acts (since 2016) <i>Individual Accountability</i>

At the international level, both forced deportations across state borders and forcible transfers within a State can constitute war crimes and crimes against humanity under the International Criminal Court (ICC)'s Rome Statute. Both of these crimes – along with ethnic cleansing – are also violations of the Responsibility to Protect doctrine (Orchard 2016b), which was endorsed by UN member States at the 2005 World Summit. While both of these mechanisms include enforcement processes, a third approach is through the UN Human Rights Council's Universal Periodic Review (UPR) process that creates an alternative mechanism for state accountability through its recommendation process. At the regional level, the African Union (AU)'s Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), and the human rights systems of the Council of Europe (CoE) and the Organization of American States (OAS) provide mechanisms whereby their member States can be held accountable. The human rights approach of the Association of Southeast Asian Nations (ASEAN) is also examined – while it does not yet provide for direct accountability, there has been a push by the ASEAN Parliamentarians for Human Rights to improve the organization's response to forced migration. Finally, at the individual State level, the principle of universal jurisdiction can be used to hold individual perpetrators accountable for a range of crimes, including deportation or forcible transfers. Another domestic practice is the introduction of so-called Magnitsky Acts, under which individuals who commit gross human rights violations can be sanctioned.

This reference paper begins by examining accountability within current refugee law, human rights law, and humanitarian law. It notes the lack of direct accountability within refugee law as well as other human rights instruments, which generally introduce positive rights rather than prohibitions. It then touches on protections provided by the Geneva Conventions as well as the possible application of the Genocide Convention. The next three sections then explore these eight accountability mechanisms in detail across the international, regional and domestic levels. The paper ends with a discussion of whether these mechanisms are enough to ensure accountability for the causes of forced displacement.

2. Accountability for Forced Displacement in Existing International Law

Accountability for forced displacement sits uncomfortably within the UN's human rights frameworks. 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 or who, not having a nationality and being outside the country

of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.¹

However, the Refugee Convention is silent on the question of state or individual accountability for displacement. It creates no treaty monitoring body and creates no “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).² Similarly, UNHCR’s Statute specified “the work of the High Commissioner shall be of an entirely non-political character.”³ 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.”⁴

There are concerns that by introducing accountability mechanisms directly into the refugee regime “every grant of asylum” would be turned “into an implicit accusation against that country” (Kälin 2000: 423). This could undermine State willingness to provide refugees with asylum and UNHCR’s own efforts to operate within States-of-origin to safeguard the rights of returnee refugees and IDPs.

The major prohibition within the Refugee Convention, instead, is embodied within the principle of *non-refoulement*, which establishes that refugees shall not be expelled or returned to “frontiers of territories where [their] life or freedom would be threatened on account of [their] race, religion, nationality, membership of a particular social group or political opinion,” a prohibition seen as a customary rule.⁵

Other international human rights conventions tend to focus on a positive right to seek asylum rather than on prohibiting forms of forced displacement. The 1948 Universal Declaration of Human Rights specifies 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 their own country as well as a right to seek asylum from persecution.⁶ This right was then more “fully articulated in the 1951 Refugee Convention” (OHCHR 2018). The rights contained within the Universal Declaration were then codified in two separate Covenants, with the 1966 International Covenant on Civil and Political Rights (ICCPR) establishing that “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” and that “everyone shall be free to leave any country, including his own.”⁷ However, the ICCPR does note these rights can be limited to

¹ Art. 1A(2), 1951 Refugee Convention

² The Convention, in Art. 38, does allow any disputes between parties to the Convention relating to its interpretation or application to be referred to the International Court of Justice, however this dispute mechanism has never been used (Kalin 2003: 653, Hathaway 2012: 192).

³ UN General Assembly, “Statute of the Office of the United Nations High Commissioner for Refugees,” Res. 428(V), 14 Dec 1950, Chapter I Art. 2.

⁴ Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987, Art. 2(1).

⁵ Art. 33(1), 1951 Refugee Convention. Decision on an Amicus Curiae application and on the “Requête tendant à obtenir présentations des témoins DRC-D02-P-0350, DRC-D02-P-0236, DRC-D02-P-0228 aux autorités néerlandaises aux fins d’asile,” *Katanga and Chui*, (ICC-01/04-01/07-3003), Trial Chamber II, 9 June 2011, para. 64; see also Chetail (2016: 928).

⁶ Arts. 13 (1-2) and 14(1), UDHR. Art. 14(2) however, does note that “This right may not be invoked in the case of prosecution genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”

⁷ Art. 12(1) and (2), ICCPR.

“protect national security, public order (ordre public), public health or morals or the rights and freedoms of others.”⁸

The Genocide Convention explicitly includes as forms of genocide the forcible transfer of children from one group to another, and acts which are “deliberately inflicting on the groups conditions of life calculated to bring about its physical destruction in whole or in part.”⁹ How expansive this clause may be is unclear. As Schabas notes, it “was added to the Convention almost as an afterthought, with little substantive debate or consideration” (Schabas 2009: 201). This has led to suggestions that some forms of forced displacement could be found to constitute genocide under these two clauses and the UN General Assembly has stated “the abhorrent policy of ‘ethnic cleansing,’ ... is a form of genocide.”¹⁰ However, both the ICTY and the ICJ have ruled that deportations (or ethnic cleansing) by themselves are not enough to constitute genocide.¹¹

International humanitarian law does include specific prohibitions against forms of forced displacement, but these prohibitions are relatively narrow and on its own, international humanitarian law lacks clear enforcement mechanisms.¹² As is discussed further below, the 1949 Geneva Convention (IV) establishes an explicit prohibition against forced deportations outside of occupied territory as well as forced transfers within that territory in situations of international armed conflict,¹³ and this was extended to non-international armed conflicts in the Additional Protocol II (1977). However, in both cases this prohibition does not apply if the security of the population or imperative military reasons demand their movement.

Internally displaced persons do not have their own Convention, but are instead described within the 1998 United Nations Guiding Principles on Internal Displacement as persons who have been forced to leave their homes “in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”¹⁴ As opposed to the Refugee Convention, the Guiding Principles do introduce a measure of accountability by establishing that every human being shall have a right be protected against arbitrary displacement. However, while the Principles have been widely recognized as both the minimum international standards for the protection of internally displaced persons, and as an important international framework (Kälin 2005: 29-30, United Nations General Assembly 2005: para 132), they remain soft law and therefore non-binding on States.

⁸ Ibid, Art. 12(3).

⁹ Art. 2(e), GC.

¹⁰ UN General Assembly, “The Situation in Bosnia and Herzegovina,” A/RES/47/121, 7 Apr 1993, 2. With respect to academic arguments that forced displacement may constitute genocide, see (Boot 2002: 451, Dawson and Farber 2012: 57)

¹¹ In the *Stakić* Judgement at the ICTY, the Trial Chamber found that “the expulsion of a group or part of a group does not in itself suffice for genocide” Judgement, *Stakić*, (IT-97-24-T), Trial Chamber, 31 July 2003, para 519. The ICJ similarly found that “Neither the intent, as a matter of policy, to render an area “ethnically homogeneous,” nor the operations that may be carried out to implement such policy, can as such be designated as genocide.” Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment of 26 Feb 2007, para 190; see also Chetail (see also 2016: 934-35).

¹² Antonio Cassese notes that apart from individual prosecutions through international criminal tribunals (and subsequently the ICC), only three enforcement mechanisms exist: reprisals, which are severely limited in scope by the Geneva Conventions and Additional Protocol I, the Protecting Power mechanism which has been rarely used, and much more widely used fact finding mechanisms (Cassese 1998: 2-4).

¹³ GCIV Art. 49.

¹⁴ United Nations, “Guiding Principles on Internal Displacement,” 1998, Principle 2.

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.¹⁵

As discussed further below, this has been brought into regional law, with the 2009 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa establishing that “all persons have a right to be protected against arbitrary displacement” including a range of specifically prohibited behaviours.¹⁶

3. International Mechanisms

3.1 International Criminal Law

International criminal law provides not only for accountability, but for a direct enforcement mechanism against individuals who engage in specific forms of forced displacement by expressly prohibiting deportations and forcible transfers as crimes against humanity and war crimes.

Deportations were recognized as a crime against humanity at the International Military Tribunal at Nuremberg and the International Military Tribunal for Far East at Tokyo. The Nuremberg Subsequent Proceedings, run by the United States, led to a number of convictions for deportations both as a war crime – particularly for slave labour offences - and as a crime against humanity – particularly for the transportation of Jews and other peoples to the concentration and extermination camps. Notably, these cases understood deportation to not only be a crime when individuals were transported across borders, but also when used to transport German nationals to concentration camps (Colvin and Orchard 2021).

The 1949 Geneva Convention (IV) then establishes both deportations from occupied territories as well as forcible transfers within occupied territory as war crimes. Article 49 notes “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,

¹⁵ Ibid, Principle 6.

¹⁶ African Union *Convention for the Protection and Assistance of Internally Displaced Persons in Africa*, Article 4; see also (Abebe 2016). Prohibited categories include a range of behaviours related to discrimination, armed conflict, intentional displacement as method of warfare, generalized violence or violations of human rights, forced evacuations if they are not required for safety and health, collective punishment, or other factors of comparable gravity. Ibid., Art 4 (a-h).

occupied or not, are prohibited, regardless of their motive”¹⁷ However, movements were permitted for either the security of the population or for imperative military reasons.¹⁸ Article 147 then includes “unlawful deportation or transfer” as a grave breach of the Convention, thereby requiring effective penal sanctions for any person who commits or is ordered to commit those offences.¹⁹ Additional Protocol I adds that “the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” similarly constitutes a grave breach.²⁰

However, while the Geneva Conventions clearly established deportations and forcible transfers as war crimes, there were no similar developments with crimes against humanity after Nuremberg. While the International Law Commission proposed a succession of draft codes of crimes against the peace and security of mankind in 1950, 1954, 1991, and 1996, all of which included deportation as a crime against humanity, these did not advance to legal status.

The creation of the International Criminal Tribunal for the Former Yugoslavia (ICTY) in 1993 significantly changed how deportations and forcible transfers were understood as war crimes and as crimes against humanity. Its Statute included “unlawful deportation or transfer or unlawful confinement of a civilian” as war crimes.²¹ 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,” where other inhumane acts were viewed to include forcible transfers.²² 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.²³

The ICTY tried a number of cases around forced displacement crimes and, following the *Kupreskic* trial judgement, generally treated deportations and forcible transfers as distinct crimes. The key distinction between the two crimes was whether victims had crossed a border, however, the ICTY jurisprudence noted that deportation could include crossing a *de jure* international border but also in some cases *de facto* borders between the warring sides. Forcible transfers were then viewed as encompassing any movements that occurred exclusively within a State’s territory.²⁴

The ICTY also clearly established the criminal character of forcible displacements, noting that “any forced displacement is by definition a traumatic experience which involves abandoning one’s home, losing property and being displaced to another location”²⁵ and that “the prohibition against forcible displacements aims at safeguarding the right and aspiration of individuals to

¹⁷ This was extended in Additional Protocol II (1977)’s Art. 17 with respect to non-international armed conflicts, which provides that “civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”

¹⁸ GCIV Art. 49(2).

¹⁹ GCIV Art. 146-7.

²⁰ API Art. 85(4)(a).

²¹ ICTYS Art. 2(g).

²² ICTYS Art. 5; Judgement, *Kupreskic et al.*, (IT-95-16), 14 January 2000, para. 566.

²³ *Nikolic*, T-94-2-R61, Review of Indictment (20 October 1995), para 26.

²⁴ The Appeal Judgement, *Stakić*, [(IT-97-24-A), 22 March 2006, para 302] established the need to cross a *de jure* or *de facto* border, while the *Dorđević* trial judgment of 2011 [(IT-05-87/1-T) 23 Feb 2011, paras. 1604 and 1613], established a clear and distinct list of elements for each crime.

²⁵ Judgement, *Krstić*, (IT-98-33-T), Trial Chamber, 2 August 2001, para. 523.

live in their communities and homes without outside interference. The forced character of displacement and the forced uprooting of the inhabitants of a territory entail the criminal responsibility of the perpetrator, not the destination to which these inhabitants are sent.”²⁶

Finally, while the ICTY did successfully convict a number of perpetrators for forcible transfers or deportations, in none of the cases were these the only crimes charged. Instead, the majority of cases were linked directly to genocide, especially as a result of the events at Srebrenica.²⁷ Other cases were linked either to detention practices,²⁸ or to a range of crimes committed during the Kosovo War including persecution and murder.²⁹

The Tribunals that followed the ICTY generally followed its practice, including deportation as a specific crime against humanity. However, the record of prosecution of these crimes has been more mixed. The International Criminal Tribunal for Rwanda was established in 1994 to prosecute individuals responsible for the genocide but did not charge any individuals with forcible transfers or deportations.³⁰ The Special Court for Sierra Leone, which was created in 2002 to address atrocities committed during the civil war of 1991-2002, could have indicted former Liberian President Charles Taylor for these crimes. However, Megan Bradley notes that: “It is therefore striking that although the Special Court for Sierra Leone has the mandate to prosecute displacement as a crime against humanity, Taylor’s indictment did not include this charge, and the Special Court’s summary judgment only briefly mentions the country’s massive displacement crisis, noting the role of the Liberian government and rebel forces in forcibly recruiting and repatriating Sierra Leonean refugees sheltered in Liberia” (Bradley 2012).

In only two other tribunals were cases of deportation or forcible transfer pursued. The Extraordinary Chambers in the Courts of Cambodia (which were created subsequently to the ICTY in 1997 but reflected international law as understood in the period 1975-1979) found Nuon Chea and Khieu Samphan guilty of forcible transfers as a crime against humanity under the “other inhumane acts” clause for the mass movement of about two million people out of Phnom Penh into the countryside in 1975 (Phase One) and the movement of approximately three to four thousand people within the country from 1975 to 1978 (Phase Two).³¹ They were

²⁶ Appeal Judgement, *Krnjelac* (IT-97-25-A), 17 Sept 2003, para. 218.

²⁷ These cases included Radovan Karadžić who was charged on eleven counts including deportation and forcible transfer as an inhumane act as well genocide and found guilty on ten of the charges (Judgement, *Karadžić*, (IT-95-5/18-T) 24 Mar 2016) and Ratko Mladić, (Judgement, *Mladić*, (IT-09-92-T) 22 Nov 2017) who was charged on eleven counts including deportation and forcible transfer as an inhumane act as well genocide and similarly found guilty on ten of the charges.

²⁸ These cases included Milorad Krnojelac, who was charged with deportation among other offences, and was convicted of persecution, cruel treatment, and inhumane acts. Judgement, *Krnjelac* (IT-97-25-T) Trial Chamber, 15 March 2002, para 486-498. It also included *Prlić et al* (IT-04-74), where the defendants were convicted of other crimes including with wilful killing, cruel treatment, and persecution.

²⁹ Included within these cases are Vlastimir Đorđević who was charged with deportation, forcible transfer, persecution, and murder as (both a crime against humanity and war crime), Đorđević, (IT-05-87/1-T), and Šainović et al. (IT-05-87), who were charged with deportation, forcible transfer, persecutions, and murder (as both a crime against humanity and war crime). Šainović, Pavković and Lukić were found guilty of deportation, forcible transfer, murder and persecution, and murder as a violation of the laws of war, while Lazarević was found guilty of aiding and abetting deportations and forcible transfers. Judgement, *Šainović et al*, (IT-05-87-A), Appeals Chamber, 23 January 2014.

³⁰ Art. 2(d) SCSLS; Art. 3(d) ICTRS. While the ICTY did not pursue any charges of forced transfers or deportations, the Court did not seek to prosecute any members of the Rwandan Patriotic Front (RPF) (Waldorf 2009). There have been allegations that the RPF, as it defeated the Hutu government and stopped the genocide, did engage in widespread forcible transfers (Human Rights Watch 2004).

³¹ Judgement, (Case 002/01), Trial Chamber, 7 August 2014, para. 11.

then subsequently also found guilty for deportation and other inhumane acts of forcible transfers as well as genocide against ethnic Vietnamese and the Cham population.³²

The United Nations Transitional Administration in East Timor's Special Panels for Serious Crimes also pursued charges of "deportation or forcible transfer of population" as a crime against humanity and "unlawful deportation or transfer or unlawful confinement" as a war crime with respect to the violence and massive forced displacement which followed the 1999 referendum.³³ However, while the SPSC indicted 106 individuals for deportation or forcible transfer as a crime against humanity (Bassiouni 2011: 253), the failure of Indonesia to cooperate with the process meant that few alleged perpetrators appeared before the Panels. Only eight individuals were convicted by the Panels of deportation or forcible transfers including three who pled guilty.³⁴

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."³⁵ 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."³⁶

However, the record of criminal prosecutions is less well developed. Only in four situations – the Democratic Republic of Congo (the DRC), Kenya, Sudan, and the Central African Republic (the CAR) – 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.³⁷ Only Bosco Ntaganda (in relation to the DRC) has been convicted pending appeal, and Patrice-Edouard Ngaïssona and Alfred Yekatom (in relation to the CAR) are in the pre-trial stages at the time of writing.³⁸ The limited record of charging in the early years of the court has led some commenters in the past to suggest that "there has been very little accountability for forced displacement at the ICC..." (Moffett 2015: 131).

³² Judgement, (Case 002-19-09-2007/ECCC/TC) Trial Chamber, 27 Mar 2019, paras. 16, 4174, and 4306.

³³ United Nations General Assembly, "Report of the International Commission of Inquiry on East Timor," A/54/726, 31 Jan 2000; United Nations Transitional Administration in East Timor, "Regulation No. 2000/15," UNTAET/REG/2000/15, 6 June 2000, Section 5 5.1 (d); Section 6 6.1.(a)(vii).

³⁴ See *The Prosecutor v. Joao Sarmento* (18A/2001); *The Prosecutor v. Benjamin Sarmento and Romeiro Tilman* (18/2001). The Panels did not clearly differentiate between the two crimes and in one case – *The Prosecutor v. Anastacio Martins and Domingos Goncalves (11/2001)* Goncalves was found guilty of forcible transfers to West Timor.

³⁵ ICCS, Art. 7(1)(d).

³⁶ *Ibid.*, Art. 7(2)(d).

³⁷ 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 because of witness recantations and withdrawal. In the situation of Sudan, four prosecutions – including *Al Bashir* (ICC-02/05-01/09-1), *Harun* (ICC-02/05-01/07), *Abd-Al-Rahman* (ICC-02/05-01/20) and *Hussein* (ICC-02/05-01/12) - have led to charges of forcible transfer constituting a crime against humanity. Abd-Al-Rahman (aka Ali Kushayb) is the only defendant from that situation to be in the Court's custody following his surrender in June 2020.

³⁸ Yekatom and Ngaïssona have been charged with crimes against humanity including deportation or forcible transfer and with war crimes including displacement of civilian population (ICC-01/14-01/18; ICC-01/14-02/18). Their charges were confirmed in December 2019 (Corrected version of 'Decision on the confirmation of charges against Alfred Yekatom and Patrice-Edouard Ngaïssona' (ICC-01/14-01/18), 11 December 2019, corrected 14 May 2020, Pre-Trial Chamber II), and the trial will begin in early 2021.

However, the Court has provided some evidence of how it will understand these crimes (Colvin and Orchard 2021). First, in the *Ruto* confirmation of charges decision, a decision which commits defendants to trial, the Pre-Trial Chamber noted that deportation or forcible transfer of population is an open-conduct crime. This means that any acts a perpetrator has performed may qualify as long as it can be demonstrated that they had the effect to deport or forcibly transfer the victim.³⁹ The Pre-Trial Chamber also suggested that a test to determine whether victims were forcibly transferred or deported could be determined based on “the factor of where they have been finally relocated as a result of these acts (i.e. within the State or outside the State)” but this has not yet been confirmed in a trial judgement.⁴⁰

Second, 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).”⁴¹

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.⁴² 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. This question has already been raised around Syria, where Jordan has accepted hundreds of thousands of refugees and is a Rome Statute party (Colvin and Orchard 2018, Vigneswaran and Zarifi 2018). Following this decision, in July 2019 the Prosecutor requested authorization to investigate the case which was authorised by the Pre-Trial Chamber in November 2019.⁴³

Finally, the *Ntaganda* judgement has seen the first individual convicted specifically of forcible transfers as a crime against humanity in its own right (as opposed to falling within the other inhumane acts category) and ordering the displacement of the civilian population as a war crime.⁴⁴ In the judgement, the Court noted that forcible transfer or displacement needs to be demonstrated by “genuine lack of choice on the part of the individuals transferred” but that this could result from a range of acts other than direct coercion.⁴⁵

³⁹ Decision on the Confirmation of Charges *Ruto, Kosgey, and Sang* (ICC-01/09-01/11-373), Pre-Trial Chamber, 23 Jan 2012, para 244.

⁴⁰ *Ibid*, para 268.

⁴¹ Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute (ICC-RoC46(3)-01/18-1), Pre-Trial Chamber, 9 Apr 2018.

⁴² Decision on the Prosecution’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute, (ICC-RoC46(3)-01/18) Pre-Trial Chamber I, 6 Sep 2018, para. 71.

⁴³ Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People’s Republic of Bangladesh/Republic of the Union of Myanmar, (ICC-01/19-27), Pre-Trial Chamber III, 14 Nov 2019.

⁴⁴ Judgement, *Ntaganda* (ICC-01/04-02/06) Trial Chamber VI, 8 Jul 2019, page 537.

⁴⁵ Judgement, *Ntaganda* (ICC-01/04-02/06) Trial Chamber VI, 8 Jul 2019, para 1056.

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. There remains a gap between this capacity and the number of cases that have been pursued to trial so far by the Court. However, recent changes - including arrests related to both Sudan and the Central African Republic as well as the Rohingya jurisdiction decision - suggests the Court is now focusing more on these crimes.

3.2 The Responsibility to Protect Doctrine

The R2P doctrine establishes that each State, as well as the international community as a whole, has the responsibility to protect populations from four mass atrocity crimes: genocide, war crimes, ethnic cleansing and crimes against humanity. As established above, forced displacement can directly qualify as an atrocity crime given two factors: the deliberate intent of the perpetrators, and the widespread or systematic nature of their acts. As Ferris has argued, 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).

While ethnic cleansing has the clearest linkage to forced displacement, it is the only mass atrocity crime adopted within the World Summit Outcome Declaration that does not have explicit grounding in current international treaty law. Instead, forced deportation or transfers can qualify as either as a war crime or crime against humanity, while forcible transfer of children can qualify as an act of genocide. These links have also been consciously drawn in the UN system. The Secretary-General’s 2009 report on the R2P (United Nations General Assembly 2009: 17) 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 (United Nations General Assembly 2009: 29).⁴⁶

The R2P doctrine functions through a three pillar framework. 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 “responsibility of Member States to respond collectively in a timely and decisive manner when a State is manifestly failing to provide such protection” (United Nations General Assembly 2009: 8-9). Under this pillar and in situations when national authorities are manifestly failing to uphold this responsibility, we have perhaps the strongest accountability mechanism possible at the international level: the UN Security Council can take actions to protect those populations in accordance with the UN Charter, including through Chapter VII (United Nations General Assembly 2005, United Nations General Assembly 2009: 17). Article 42 within Chapter VII establishes that the UN Security Council may take any actions it considers necessary in order to maintain international peace and security.⁴⁷

⁴⁶ On the links between mass atrocities and asylum, see Barbour and Gorlick (2008) and Coen (2015).

⁴⁷ Under Chapter VI, the Council has powers to investigate any dispute, while under Chapter VII, the Council can use sanctions and other measures up to and including “such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.” United Nations, “Charter,” Chapter VI, Art 34 and Chapter VII, Art 41 and 42.

The R2P is routinely invoked by the main bodies of the UN system. The Security Council has referenced it in some 84 resolutions and presidential statements,⁴⁸ while the General Assembly has referenced the R2P 17 times in resolutions⁴⁹ and the Human Rights Council 50 times.⁵⁰ Two roles – special advisers to the Secretary-General on R2P and on genocide prevention – have been created within the UN system (Thakur 2016, Hunt and Orchard 2020: 5-6).

We have also begun to see the R2P doctrine invoked to respond to forced displacement situations. While the UN Security Council’s powers under Chapter VII 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” (quoted in Bellamy 2011: 54).

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 associated violence led to the creation of over one million IDPs, the UN Security Council recognized the victor, Alanssane Ouattara, as forming the legitimate government. The UN Security Council 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” (Bellamy and Williams 2011). With French support, the mission defeated Gbagbo. He was subsequently tried by the ICC for four counts of crimes against humanity, including rape, murder and persecution, although not with forcible transfers, but found not guilty.⁵¹

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 2010b). 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 through China and

⁴⁸ Global Centre for the Responsibility to Protect, “UN Security Council Resolutions and Presidential Statements Referencing the R2P,” May 2020, <https://www.globalr2p.org/resources/un-security-council-resolutions-and-presidential-statements-referencing-r2p/>. See also (Gifkins 2016: 157-160).

⁴⁹ Global Centre for the Responsibility to Protect, “R2P references in United Nations General Assembly Resolutions,” 15 April 2020, <https://www.globalr2p.org/resources/un-general-assembly-resolutions-referencing-r2p-2/>.

⁵⁰ Global Centre for the Responsibility to Protect, “UN Human Rights Council Resolutions Referencing R2P,” 12 Jul 2020, <https://www.globalr2p.org/resources/un-human-rights-council-resolutions-referencing-r2p/>.

⁵¹ Judgement, “The Prosecutor v. Laurent Gbagbo and Charles Blé Goudé,” (ICC-02/11-01/15), Appeals Chamber, 31 March 2021.

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).

By establishing four atrocity crimes and specifying clear and distinct responsibilities for States (under the first pillar), the wider international community (under the second pillar), and for the UN Security Council (under the third pillar), the R2P doctrine creates a clear accountability mechanism. This mechanism directly incorporates forced displacement crimes, including forcible transfers and deportations as both war crimes and crimes against humanity and ethnic cleansing. The pillar approach also provides different mechanisms for the international community to assist States in upholding their own responsibilities to avoid such crimes from occurring. As the Kenyan and Cote d'Ivoire examples show, this can even apply in situations where widespread forced displacement is occurring. Finally, through the UN Security Council's powers under chapter VII of the UN Charter, the third pillar also creates an enforcement mechanism to stop or avert such crimes in individual States, though the use of this mechanism is likely to be rare as the so far single case of Libya demonstrates.

3.3 The Universal Periodic Review Process

The Universal Periodic Review (UPR) process was established alongside the UN's Human Rights Council in 2005 with the goal of improving "the human rights situation in all countries and address human rights violations wherever they occur."⁵² Under the process, all UN member States are subject to review on a cyclical basis every four and a half years, which allows 42 States to be reviewed each year. It uses as its basis a State's performance with respect to its obligations under 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 process 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 UN agencies, 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.⁵³ 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. Because of the nature of the recommendation process, States have the opportunity to use this information base to highlight

⁵² Office of the High Commissioner for Human Rights, 'Universal Periodic Review', www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx.

⁵³ UN Human Rights Council, "Institution-building of the United Nations Human Rights Council" 5/1, 18 Jun 2007.

where the State under review is seen as underperforming its accepted obligations. While the recommendations are only that, Charlesworth and Larking have argued that overall there appears to “have been significant implementation rates within states in the years following their review,” even with recommendations that were rejected by the State under review (Charlesworth and Larking 2014: 14). A 2016 review by the Universal Rights Group found that overall there was high levels of implementation: “Nearly half (48%) of all accepted first cycle UPR recommendations were, according to [State under review]s’ second cycle reports, implemented. A further 20% were, according to the SURs, partially implemented. Only 25% were not implemented” (Gujadhur and Limon 2016: 6). However, the review found that the rate of implementation of recommendations which required domestic level reforms was lower, at around 24 percent (Gujadhur and Limon 2016: 6). Together, these elements create a clear accountability mechanism whereby government commitments with respect to human rights can be tracked and the recommendation process used to encourage improved responses and, in the worst cases, as a mechanisms of public shaming.

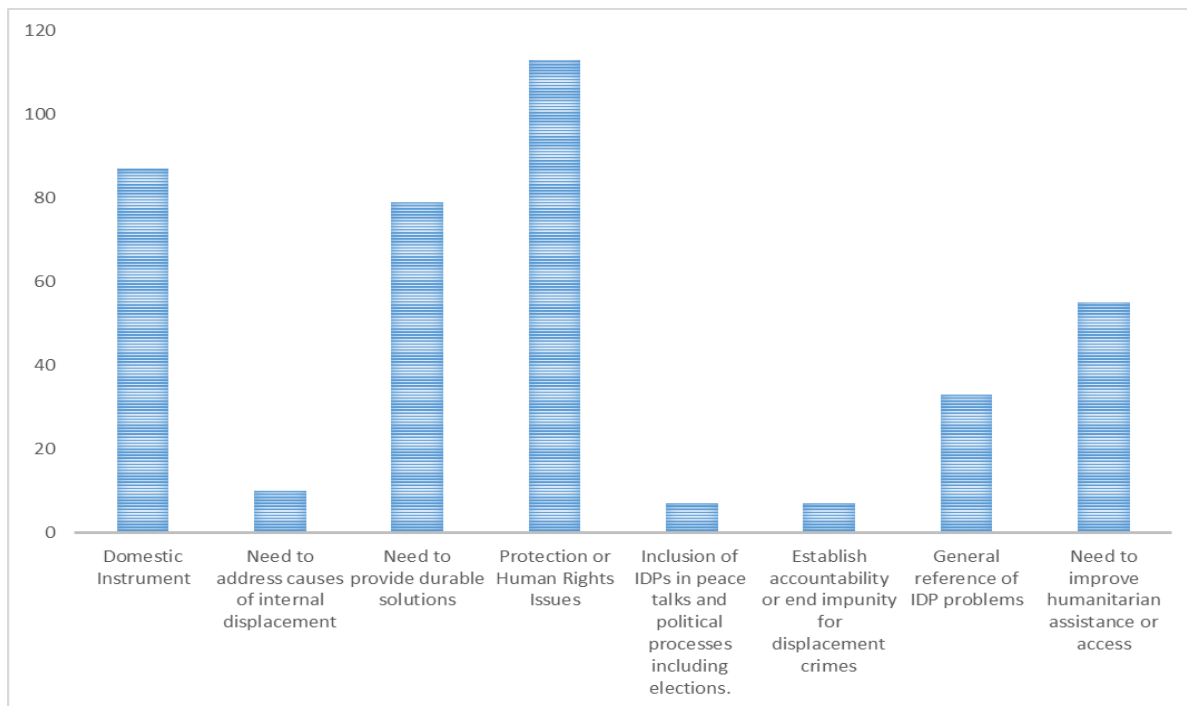
How has this process worked so far concerning issues of forced displacement? A total of 294 recommendations concerning internally displaced persons were made across the three cycles of the UPR until March 2020 (with the third cycle currently underway and due to complete in 2021) covering a total of 52 States (see Figure 1 below). The recommendations cover a range of issues. Many either noted the need to ensure that IDPs’ rights are upheld and are provided with protection (a total of 113 recommendations), such as Canada’s recommendation that the government of Chad needed to “respect the human rights of internally displaced persons and refugees.”⁵⁴

A number of recommendations also highlight more specifically the need for governments to adopt laws or policies with respect to internal displacement (a total of 87 recommendations), with some recommendations noting this should be done in line with the Kampala Convention (16 recommendations) or following the Guiding Principles on Internal Displacement (12 recommendations). An example is Austria’s recommendation to the Central African Republic in the first cycle that it “Implement the Guiding Principles on Internal Displacement, enact a national law on internal displacement with provisions for protecting displaced children, effectively address the basic needs of persons affected by internal displacement, and take every measure to ensure the protection of civilians.” A third category with significant support reflects the need for IDPs to receive durable solutions (a total of 79 recommendations) such as Turkey’s recommendation to the Myanmar in the second cycle that it “ensure the safe and voluntary return of all internally displaced persons to their place of origin”.

Figure 3.3.1: Breakdown of UPR Recommendations on Internal Displacement⁵⁵

⁵⁴ All recommendations are available through the UPR Database of Recommendations at <https://upr-info-database.uwazi.io/en/>

⁵⁵ Recommendations were drawn from the UPR Database of Recommendations available at: <https://upr-info-database.uwazi.io/en/> which were used to produce a dataset of all recommendations including specific mentions either of internally displaced persons or more generically displaced persons as issues. Textual analysis was then undertaken of all recommendations by the author, coding them along the eight distinct categories listed in Figure 1. In some cases, individual recommendations were coded in two separate categories resulting in a total of 391 coded elements.



By contrast, recommendations were significantly less likely to focus on State accountability for internal displacement. Only ten recommendations suggest governments address the root causes or drivers of displacement. These include Mexico’s recommendation to Ethiopia that it “address the root causes of the increase in the number of internally displaced persons, in particular because of ethnic or cultural differences” or New Zealand’s recommendation in Myanmar’s first review cycle that the government “implement and enforce the right not to be arbitrarily displaced and the Guiding Principles on Internal 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).”

Specific references to accountability or ending impunity were even less frequent, with only seven references. These include a specific focus on the need for domestic prosecutions. In one of the few examples of coordinated action, Portugal recommended to Colombia in the first cycle that it “prosecute the perpetrators of forced displacement independently of other possible crimes and human rights violations, instead of considering it an accessory fact or a simple consequence of armed conflict.” Australia, Austria, Canada, Italy, and Ireland made similar recommendations.

Other recommendations focused on a more general need to end impunity for forced displacement. These include Azerbaijan’s recommendation to the Central African Republic in the first cycle that it “continue to firmly fight arbitrary executions and impunity, assure the protection of the civilian population and promote the return of refugees and displaced persons to their regions of origin.” Argentina also recommended to Haiti in the second cycle that it “deepen measures aimed at guaranteeing the fight against impunity of perpetrators of acts of gender violence and sexual abuse, in particular against women and girls living in the IDP camps.”

Recommendations around refugee issues tend to focus on host countries, rather than the countries of origin. 60 recommendations have been made that focus on the need to allow the return of refugees, such as Switzerland's recommendation to Bhutan that it "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." In some cases, these also make references to human rights standards, such as Japan's recommendation to North Korea in the first cycle that it "allow freedom of movement of its citizens within and across the border and end the punishment of those expelled or returned from abroad, including refugees and asylum-seekers" or Pakistan's recommendation to Israel that it "acknowledge the right of all Palestinian refugees to return to their homeland, as enshrined in the Fourth Geneva Convention." However, they generally do not include any language around accountability for the original acts of displacement.

The recommendation process can be used as accountability mechanism, with recommendations able to track State progress on commitments, and to publicly note when States are deficient in their responses towards forced migrants. However, at this stage this process remains limited in two ways. First, specific recommendations with respect to internal displacement remain limited, focusing on a more general need to support either IDP rights or protection, rather than specifically recommending the State needs to limit actions that are causing displacement or to target perpetrators for their actions. Second, the recommendation process around internally displaced person issues remains very ad hoc and without any clear coordination. While a number of States make recommendations around IDP issues, the approach is still limited. The countries which have made the most recommendations have still made relatively few, with Austria having made 14 recommendations covering ten countries, and Canada having made 14 covering 11 countries. A lack of consistency in this process means that States may not be held to account in future cycles. Ensuring that recommendations are made more consistently and specifically targeting violations of international law would improve the ability of the UPR process to ensure that States were held to account.

4. Regional Mechanisms

4.1 The African Union

The Kampala Convention has been ratified by 31 and signed by 40 of the 54 member States of the AU.⁵⁶ 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."⁵⁷ Kenya and Niger have domesticated these responsibilities. This requirement is beginning to lead to changes in national laws. Kenya's 2012 law on the prevention, protection and assistance to internally displaced persons specifies that the government shall protect every human being against arbitrary displacement and that no person shall intentionally cause arbitrary displacement. Individuals who contravene those provisions shall be subject to up to ten years imprisonment, a fine of up to five million shillings, or both punishments.⁵⁸ Niger's 2018 law on protection and assistance to internally displaced persons specifies that every citizen has a right to be protected against arbitrary displacement and provides for imprisonment

⁵⁶ 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, 18 June 2020, <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa>.

⁵⁷ African Union 2009, Art. 4(6).

⁵⁸ Republic of Kenya, The Prevention, Protection and Assistance to IDPs and Affected Communities Act, 2012 (No.56), Art. 6, 23.

for between 15 and 30 years or fines of FCFA two to five million for offences committed against internally displaced persons.⁵⁹

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.”⁶⁰ 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).⁶¹ 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.”⁶²

The Convention introduces several mechanisms to monitor implementation and compliance. However, the implementation of these processes remain mixed. On the positive side, the AU has taken a number of steps to improve domestic implementation of the Kampala Convention, including creating a model law on internal displacement in January 2018.⁶³ A number of the signatories to the Convention have also begun to create new government bodies to improve their responses to internal displacement – including Cameroon, Côte d’Ivoire, Niger, Somalia and South Sudan- while Ethiopia and Mali have assigned new responsibilities to existing government bodies (International Committee of the Red Cross 2020: 19).

Other processes created by the Convention have, however, lagged. The Conference of State Parties, which is tasked to enhance cooperation, has only met once since the Convention was ratified, in 2017. However it has now committed to developing a five-year plan of action to strengthen regional and national measures to prevent internal displacement and improve durable solutions.⁶⁴

The Convention also creates a monitoring mechanism, by requiring 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 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 19 of the 40 submitted reports mention IDPs; ten, however, do point to some forms of concrete legislative and policy changes toward IDPs.⁶⁵

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

⁵⁹ Projet de loi relative à la protection et l’assistance aux personnes déplacées internes au Niger, 2 Dec 2018, Art. 10, 30-2

⁶⁰ Ibid, Art. 9 1(b).

⁶¹ Ibid, Art. 8 (1).

⁶² 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).

⁶³ The Model Law is available here: <https://www.refworld.org/docid/5afc3a494.html>.

⁶⁴ African Union, Plan of Action for the implementation of the Kampala Convention 2017-2025, 6 Apr 2017, <https://au.int/en/pressreleases/20170406/plan-action-implementation-kampala-convention-adopted-conference-states>.

⁶⁵ Art. 62 Process Reports are available at: <https://www.achpr.org/statereportsandconcludingobservations>. Coding of these reports were undertaken by the author.

Justice and Human Rights.⁶⁶ Neither process has yet been used (Orchard 2016a: 311-314). However, more collaborative peer-to-peer exchanges between States are occurring through regional and subregional workshops. As the International Committee of the Red Cross has noted, these initiatives have played a vital role “in keeping the momentum going towards ratification/accession and implementation of the Kampala Convention” (International Committee of the Red Cross 2020: 33).

At this stage, therefore, it is easier to discuss the Convention as having anticipatory enforcement mechanisms, rather than effective mechanisms. But it is important to note that these do reflect clear obligations that State parties have agreed to: to implement domestic legislation, to report periodically on that implementation, and to meet regularly to monitor and review implementation.

4.2 The Organization of American States

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). The Inter-American Commission on Human Rights (IACHR) has the mandate to “promote the observance and protection of human rights” in all OAS member States, including by making recommendations and preparing country and thematic reports. Notably, the IACHR also has the power to examine petitions which allege violations of human rights standards (Cantor and Barichello 2013: 691).

The Inter-American Court on Human Rights has established that the right to freedom of movement and residence within the American Convention on Human Rights also “protects the right not to be forcibly displaced within a State Party to the Convention.”⁶⁷ This right requires to States to effectively investigate supposed violations of these rights⁶⁸ and “obliges the States to adopt positive measures to reverse the effects of the said condition of weakness, vulnerability and defencelessness, including vis-à-vis the actions and practices of private individuals.”⁶⁹ In specific situations, the Court has also determined that victims of displacement are entitled to reparations and compensation.⁷⁰

The Inter-American Commission on Human Rights also has the ability to make recommendations to States concerning policies towards internally displaced persons and refugees. The Commission’s 2013 report on the human right situation in Colombia recommended that the State “adopt the measures necessary to prevent forced displacement” and to “guarantee the protection and safety of persons who return to the territories from which they were displaced.”⁷¹ However, these processes are limited. Venezuela, for example, has not ratified the American Convention on Human Rights or recognized the Inter-American Court⁷²

⁶⁶ AU 2009, Art. 22 (1-2)).

⁶⁷ Inter-American Court of Human Rights Case of the Mapiripán Massacre v. Colombia. Merits, reparations and costs, para 188; Case of Chitay Nech et al. v. Guatemala, para 139; Inter-American Court of Human Rights, Case of the Rio Negro Massacres v. Guatemala (2012), para 172. See also Casalin (2018).

⁶⁸ Case of Chitay Nech et al. v. Guatemala, para. 149.

⁶⁹ Inter-American Court of Human Rights, Case of the Rio Negro Massacres v. Guatemala (2012), para 172.

⁷⁰ IACHR, Mapiripán Massacre v. Colombia, para. 256; Case of Chitay Nech et al. v. Guatemala, para. 290

⁷¹ Inter-American Commission on Human Rights, “Truth, Justice and Reparation: Fourth Report on Human Rights Situation in Colombia,” 31 Dec 2013, Para 589.

⁷² IACHR, Situation of Human Rights in Venezuela, 31 Dec 2017, para. 477

and refused entry to an IACHR delegation in February 2020 that was to meet with groups of victims of human rights violations.⁷³

4.3 The Council of Europe

The Council of Europe's human rights system also creates specific accountability mechanisms for forced displacement. The European Convention on Human Rights establishes that everyone has a right to life which shall be protected by law as well as right to liberty and security of persons, and to not be subject to torture or to inhuman or degrading treatment or punishment.⁷⁴ In their Recommendation Rec(2006)6, the Committee of Ministers of the Council of Europe notes that in accordance with these articles:

member states shall... take appropriate measures, on the one hand, to prevent acts that may violate internally displaced persons' right to life, to physical integrity and to liberty and security and, on the other, to effectively investigate alleged violations of these rights.⁷⁵

The Parliamentary Assembly of the Council of Europe (PACE) has also sought to improve accountability mechanisms for forced displacement. It passed a 2010 resolution that emphasized "that all member states must refrain from and prevent arbitrary displacement and dispossession and provide effective domestic remedies and redress where they fail to do so."⁷⁶

The CoE has also focused specifically on property protections for the displaced. Article 8 of the ECHR establishes that "everyone has the right to respect for his... home" and "there shall be no interference by a public authority with this exercise of this right except such as in accordance with the law..."⁷⁷ PACE resolution 1708(2010) specifically notes with respect to property rights that:

the destruction, occupation or confiscation of abandoned property violate the rights of the individuals concerned, perpetuate displacement and complicate reconciliation and peace-building. Therefore, the restitution of property – that is the restoration of rights

⁷³ IACHR, "IACHR regrets denied entry into Venezuela and announces that will meet with victims and organizations on the Colombian border," 4 Feb 2020. The OAS has also created a separate working group on Venezuelan Migrants which concluded that Venezuelans should be identified as refugees under the 1984 Cartagena Declaration in order to receive permanent protection (OAS, OAS Working Group on Venezuelan Migrants Urges Granting Refugee Status and Creation of Regional Identity Card, 28 Jun 2019, https://www.oas.org/en/media_center/press_release.asp?sCodigo=E-048/19). However, a number of countries including Colombia, Ecuador, Peru and Chile have been unwilling "to recognize incoming Venezuelans as refugees in practice." Kristen Martinez-Gugerli, "Capacity Building and Multilateral Cooperation Needed for Long-Term Response to Fleeing Venezuelans", 14 Nov 2019, <https://www.wola.org/analysis/capacity-building-multilateral-cooperation-quito-process/>.

⁷⁴ ECHR, Arts. 2(1), 3, 5.

⁷⁵ Council of Europe, Committee of Ministers, Recommendation 2006(6) on internally displaced persons, 5 April 2006, Art. 5.

⁷⁶ Parliamentary Assembly of the Council of Europe (PACE) Resolution 1708 (2010) Solving property issues of refugees and displaced persons, Art. 8.

⁷⁷ ECHR, Art. 8(1, 2). Article 1 of Protocol No.1 to the ECHR adds that "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

and physical possession in favour of displaced former residents – or compensation, are forms of redress necessary for restoring the rights of the individual and the rule of law.⁷⁸

While the European Court of Human Rights has not ruled specifically on the issue of arbitrary displacement, it has a well-developed jurisprudence on the protection of property rights of internally displaced persons. It has affirmed State jurisdiction over contested territory and required the controlling State to ensure all substantive rights be respected.⁷⁹ In individual cases, it also has ordered a number of governments, including the Russian and Turkish governments, to pay compensation to IDPs for violations of their property rights.⁸⁰ The Court has also ruled against unlawful forced evictions of resettled IDPs.⁸¹ Therefore, while the Council of Europe has created a strong human rights monitoring and accountability system, Court decisions have generally focused on property rights rather than on the question of arbitrary displacement or other rights violations.

4.4 Association of Southeast Asian Nations

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.”⁸² Bodies such as the ASEAN Intergovernmental Commission on Human Rights (AICHR) have only limited capabilities and the organization’s focus on non-interference means it frequently fails to criticize governments that fail to respond to situations of forced displacement. However, civil society organizations are playing a more active role at criticizing both individual governments and ASEAN itself for failing to take action.

This can be seen in the response by ASEAN to the Rohingya crisis in Myanmar, where the Human Rights Council’s Independent International Fact-Finding Mission on Myanmar found that the Tatmadaw were “the main perpetrator of serious human rights violations and crimes under international law” (UN Human Rights Council 2018: para 90). However, the 34th ASEAN Summit in 2019 noted only that member States “reaffirmed our support for a more visible and enhanced role of ASEAN to support Myanmar in providing humanitarian assistance, facilitating the repatriation process with regard to the situation in Rakhine State, and promoting sustainable development” and for “continued and effective dialogue between

⁷⁸ ECHR, Art. 3.

⁷⁹ In *Cyprus v. Turkey*, (No. 25781/94 [GC], 10/05/2001, para. 77) the Court found that Turkey had effective overall control over northern Cyprus and its jurisdiction included securing all substantive rights. It then concluded that the rights of Greek-Cypriot displaced persons under Article 8 had been violated due to the refusal by state authorities to allow them to return to their homes in northern Cyprus. However, the Court then ruled that it was not necessary to examine whether this posed a violation to Article 3 of the Convention (which reflects degrading or inhumane conduct). In *Chiragov and Others v. Armenia*, No. 13216/05 [GC], 16/06/2015 (para. 186, 201), the Court found that Armenia exercises effective control over Nagorno-Karabakh and that Armenia was responsible for a breach of the IDP applicants’ property rights under Art 1 of Protocol No. 1.

⁸⁰ See PACE “Europe’s forgotten people: protecting the human rights of long-term displaced persons,” 8 Jun 2009, Doc. 11942, 11.

⁸¹ In *Saghinadze and Others v. Georgia*, No. 18768/05, 27/05/2010 (paras. 104-8, 160), the applicant claimed the government had forcibly evicted them from accommodations that the government had previously assigned to them. The Court found that this was a violation of the ECHR and its Protocol No. 1 as well as of Georgia’s own IDP Act, and ordered that the property be returned to the applicant or suitable compensation provided.

⁸² ASEAN (2012, art. 10-11,14-15).

Myanmar and Bangladesh to facilitate the repatriation process of displaced persons from Rakhine State.”⁸³ Even so, organizations like the ASEAN Parliamentarians for Human Rights, composed of current and former parliamentarians, have used forced displacement situations to argue for mandate expansion within ASEAN. 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 2915, 4). In August 2020, the organization argued specifically that ASEAN had not done enough with respect to the Rohingya crisis in Myanmar since 2017: “The evidence lack of progress is a clear indication that ASEAN and the international community must step up their pressure on Myanmar to restore the rights of the Rohingya...”⁸⁴ Their advocacy has not yet been successful, but it does demonstrate that even under-developed human rights frameworks at the regional level can create at least a measure of public accountability.

5. Domestic-Level Mechanisms

5.1 Universal Jurisdiction

The principle of universal jurisdiction allows States to try individual perpetrators for genocide, war crimes, and crimes against humanity as well as other acts committed outside their jurisdiction. In some cases, national legislation can allow domestic prosecution of crimes against humanity “even when committed outside the State’s territory and even when committed by or against non-nationals” (Bassiouni 2001: 120). While this means individuals not present in the country can be charged, Human Rights Watch has noted that of the fewer than 20 cases filed under universal jurisdiction from 1994 to 2009, “most of these cases concern low- or mid-level alleged perpetrators who had found refuge on the territory of the State exercising universal jurisdiction.”⁸⁵ When States do use international arrest warrants, these can be challenged on immunity grounds, as occurred when Belgium issued an arrest warrant in 2000 against Abdoulaye Yerodia Ndongbasi, the acting Congolese Minister for Foreign Affairs at the time. The International Court of Justice ruled that this did constitute a violation of diplomatic immunity and ordered Belgium to cancel the warrant.⁸⁶

Universal jurisdiction creates a potential accountability mechanism by allowing individual perpetrators of forced displacement crimes as discussed above to be tried by other States in which neither the individual is present nor where the crime was committed (Meron 2018: 437-38). The concept of universal jurisdiction, as Bassiouni has argued, therefore “transcends national sovereignty” and is based on three rationales: “(1) no other State can exercise jurisdiction on the basis of the traditional doctrines; (2) no other State has a direct interest; and

⁸³ ASEAN, “Chairman’s Statement of the 34th ASEAN Summit,” 23 June 2019, paras. 42-3, <https://www.asean2019.go.th/en/news/chairmans-statement-of-the-34th-asean-summit-bangkok-23-june-2019-advancing-partnership-for-sustainability/>.

⁸⁴ ASEAN Parliamentarians for Human Rights, “On third anniversary of 2017 mass atrocities, MPs call for accountability and restoration of Rohingya’s rights,” 24 Aug 2020, <https://aseanmp.org/2020/08/24/rohingya-third-anniversary/>.

⁸⁵ Human Rights Watch, “Basic Facts on Universal Jurisdiction: Prepared for the Sixth Committee of the United Nations General Assembly,” 19 Oct 2009, <https://www.hrw.org/news/2009/10/19/basic-facts-universal-jurisdiction>.

⁸⁶ International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), Judgement 14 Feb 2002.

(3) there is an interest of the international community to enforce” (Bassiouni 2001: 96). Therefore, universal jurisdiction can play an accountability role of last resort when no other mechanisms have functioned.

A survey undertaken by Amnesty International in 2012 found that 166 UN member States had defined one or more of war crimes, crimes against humanity, genocide, and torture as crimes in their domestic law. It also found that 147 States (or 76.2 percent of all UN member States) had provided for universal jurisdiction over one or more of these crimes suggesting a very strong level of support (Amnesty International 2012: 2).

However, the actual use of universal jurisdiction is considerably more limited. Heller notes that while the principle of universal jurisdiction is widely recognized, the practice is limited in many States. Almost all States require the domestic criminalization of the act, 57 States provide for universal jurisdiction only when formally required to do so by treaty, and 59 States explicitly condition “the use of universal jurisdiction on the territorial State being unwilling or unable to prosecute an international crime” (Heller 2017: 400-401).

Thus, actual prosecutions under universal jurisdiction have been quite limited. In a 2018 article, Hovell finds that from the 1961 Eichmann trial⁸⁷ that have been “a total of 52 completed universal jurisdiction trials worldwide” which had been “run to completion in only 16 States, 15 of which are in the Western European and Others’ regional grouping.” She also finds that the majority of these cases (a total of 30) specifically involve prosecutions for war crimes and torture (Hovell 2018: 434).

However, the use of universal jurisdiction is expanding. This has been assisted by a number of States introducing their own domestic legislation on crimes against humanity, following the 1998 Rome Statute. The Canadian Crimes Against Humanity and War Crimes Act (S.C. 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. The German Code of Crimes Against International Law allows for prosecution of war crimes, crimes against humanity, and genocide even when the offence was committed abroad and bears no relation to Germany. Thirteen States have now created their own specialized War Crimes Units in order to investigate these crimes, including Belgium, Canada, Croatia, Denmark, France, Germany, the Netherlands, Norway, South Africa, Sweden, Switzerland, the UK and the USA (Hovell 2018, Rowen and Hamlin 2018). Further, TRIAL International, a Geneva-based NGO, has noted that in 2019 the use of universal jurisdiction grew exponentially with 16 countries pursuing prosecutions and a minimum of 207 suspects being investigated for 141 war crimes charges, 21 genocide charges, and 146 crimes against humanity charges (TRIAL International 2020: 13).

As noted above, forced displacement crimes can constitute both war crimes and crimes against humanity, as well as genocide in some circumstances. The growth in universal jurisdiction prosecutions targeted these types of crimes creates a direct accountability mechanism by ensuring perpetrators may be charged by domestic jurisdictions, but also helps to create a deterrent effect against these crimes more generally. Unfortunately, forcible transfers or deportations as war crimes and crimes against humanity have, so far, been very infrequently

⁸⁷ The 1961 trial of Adolf Eichmann by the District Court of Jerusalem for crimes against humanity and war crimes (which included charges of deportation for transfers of Jews within Germany and areas occupied by Germany) is seen as a critical moment in the establishment of universal jurisdiction. As Bilsky notes, “it was here that the precedent of the authority of a national court to adjudicate ‘crimes against humanity’ committed outside its territorial jurisdiction was established” (Bilsky 2010: 198-9).

charged. TRIAL International identifies only two such investigations occurring in 2019. The first is in Argentina, where a criminal complaint was filed by the Burmese Rohingya Organisation in 2019 against Aung San Suu Kyi and others and where the Court allowed the case to move forward in June 2020. The complaint included alleged genocide and crimes against humanity, including deportation or forcible transfer of population.⁸⁸ In the second case, French prosecutors have opened a formal investigation into the alleged complicity of the French bank BNP Paribas as a company as well as its senior staff in crimes committed by the Sudanese government in Darfur, including killings, torture, detention, forcible displacement, rape, and assault (TRIAL International 2020: 34).

5.2 Magnitsky Acts

Another domestic process that can be used to increase accountability for forced displacement are the so-called Magnitsky Acts which are “autonomous sanctions” used by one or more States “to invoke sanctions against individuals in a target State, without the support of the UN or broader international community” (Lilly and Arabi 2020: 164). They can be used by individual States to apply sanctions against individual perpetrators of human rights abuses in order to modify current behaviour as well as deter future actions.

The first Magnitsky Act was introduced in the United States in 2012, and initially targeted corruption in Russia. But in 2016, with the Global Magnitsky Human Rights Accountability Act, the United States expanded this to also target and impose sanctions against any foreign person who “is responsible for extrajudicial killings, torture, or other gross violations of internationally recognized human rights committed against individuals in any foreign country who seek” either to expose illegal activity or exercise or defend internationally recognized human rights.⁸⁹

While the potential human rights abuses have not been clearly laid out within the Act, the United States has used the Global Magnitsky Act to specifically target individuals responsible for forced displacement. This includes a number of people in Myanmar, after the United States Department of State determined the displacement of the Rohingya population to constitute ethnic cleaning. The first person named was Maung Maung Soe, the former chief of the Tatmadaw’s Western command, in December 2017 for allegations including “extrajudicial killings, sexual violence and arbitrary arrest as well as the widespread burning of villages. Security operations have led to hundreds of thousands of Rohingya refugees fleeing across Burma’s border with Bangladesh.”⁹⁰ These have been extended to other individuals and military organizations in Myanmar, including the 33rd Light Infantry Division who were designated for engaging in serious human rights abuses including “firing on fleeing villages” and engaging in driving out thousands of Rohingya residents.⁹¹

⁸⁸ “Complainant Files a Criminal Complaint of Genocide and Crimes Against Humanity Committed Against the Rohingya Community in Myanmar- Universal Jurisdiction” Certified Translation available at: <https://burmacampaign.org.uk/media/Complaint-File.pdf>, 33; Md. Kamruzzaman, “Argentinian court decision brings hope for Rohingya,” AA, 2 June 2020, <https://www.aa.com.tr/en/americas/argentinian-court-decision-brings-hope-for-rohingya/1861967>.

⁸⁹ United States, “Global Magnitsky Human Rights Accountability Act” (22 USC 2656), 23 Dec 2016.

⁹⁰ US Department of the Treasury, “United States Sanctions Human Rights Abusers and Corrupt Actors Across the Globe,” 21 Dec 2017.

⁹¹ US Department of the Treasury, “Treasury Sanctions Commanders and Units of the Burmese Security Forces for Serious Human Rights Abuses,” 17 Aug 2018. The Global Magnitsky Act has also been used against individuals in Iraq for preventing forced migrant return. Rayan Al-Kildani has been specifically sanctioned due to his leadership of the 50th Brigade militia which “is reportedly the primary impediment to the return of internally

A range of other States have also introduced their own Magnitsky Acts and Canada and the United Kingdom along with the United States have used them to impose sanctions on individuals.⁹² The Canadian Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) was passed in 2017 and allows sanctions to be applied against foreign nationals who are responsible for or complicit in “extrajudicial killings, torture or other gross violations of internationally recognized human rights...”⁹³ The Act was used to impose sanctions for “crimes against humanity” on Maung Maung Soe three months after the US took action against him.⁹⁴

The United Kingdom passed a Magnitsky amendment in the Sanctions and Anti-Money Laundering Act 2018 and subsequent Global Human Rights Sanctions Regulations in 2020. These are designed more narrowly than the US and Canadian models, and aim to deter violation by a State of an individual’s right to life, right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment, and their right to be free from slavery, not to be held in servitude, or required to perform forced or compulsory labour.⁹⁵ Its first sanctions were imposed in July 2020 and in spite of the more narrow construction, the UK has imposed sanctions against two members of the Tatmadaw for their involvement in human rights violations against the Rohingya- Min Aung Hlaing and Soe Win. While the sanctions specify unlawful killings, they note this includes “through systematic burning of Rohingya houses and buildings.”⁹⁶ Other governments are also moving forward with Magnitsky Acts, including the European Union, which proposed a EU Human Rights Sanction regime in December 2019 after the European Parliament adopted a resolution in favour in March 2019, and Australia, which commenced an inquiry into whether the country should adopt a Magnitsky Act in December 2019.

When based around a wide understanding of gross human rights abuses, these Acts provide another mechanism to directly target individual perpetrators who engage in forced displacement crimes. They have the advantage that Magnitsky sanctions can be levelled relatively easily by individual States without having to resort to a lengthy judicial process though, due to this, it is critical that the laws include procedural fairness including clear opportunities for listed individuals to have their names removed.⁹⁷ However, as of yet individual countries’ legislation and (in particular) the sanctions notices on individuals remain relatively vague and disconnected from individual countries’ criminal law standards or the

displaced persons to the Ninewa Plain.” US Department of the Treasury, “Treasury Sanctions Persons Associated with Serious Human Rights Abuse and Corrupt Actors in Iraq,” 18 Jul 2019.

⁹² Apart from the United States, Canada, and the UK, Estonia, Gibraltar, Jersey, Kosovo, Lithuania, and Latvia have all introduced Magnitsky Acts. Estonia and Latvia have imposed sanctions on a number of Russian individuals, while Latvia has imposed sanctions on Russian and Saudi Arabian individuals, but none reflect forced displacement. Moldova and Ukraine are also currently considering Magnitsky legislation. See William Browder, “Submission: Inquiry into targeted sanctions to address human rights abuses,” 14 Jan 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=54b840e0-435c-4e57-97a3-e1a8ff8244fc&subId=678444>.

⁹³ Justice for Victims of Corrupt Foreign Officials Act (Sergei Magnitsky Law) S.C. 2017, c.21, Art 4(2)(a).

⁹⁴ Global Affairs Canada, “Canada imposes targeted sanctions in response to human rights violation in Myanmar,” 16 Feb 2018.

⁹⁵ United Kingdom, “The Global Human Rights Sanctions Regulations 2020,” 6 Jul 2020, Art. 4(2).

⁹⁶ UK Sanctions list, “Regime: Global Human Rights Sanctions Regulations 2020,” 6 July 2020, <https://www.gov.uk/government/publications/the-uk-sanctions-list>.

⁹⁷ See Geoffrey Robertson, “Magnitsky Act Submission: Australian Human Rights Subcommittee, Joint Standing Committee on Foreign Affairs, Defence and Trade,” 26 Jan 2020, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Foreign_Affairs_Defence_and_Trade/MagnitskyAct/Submissions, 2.

standards in international criminal law around forcible transfers and forced deportations. This may leave Magnitsky sanctions delinked from international legal processes.

6. Whether new accountability mechanisms are necessary

These reference paper has identified that a range of accountability mechanisms do exist at the international, regional, and domestic levels to investigate and hold accountable States and individuals which cause forced displacement. But, while these mechanisms exist, too often they are not being used to address such situations and their overall effectiveness over the long term is unknown.

At the international level, one of the strongest accountability mechanisms is the International Criminal Court, which can try individuals for specific crimes associated with forced displacement, including deportations and forcible transfers as both war crimes and crimes against humanity. Yet, while the Rome Statute came into force in 2001, almost nineteen years later the Court has only convicted one individual of forcible transfers - though the Court now has three other cases involving charges of forcible transfers moving forward. Similar issues affect the Responsibility to Protect doctrine, which allows at the extreme the UN Security Council to take action when a State is manifestly failing to protect its own population from genocide, war crimes, crimes against humanity, and ethnic cleansing. While the United Nations does play an important role in assisting States to uphold these responsibilities, the Security Council has only used its Chapter VII powers once (in the case of Libya). The Universal Periodic Review process within the Human Rights Council ensures that the human rights records of all States are investigated on a four and a half year cycle. While States do make recommendations within the UPR process concerning States' actions with respect to forcible displacement, so far these recommendations have been quite ad hoc and limited.

At the regional level, we see the development of different forms of mechanisms, including the legal approach through the Kampala Convention and the less formal IACHR reporting approach. The Kampala Convention, while it has strong accountability mechanisms on paper, has not yet seen these mechanisms actually used. Finally, at the domestic level, the use of universal jurisdiction has seen individuals tried for crimes outside the State's jurisdiction but tends to focus on war crimes and torture rather than forced displacement. The growing use of Magnitsky Acts provides a second mechanism to sanction individuals for gross human rights. This can include forced displacement, but so far Magnitsky sanctions have only been applied for that form of crime in Myanmar by the US and Canada, while the UK has imposed sanctions for unlawful killings through systematic burnings of houses and buildings.

At the same time, the existence of these accountability mechanisms provides a significant benefit in that neither the financial costs nor the political commitment that would be required to create a new mechanism is necessary. Instead, the key issues with these mechanisms is application – too often, they are not being used to examine forced displacement, even though these situations can constitute both crimes against humanity, war crimes, or ethnic cleansing. This appears to be happening with the International Criminal Court, which now has one conviction on the crime of forcible transfer and has recently opened a number of new investigations into deportations and forcible transfers. But the use of other mechanisms can similarly be improved: the recommendation system of the UPR process can be used to encourage States to improve their responses; and regional and domestic level mechanism can be used to generate further accountability and ensure that individual perpetrators are held to

account. With support and reapplication, these mechanisms will be able to directly hold States accountable for the causes of forced displacement.

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