

17 May 2021

**OPINION OF THE COMMITTEE OF LEGAL ADVISERS ON  
PUBLIC INTERNATIONAL LAW (CAHDI)  
ON RECOMMENDATION 2197 (2021) OF THE PARLIAMENTARY ASSEMBLY ON  
" THE PROTECTION OF VICTIMS OF ARBITRARY DISPLACEMENT "**

1. On 31 March 2021, the Ministers' Deputies, at their 1400th meeting, agreed to communicate Recommendation 2197 (2021) of the Parliamentary Assembly of the Council of Europe (PACE) on "*The protection of victims of arbitrary displacement*" to the Committee of Legal Advisers on Public International Law (CAHDI), for information and possible comments. PACE Resolution 2367 (2021) on the same topic is associated to it.

2. The CAHDI examined the abovementioned Recommendation via written procedure and made the following comments which concern aspects of the Recommendation which are of particular relevance to the Terms of Reference of the CAHDI.

3. With regard to paragraph 2.1 of the Recommendation, the CAHDI points out that, "arbitrary displacement" is a concept used more often in the context of international human rights, refugee and migration law, but including as well prohibited displacement under international humanitarian law in situations of armed conflict.

4. The *UN Guiding Principles on Internal Displacement*<sup>1</sup>, which compile human rights and humanitarian law relevant to internally displaced persons, explicitly provide for the right not to be arbitrarily displaced.

Principle 6 sets out permissible grounds for displacement, which cannot be considered arbitrary. In situations of armed conflict, the displacement will not be considered arbitrary where it is demanded for the security of civilians or imperative military reasons. In cases of large-scale development projects, the displacement will not be considered arbitrary where the project is carried out in the realisation of a compelling and overriding public interest need. In cases of disasters, displacement will not be considered arbitrary if carried out on the grounds of safety and health. Certain types of displacement based on policies of apartheid, ethnic cleansing or similar practices, as well as displacement used as a collective punishment are arbitrary in all circumstances and, therefore, absolutely prohibited.

5. The term "arbitrary displacement" does not appear as such in treaties relating to international humanitarian law (IHL); however, in IHL-related contexts, the prohibition for the parties to an international or a non-international armed conflict to forcibly displace the civilian population for reasons related to an armed conflict, unless

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<sup>1</sup> <https://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>.

the security of the civilians involved or imperative military reasons so demand, falls within this broader concept.

6. In international armed conflicts, the prohibition of the transfer or deportation of civilians is contained in Art. 49 of the Fourth Geneva Convention,<sup>2</sup> according to which, “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”, except if the security of the population or imperative military reasons so demand. The unlawful transfer or deportation of protected persons is a grave breach of the Geneva Conventions (Art. 147 of the Fourth Geneva Convention) and this criminalization was broadened in Additional Protocol I to cover all parts of the population of the occupied territory within or outside this territory (Art. 85(4)(a) of Additional Protocol I). Evacuations due to the security of the population or imperative military reasons may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Furthermore, persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased (Art. 49 (2) of the Fourth Geneva Convention).<sup>3</sup>

7. Moreover, for the purpose of the Rome Statute of the International Criminal Court, war crimes in international armed conflicts mean, *inter alia*, grave breaches of the Geneva Conventions of 12 August 1949, including, unlawful deportation or transfer or unlawful confinement (Art. 8 (2)(a)(vii)), as well as “the deportation or transfer [by the Occupying Power] of all or parts of the population of the occupied territory within or outside this territory” (Art. 8 (2)(b)(viii)).

8. In non-international armed conflicts, “the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand” (Additional Protocol II, Art. 17(1)).<sup>4</sup>

9. The Rome Statute of the International Criminal Court provides that, for the purpose of the Statute, “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand” represents a war crime in armed conflicts not of an international character (Art.8(2)(e)(viii)).<sup>5</sup>

10. At the same time, “deportation or forcible transfer of population” qualifies as crime against humanity when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack (Art. 7 (1)(d) of the Rome Statute).

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<sup>2</sup> Rule 129 of the ICRC’s study on customary IHL, originally published by Cambridge University Press in 2005, available online under: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>.

<sup>3</sup> Rule 132 of the ICRC’s study on customary IHL.

<sup>4</sup> Rule 129 of the ICRC’s study on customary IHL. See, also, the explanations to Rule 132 of the same study concerning the right to return.

<sup>5</sup> See, the explanations to Rule 156 of the ICRC’s study on customary IHL.

11. The CAHDI further notes that there exists no overarching public international law obligation to provide for universal jurisdiction for arbitrary displacement, whether in treaty or customary international law, taking also into consideration that arbitrary displacement is not limited to a conflict-related context. In such situations, the criminal responsibility relies on the relevant legislation in each State.

12. Yet, the CAHDI underlines that the 1949 Geneva Conventions provide for the obligation of States Parties to search for suspected perpetrators of grave breaches (including of Art. 49), regardless of their nationality, and prosecute or extradite them (Art. 146 of the Fourth Geneva Convention). Additional Protocol I to the Geneva Conventions extends this obligation to the grave breaches defined therein (Art. 85).<sup>6</sup> For grave breaches of the Geneva Conventions and of Additional Protocol I, the obligation to prosecute entails that States must ensure that their domestic legislation allows for the effective activation of the principle of universal jurisdiction.

13. Furthermore, States have the right to vest universal jurisdiction in their national courts over war crimes and crimes against humanity of their own choosing.<sup>7</sup> An increasing number of member States of the Council of Europe have made use of this opportunity.

14. Notwithstanding the above, the CAHDI recalls that the primary responsibility for prosecuting war crimes and crimes against humanity lies with the State or States with direct jurisdictional links with these crimes, notably those with territorial or personal jurisdiction.<sup>8</sup>

15. Concerning the proposal of the Parliamentary Assembly under paragraph 2.1 of the Recommendation to “prepare guidelines for member States on universal jurisdiction of national courts for arbitrary displacement and other war crimes or crimes against humanity”, in light of the above, the CAHDI considers that such a step is not opportune.

16. The CAHDI shall further reflect during its future meetings on the feasibility of developing guidelines for member States willing to implement the principle of universal jurisdiction as a means to address impunity gaps and ensure accountability for war crimes and crimes against humanity, in general. The outcome of the discussions shall be reflected in the meeting report of the CAHDI.<sup>9</sup>

17. The CAHDI notes, in this context, the various practical tools developed by the ICRC on the matter and its sustained effort in assisting States both in strengthening their national criminal legislation as well as in establishing universal jurisdiction over war crimes.

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<sup>6</sup> Rule 158 of the ICRC’s study on customary IHL.

<sup>7</sup> Rule 157 of the ICRC’s study on customary IHL. See, moreover, the position of the government in *Korbely v. Hungary* [GC], no. 9174/02, judgment of 19 September 2008 (Merits and Just Satisfaction), para. 62; S. Macedo et al., *Princeton Principles on Universal Jurisdiction*, (Program in Law and Public Affairs, Princeton University, 2001), Principle 2 (1) (3).

<sup>8</sup> S. Macedo et al., *Princeton Principles on Universal Jurisdiction*, Introduction, p. 24.

<sup>9</sup> Turkey does not agree with paragraph 16 of the opinion and maintains that the opinion in its entirety with its footnotes cannot be interpreted in a way that could create legal obligations for Turkey beyond those it has assumed.

18. The CAHDI further notes that the topic “*The scope and application of the principle of universal jurisdiction*” has been a standing agenda item of the UN General Assembly’s Sixth Committee and recalls the respective reports of the UN Secretary-General as well as UN General Assembly resolutions on the matter.

19. With regard to paragraphs 2.2 and 2.3 of the Recommendation, the CAHDI further recalls that States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects.<sup>10</sup> In this context, the CAHDI endorses the promotion of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and the Financing of Terrorism (CETS No. 198).

20. Lastly, the CAHDI recalls the fact that not all Council of Europe member States are States Parties to the International Criminal Court. However, the CAHDI reminds that the Trust Fund for Victims can accept voluntary contributions from Governments (not only those of States Parties), international organisations, individuals, corporations and other entities, in accordance with the relevant provisions of Resolution ICC-ASP/1/Res.6 and its Regulations.

21. This opinion of the CAHDI cannot imply international obligations for the Council of Europe member States beyond those that they have assumed.

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<sup>10</sup> Rule 161 of the ICRC’s study on customary IHL.