

**INTERNALLY DISPLACED PERSONS: TOWARDS AN  
EFFECTIVE INTERNATIONAL LEGAL PROTECTION REGIME**

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## **DEDICATION**

I dedicate this work to my mother and family for their unfailing love and consistent support. They have been a source of invaluable inspiration and I remain eternally grateful to them.

To the millions of internally displaced persons around the globe.

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## ABBREVIATIONS

AHRLR	African Human Rights Law Reports
AP I	The Second Additional Protocol to the Geneva Conventions
AP II	The Second Additional Protocol to the Geneva Conventions
ASEAN	Association of Southeast Asian Nations
ASIL	American Society of Public International Law
AU	African Union
CAT	Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on Elimination of Discrimination Against Women
CRC	Convention on the Rights of the Child
DFID	United Kingdom Department for International Development
ECOSOC	United Nations Economic and Social Council
ECOWAS	Economic Community of West African States
ERC	Emergency Relief Coordinator
GA	United Nations General Assembly
GAOR	United Nations General Assembly Official Records
GC I	The First Geneva Convention
GC II	The Second Geneva Convention
GC III	The Third Geneva Convention
GC IV	The Fourth Geneva Convention
IADD	Inter- Agency Internal Displacement Division
IASC	Inter-Agency Standing Committee
ICCPR	International Covenant on Civil and Political Rights
ICESR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
IDPs	Internally Displaced Persons
IGAD	Intergovernmental Authority on Development
ILA	International Law Association
NGO	Non-Governmental Organization

OAU	Organization of African Unity
OAS	Organization of American States
OCHA	UN Office for the Coordination of Humanitarian Affairs
OSCE	Organization for Security and Cooperation in Europe
RC/HC	UN Resident Coordinator/Humanitarian Coordinator
RPG	Refugee Policy Group
RSG	Representative of the Secretary-General on the Human Rights of IDPs
SAARC	South Asian Association for Regional Cooperation
SC	United Nations Security Council
SCOR	United Nations Security Council Official Records
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNOHCHR	United Nations Office of the High Commissioner for Human Rights
US	United States of America
WFP	World Food Programme

## CHAPTER 1: INTRODUCTION

Internal displacement has emerged as one of the great human tragedies of our time. It has also created an unprecedented challenge for the international community: to find ways to respond to what is essentially an internal crisis...protection should be central to the international response and [with] assistance should be provided in a comprehensive way that brings together the humanitarian, human rights, and development components of the United Nations.<sup>1</sup>

### 1.1 Background to the study

Internal displacement has become one of the most pressing humanitarian, human rights and security problem confronting the international community today. Although not a new phenomenon, what has changed is the number and severity of the plight of IDPs and the corresponding increase in the presence and coverage given to forced migration by the various actors, mainly the media and international community.<sup>2</sup> This, coupled with a better understanding of the acute suffering endured by the millions affected and the lack of a comprehensive international regime providing for the protection and assistance of IDPs, has resulted in a growing concern within the international community. This concern about IDPs is amply justified, all too often, IDPs suffer extreme deprivation that threatens their very survival, and they are all too often exposed to considerable danger - during their flight, while they are displaced and even upon their return or resettlement.<sup>3</sup>

As of December 2006, there were about 24.5 million people uprooted within their own country, commonly referred to as IDPs, by armed conflicts, internal strife or systematic human rights violations.<sup>4</sup> It worthy noting that there are also millions of people who

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<sup>1</sup> Kofi Annan, former UN Secretary-General in preface of FM Deng and R Cohen *Masses in flight: The global crisis of internal displacement* (Washington DC: Brookings Institution, 1998).

<sup>2</sup> J Bennet 'Forced migration within national borders: the IDP agenda' (1998) 1 *Forced Migration Review* 4.

<sup>3</sup> As above.

<sup>4</sup> See report by the Norwegian Refugee Council (NRC) and Internal Displacement Monitoring Centre (IDMC) *Internal Displacement: Global Overview of Trends and Developments in 2006*, April 2007 (NRC and IDMC report) 6, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)9251510E3E5B6FC3C12572BF0029C267/\\$file/Global\\_Overview\\_2006.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)9251510E3E5B6FC3C12572BF0029C267/$file/Global_Overview_2006.pdf) (accessed 3 July 2007).

have been internally displaced by natural disasters and many more evicted from their homes due to development projects.<sup>5</sup> The year 2006 saw a sharp increase in the number of people newly displaced by conflict and the number continues to rise.<sup>6</sup> At least 52 countries are affected - Africa being the most affected with 11.8 million IDPs in 21 countries and Sudan tops in Africa with 5 million IDPs.<sup>7</sup> According to a news alert issued by IDMC on 7 January 2008, the UN reported that 250,000 people had been displaced in Kenya in less than a week following post elections violence and their situation remained critical.<sup>8</sup> There were reports of food shortage and deteriorating healthcare leading to deaths of children.<sup>9</sup> Health workers also expressed concern on the security of women and children, who remain at risk of sexual attacks in the poorly protected camps, especially given that the referral systems that would exist normally to handle sex attacks have broken down.<sup>10</sup>

Unlike refugees, IDPs do not cross a state border, but rather seek refuge in another part of their country, which renders their situation intrinsically complicated and unique.<sup>11</sup> It is widely acknowledged that IDPs face more risks with regard to their basic human rights and in particular their physical safety and material security, as well as various forms of legal vulnerability than the rest of the population and are generally perceived to be a high-risk group.<sup>12</sup> More than 70 per cent of IDPs are either women and/or children, who are particularly vulnerable to abuse.<sup>13</sup> The estimated number of IDPs exposed to serious threats to their physical safety is estimated at 15.6 million.<sup>14</sup>

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<sup>5</sup> See NRC and IDMC report, note 6 above, 9.

<sup>6</sup> As above, 6.

<sup>7</sup> As above.

<sup>8</sup> IDMC *Kenya: 250,000 displaced by post-election violence*, IDMC News Alert, 7 January 2008, available at [http://www.internal-displacement.org/8025708F004D31AA/\(httpIDPNewsAlerts\)/CD0E4E9AFE9F2F86C12573C4004900A4?OpenDocument](http://www.internal-displacement.org/8025708F004D31AA/(httpIDPNewsAlerts)/CD0E4E9AFE9F2F86C12573C4004900A4?OpenDocument) (accessed 15 January 2008).

<sup>9</sup> As above.

<sup>10</sup> See report by UNOCHA *Kenya: Health workers grappling with conflict-related sexual violence*, IRIN, 16 January 2008, available at <http://www.irinnews.org/Report.aspx?ReportId=76247> (accessed 16 January 2008).

<sup>11</sup> N Geissler 'The international protection of internally displaced persons' (1999) 11(3) *International Journal of Refugee Law* 451, 451-2.

<sup>12</sup> As above, 452.

<sup>13</sup> See NRC and IDMC report, note 4 above, 6.

<sup>14</sup> As above.

Since 2001, the global number of IDPs has remained almost unchanged, hovering around the 25 million mark.<sup>15</sup> From this, one can deduce that neither the increased international attention to the plight of IDPs, nor state pledges to protect civilians from arbitrary displacement and other human rights violations has resulted in a tangible reduction of the global IDP population. Even more troubling is the findings of the NRC and IDMC report which suggest that the number of IDPs exposed to violence went up in 2006.<sup>16</sup> A case in point highlighting the plight of IDPs is the current IDP crisis in Kenya, which has been widely reported by the media. A local newspaper reported that ‘Life in camps hosting displaced people in Eldoret and other places in the North Rift [in Kenya] is one of suffering, misery and frustration. It is a story of disease, adverse weather and inadequate food rations... desperate girls at the camp have turned to prostitution.’<sup>17</sup>

Under international law the obligation to prevent arbitrary displacement and to protect and assist those who have been displaced falls squarely within the purview of states. However, in several countries the very governments responsible for the protection of the displaced were/are either directly or indirectly the force behind arbitrary displacements.<sup>18</sup> At least 18 governments were involved in the arbitrary displacement of civilians.<sup>19</sup>

Today, the UN Guiding Principles on Internal Displacement (Guiding Principles)<sup>20</sup> offer a comprehensive and authentic basis for providing protection and assistance to IDPs. However, despite this high powered exhortation, the Guiding Principles just remain that: they do not by themselves establish legally binding obligations thus, not affording IDPs comprehensive, effective and adequate protection. The study argues that given the

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<sup>15</sup> See NRC and IDMC report, note 4 above, 10.

<sup>16</sup> As above.

<sup>17</sup> S Makabila ‘Displaced people face tough times in the camps’ *The Standard*, 8 February 2008, available at <http://www.eastandard.net/news/?id=1143981578> (accessed on 8 February 2008).

<sup>18</sup> See NRC and IDMC report, note 4 above, 12.

<sup>19</sup> As above.

<sup>20</sup> UN Commission on Human Rights, Guiding Principles on Internal Displacement, UN Doc E/CN.4/1998/53/Add.2, 17 April 1998.

heightened awareness of the suffering endured by IDPs, it is time for the international community to address this problem from a legal standpoint.

This study argues that the issue of internal displacement is not merely a humanitarian problem, but needs to be discussed within a wider human rights context. Thus any proposed solutions to the plight of IDPs should integrate human rights. The study highlights and addresses the problems of IDPs' legal identity, rights, humanitarian assistance, and protection in international law. The study aims to interrogate three interrelated internal displacement concepts that need to be clarified and defined: the category of people identified as 'IDPs', 'protection' as a legal and operational principle, and 'solutions' as the ultimate means of remedying the crisis of internal displacement. The study traces the development of international legal framework for IDPs and its current state of coverage and protection. It offers suggestions to overcome the inadequate legal coverage and uncertain protection. It posits that the marginalisation of IDPs needs to be addressed in a holistic manner as an integral part of the international protection of human rights and the enforcement of humanitarian law.

The legal framework for the protection of IDPs should proceed on the basis of state responsibility and the responsibility of non-state actors during all phases of displacement. It should establish institutional machinery for coordinating protection and assistance to IDPs. It should further provide a means for assistance and for monitoring such protection as well as for ensuring compliance by the member states. The international community must consider not only how international law should provide for necessary assistance and protection to persons once they are displaced, but also how to address the causes of displacement under international law.

The study analyses the phenomenon of internal displacement, responses to the problems and what needs be done to improve the legal framework for the protection and assistance of IDPs. It is based on the assumption that states can no longer hide behind the veil of sovereignty and non-intervention principles and claim that their treatment of their citizens is solely a domestic matter.

## 1.2 Statement of the problem

Lack of a specific legal instrument and defined institutional protection and assistance for IDPs, which has come to be known as the ‘protection gap’ or *lacunae* in protection of IDPs is one of the major problems faced by millions of IDPs around the world – what exists is only a little coordinated *ad hoc* response.<sup>21</sup> Although IDPs outnumber refugees almost by a two-to-one ratio, unlike refugees, they do not benefit from a specific international regime or treaty exclusively devoted to ensuring their protection and assistance.<sup>22</sup> While refugees are entitled to seek international protection under the 1951 UN Convention on Status relating to Refugees<sup>23</sup> and its 1967 Protocol<sup>24</sup> (1951 UN Refugee Convention), the international community is not under the same legal obligation to protect IDPs. To qualify for international protection as a refugee, not only would a person have to show persecution on certain enumerated grounds (race, religion, nationality, political opinion, or membership in a particular social group), one would also need to have crossed an internationally recognized border.<sup>25</sup> The latter in place because of the reality of a world structured and ordered around the principle of sovereignty – which constituted the proverbial ‘trip wire’ for international action on behalf of IDPs.<sup>26</sup> National governments have the responsibility for the security and well-being of all displaced people on their territory, but often they are unable or unwilling to live to this obligation and in some instances are the perpetrators of internal displacement.

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<sup>21</sup> C Beyani ‘Recent developments the elaboration of a legal framework for the protection of internally displaced persons in Africa’ (2006) 50(2) *Journal of African Law* 187, 190.

<sup>22</sup> See report by NRC and IDMC *Internal Displacement*, note 5 above, 9.

<sup>23</sup> The Convention Relating to the Status of Refugees, adopted on 28 July 1951 under GA res 429(V) of 14 December 1950. Text of the 1951 Convention and 1967 Protocol available at <http://www.unhcr.org/cgi-bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b66c2aa10> (accessed 22 November 2007).

<sup>24</sup> The Protocol Relating to the Status of Refugees, adopted on 31 January 1967 and entered into force on 4 September 1967 pursuant to GA res 2198(XXI) of 16 December 1966.

<sup>25</sup> See article 1A(2) of the 1951 UN Refugee Convention and article I of the 1967 Protocol on definition of the term ‘refugee’.

<sup>26</sup> M Zard ‘Towards a comprehensive approach to protecting refugees and internally displaced’ in Anne F Bayefsky (ed) *Human rights and refugees, internally displaced persons and migrant workers* (Leiden: Netherlands, 2006) 15-63, 16.

The treatment of refugees, however, did provide a powerful contrast to the plight of IDPs as advocates<sup>27</sup> began to question such disparities in treatment.<sup>28</sup> In the 1980s, groups advocating for refugees – such as the Refugee Policy Group (RPG) and the United States (US) Committee for refugees – began to ask this question with increasing frequency.<sup>29</sup> The same question continues to be posed today.

The former UN Secretary-General, Kofi Annan, in his programme for reform in July 1997 cited the challenge of providing protection, assistance and reintegration, and development support for IDPs as an example of a humanitarian issue that falls between the gaps of the existing mandates of the different agencies.<sup>30</sup> A field-based study on international protection for IDPs, commissioned by the Internal Displacement Unit (now Division) of the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the Brookings Institution-Johns Hopkins SAIS Project on Internal Displacement, found that the UN's approach to internal displacement is 'still largely ad hoc and driven more by personalities and the convictions of individuals on the ground than by an institutional system-wide agenda' and suffers 'from a lack of political and financial support from UN headquarters and UN member states.'<sup>31</sup> In addition, many countries with internally displaced populations are unwilling to protect the rights of those affected or lack the capacity and tools to do so.<sup>32</sup> Why, the study asked, did those on one side of the border, and yet in dire need of protection and assistance, deserves to be treated any differently from those individuals who managed to cross that same border?<sup>33</sup>

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<sup>27</sup> Through out this study, the term advocate is often used broadly, to denote Non-Governmental Organization (NGO) activists, academics, and practitioners, unless otherwise specified. It should be noted that although the study occasionally distinguishes between refugee advocates and IDP advocates, these divisions are not rigid and the reality is that many advocates increasingly wear both hats.

<sup>28</sup> See M Zard 'Towards a comprehensive approach to protecting refugees and internally displaced', note 26 above, 16.

<sup>29</sup> As above.

<sup>30</sup> UN Secretary-General's report to the General Assembly, UN Doc A/51/950, July 1997, para 186.

<sup>31</sup> S Bagshaw and D Paul *Protect or neglect: Toward a more effective United Nations approach to the protection of internally displaced persons* (November 2004) Brookings-SAIS Project on Internal Displacement and UN OCHA 3, available at <http://www.reliefweb.int/idp/docs/references/Protect20or%20Neglect.pdf> (accessed 22 November 2007).

<sup>32</sup> See M Zard 'Towards a comprehensive approach to protecting refugees and internally displaced', note 26 above, 16.

<sup>33</sup> As above.

The attention of the international community towards IDPs tends to be focused more on the humanitarian dimension, specifically the need for providing assistance and, to a lesser extent, respect for human rights and their physical security. If humanitarian and human rights principles were holistically interpreted and implemented, they could provide a comprehensive system of protection for the IDPs.

The major objective of this research is to draw on contemporary developments in the treatment of IDPs, re-examine the adequacy of the legal protection given to them, and make out a case for a comprehensive international framework establishing binding obligations on states and non-state actors for the protection and assistance of this group of people.

### **1.3 Objectives and relevance of the research**

This study is intended to raise awareness of the still often-overlooked plight of some 25 million people internally displaced by conflict and persecution plus others who are not yet accounted for, and to draw attention to existing gaps in response at international level. It is my hope that this study will contribute to a better understanding of the causes and effects of internal displacement and thus help advance solutions leading to the sustainable return or resettlement and reintegration of internally displaced populations worldwide. If this goal is to be realized, researchers, scholars, human rights advocates, legal practitioners and humanitarian commentators must dedicate time and effort in order to enrich the debate and voice to the call for a comprehensive legal regime for the protection and assistance of IDPs. A lot needs to be done in terms of research, advocacy and lobbying to convince the collective international community that an effective international protection mechanism for IDPs is long overdue and it is time to act.

It is our hope that this report

The study aims to add momentum to the current attention focused towards improved protection and assistance of IDPs. Major legal developments concerning the protection of IDPs are currently unfolding at the African Union (AU) as well as Great Lakes region

of East, Central and Southern Africa.<sup>34</sup> These developments coincide with the recent opinions issued by the International Court of Justice and decisions rendered by regional human rights bodies in Africa, Europe and the Inter-Americas, which have shed further light on state responsibility for IDPs.<sup>35</sup> State practice is also crystallizing, with states such as Angola, Colombia, Georgia, Peru and Uganda articulating national legal and policy frameworks for the protection and assistance of IDPs.<sup>36</sup> These are positive and encouraging developments worthy being replicated by other states, regional bodies and at the international level by the UN.

#### 1.4 Literature review

Many writers and commentators have had occasion to discuss the concepts of internal displacement and the human rights situation of internally displaced persons. Views vary as to who should be considered to be an IDP, whether people displaced by natural disasters or development projects qualify as IDPs or not; whether or not IDPs should be legally equated to refugees or singled out as a special category of people in need of protection, if at all; what situations require international action; and in what form, if any, what form should institutional response take, how issues on sovereignty should be resolved and noninterference and whether there should be an international treaty and machinery protecting IDPs?

Luke Lee<sup>37</sup> proposes the idea of a legal synthesis between IDPs and refugees and proposes to achieve this, by deleting the border-crossing element from the definition of a refugee. He argues that requirement of border-crossing has lost its relevance in the post-Cold War era and it must be dropped in order to give states, international organizations and NGOs the legal capacity to address the problem of internal displacement. Lee finds support in Ambassador Richard Holbrooke, former US Permanent Representative to the

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<sup>34</sup> C Beyani 'Recent developments the elaboration of a legal framework for the protection of internally displaced persons in Africa', note 21 above, 187.

<sup>35</sup> As above.

<sup>36</sup> As above.

<sup>37</sup> LT Lee 'Internally displaced persons and refugees: Towards a legal synthesis?' (1996) 9 (1) *Journal of Refugee Studies* 27, 31.

UN, and others who have called for eradication of the distinction between refugees and IDPs.<sup>38</sup> The crux of his argument for dropping the border-crossing requirement, however, relates to human rights: that the maintenance of an artificial distinction between refugees and IDPs creates an unfair difference in the standard of human rights protection between the two groups.<sup>39</sup> Lee proposes that a remedy for the existence of such inequality of protection would be to merge the two groups and create a single legal status for both.<sup>40</sup>

However, this view is opposed by several commentators in the field of forced migration (Goodwin-Gill [1986]; J. Hathaway [1993]; and C. Phuong [2004]). Goodwin-Gill argues that the element of border-crossing (or alienage as is sometimes referred to) has always been implicit requirement and therefore no refugee definition has ever included IDPs in its provisions. The study is inclined towards maintaining a distinction between refugees and IDPs and same time comprehensively re-evaluate the situation of IDPs with an aim of formulating an international framework for the protection and assistance of IDPs.

There has been considerable debate over the degree to which international law should be extended to provide more concrete protection for IDPs.<sup>41</sup> Controversy still prevails among lawyers as to the scope and applicability of existing legal doctrine pertaining to the internally displaced. Three key approaches can be identified. Firstly, there are those who believe that the existing standards provide adequate protection and it is only a matter of implementation.<sup>42</sup> The advocates of this approach further fear that strengthening protection for IDPs, i.e. in-country protection would serve as a pretext for denying the possibility of protection abroad, i.e. asylum, thus their reluctance to increase

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<sup>38</sup> See M Zard 'Towards a comprehensive approach to protecting refugees and internally displaced', note 26 above, 18.

<sup>39</sup> See LT Lee 'Internally displaced persons and refugees: Towards a legal synthesis?', note 37 above, 37.

<sup>40</sup> As above.

<sup>41</sup> On the debate see generally C Phuong *The international protection of internally displaced persons* (Cambridge: Cambridge University Press, 2004) 13 -38; M Barticiski 'Tensions between the refugee concept and the IDP debate' (December 1998) 3 *Forced Migration Review* 11-14; Response to Barticiski's article by B Rutinwa, M Kingsley-Nyinah, J Bennet and Barticiski's rebuttal in (April 1999) 4 *Forced Migration Review* 29-35.

<sup>42</sup>C Phuong, above note, 52.

the focus on IDPs. The International Committee of the Red Cross (ICRC), for instance, even contended for some time that the protection of IDPs under international law was sufficient and that there was no need to develop the law.<sup>43</sup> It could also be questioned whether approaching the problem of internal displacement through law is a useful strategy. It has been contended that ‘any new instrument concentrating solely on displaced persons might lead to a reaffirmation of state sovereignty, and that it would be difficult to reach a consensus on the definition of the term ‘IDP’ since the result would be the lowest common denominator and thus would constitute a backward step in relation to the existing law.’<sup>44</sup>

The second approach rejects both inaction and the need for a new legal instrument focusing on the needs of IDPs but who nonetheless want to improve the implementation of existing law. It is also favoured by the proponents of a new legal instrument who realize that such a move is not feasible in the current political context and that a ‘soft law’ or ‘incremental approach to developing new human rights standards’<sup>45</sup> is more realistic. This appears to be the approach favoured by the UN, after the completion of the compilation of the Guiding Principles, the Commission on Human Rights encouraged the Representative of the Secretary-General on the Human Rights of IDPs (RSG)<sup>46</sup> to further develop ‘an appropriate framework’ for the protection of IDPs and avoided the term ‘legal framework’.<sup>47</sup> The use of such language by the Commission on Human Rights appears to suggest that it did not favour the adoption of a new legal instrument.

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<sup>43</sup> ICRC ‘Internally displaced persons: The mandate and the role of the International Committee of the Red Cross’ (2000) *International Review of the Red Cross* No 838, 491-500, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/57JQHR> (accessed 3 December 2007).

<sup>44</sup> As above.

<sup>45</sup> See C Phuong, *The international protection of internally displaced persons*, note 41 above, 73 – 74; W Kälin ‘How hard is soft law? The Guiding Principles on Internal Displacement and the need for a normative framework’ in W Kälin, FM Deng, & R Cohen (eds) *Recent Commentaries about the Nature and Application of the Guiding Principles on Internal Displacement* (Washington DC: Brookings-CUNY Project on Internal Displacement, April 2002) 2-5.

<sup>46</sup> The UN Secretary-General, at the request of the Commission on Human Rights (res 1992/73), appointed Francis Deng as his representative on IDPs in 1992. His successor, Walter Kälin, was appointed in September 2004 as RSG.

<sup>47</sup> UN Office of the High Commissioner for Human Rights(UNOHCHR), Commission on Human Rights res 1996/52, 19 April 1996, para 9.

In contrast, to the two approaches alluded to above, there are those who maintain that a comprehensive approach to displacement in order to address the problem of forced migration as a whole. Its justification lies in the fact that refugees and IDPs are two aspects of the same problem, i.e. forced displacement, which should be dealt with within a single instrument. According to Petrasek,<sup>48</sup> IDPs face the same problems as refugees, large populations of both refugees and IDPs are to be found in the same areas. He also emphasizes on the negative impact that development of new standards for the protection of IDPs would have on the institution of asylum. For him, the main advantage in addressing external and internal displacement within the same instrument would be to reduce the threat to the principle of asylum.<sup>49</sup> Refugees and IDPs would be covered by the same instrument, but would still constitute separate category.<sup>50</sup>

The study analyses all the above positions and posits that legal reform is necessary to ensure complete and adequate protection of IDPs. A legal framework creating binding obligations and directly addressing the internal displacement phenomenon would not only fill any existing gaps but would also focus international attention on and thereby raise the level of public awareness of the problem and the need for solutions.

#### **1.4 Synopsis**

The study is divided into five chapters: The current chapter serves well to introduce the study. Chapter two discusses definitional issues explores the debate as to whether IDPs should be legally equated to refugees or even be singled out as a special category of people in need of protection and assistance. The essence of a legal or operational definition of IDPs is also explored. The third chapter identifies and analyses the applicable existing legal framework for the protection of IDPs with a particular emphasis on international human rights and humanitarian law. The adequacy and challenges to the existing international legal framework in relation to the protection and

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<sup>48</sup> D Petrasek 'New Standards for the Protection of Internally Persons: A Proposal for a Comprehensive Approach' (1995) *Refugee Survey Quarterly* 1, 14.

<sup>49</sup> As above.

<sup>50</sup> As above.

assistance of IDPs shall be examined in this chapter. Chapter four dwells on the examination and appraisal of the Guiding Principles. The fifth and final chapter five consists of the conclusions of the study and an attempt at supplying the ingredients needed for a more effective and comprehensive package for the protection and assistance of IDPs.

## CHAPTER 2: DEFINING INTERNALLY DISPLACED PERSONS

### 2.1 Introduction

What is an IDP? What is a refugee? They do not care. They are all homeless and we must address this problem.<sup>51</sup>

Internal displacement, is not a new phenomenon, yet it has come to the fore in recent years capturing significant and sustained international attention and concern. However, despite being firmly embedded in the international lexicon there is no universal or legal definition of an IDP and several definitions have been offered. When the issue of internal displacement emerged onto the international agenda in the early 1990s, no definition of an IDP existed.<sup>52</sup> During the preparations of the successive World Conferences<sup>53</sup> which were organized at the beginning of the 1990s during the period of revival of the UN organization, the question of terminology on internal displacement was always a source of debate and strong disagreements appeared.

For some, the term 'IDP' refers only to people uprooted by conflict, violence and persecution, that is people who would be considered refugees if they crossed a border.<sup>54</sup> Global statistics on IDPs generally reinforce this view by counting only those displaced by conflict.<sup>55</sup> Others, however, consider internal displacement concept to be a much broader concept and to encompass the million more persons uprooted by natural disasters and development projects.<sup>56</sup> Confounding matters further is that in common parlance the IDPs are often referred to as 'refugees', which tend to be a catch-all phrase to describe all uprooted peoples without regard to whether they have left the country, as

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<sup>51</sup> Statement by Ambassador Richard C Holbroke, the then US Permanent Representative to the UN 'Promoting peace and security: Humanitarian assistance to refugees in Africa' in the Security Council, 13 January 2000 in M Zard 'Towards a comprehensive approach to protecting refugees and internally displaced', note 26 above, 16.

<sup>52</sup> As above, 9-10.

<sup>53</sup> The 1993 World Conference on Human Rights in Vienna, the 1994 International Conference on Population and Development in Cairo, the 1995 World Summit on Social Development in Copenhagen and the 1995 Fourth World Conference on Women in Beijing in C Phuong *The international protection of internally displaced persons*, note 40 above, 14.

<sup>54</sup> As above.

<sup>55</sup> As above.

<sup>56</sup> As above.

the legal definition of ‘refugee’ requires. This tends to blur the distinction between refugees and IDPs. Having a definition for IDPs is absolutely essential for identifying the populations of concern and their particular needs, compiling data, and framing laws and policies designed to protect and assist them. A definition will be instructive in outlining norms of protection in legal terms, in conformity with the principle that subjects of the law must know how to behave in terms of both rights and duties.<sup>57</sup> In searching for a definition of IDPs, the issue of protection remains central, and the challenge is to find a precise, but flexible, definition which would cover all those internally displaced and in need of international protection.<sup>58</sup> This chapter seeks to clarify the definition of an IDP, examine the critical elements that the definition should include. It further seeks to make a distinction between refugees and IDPs and determine whether there is justification for the exclusion of IDPs from the definition of refugees.

## **2.2 Who is an internally displaced person?**

As discussed above, there is no universal or legal definition of an IDP and, in deed, a publication prepared for UNHCR poses the question: ‘Could a legal definition of “internally displaced person” be established in the same way the 1951 Convention defines the refugee concept?’<sup>59</sup> However, considerable efforts have been made to develop a convincing definition of IDPs over the years and a few attempts are discussed below.

### **2.2.1 Attempts at a definition of internally displaced persons**

A first attempt at a definition by the UN was made by the then Secretary-General Boutros-Ghali in his Analytical Report in 1992, which defined IDPs as ‘persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a

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<sup>57</sup> FM Deng ‘Dealing with the displaced: a challenge to the international community’ (1995) 1 *Global Governance* 45, 50

<sup>58</sup> See Recommendation 40 of UNHCR/ICVA *Oslo declaration and plan of action*, UNHCR, Geneva, 1995 in C Phuong *The international protection of internally displaced persons*, note 41 above, 33.

<sup>59</sup> UNHCR *UNHCR’s role in protecting and assisting internally displaced people*, Central Evaluation Section discussion paper EVAL/IDP/13/2, 12 in R Plender ‘The legal basis of international jurisdiction to act with regard to the internally displaced’ (1994) 6(3) *International Journal of Refugee Law* 345, 356.

result of armed conflict, internal strife, systematic violations of human rights or natural or human-made disasters; and who are within the territory of their own country.’<sup>60</sup>

The above definition has been modified over the years following a better understanding of the concept of internal displacement as a consequence of in-depth research in the field. For instance, the 1992 definition described the IDPs as fleeing ‘suddenly and unexpectedly in large numbers’. However, the two adverbs and the criterion for large numbers do not characterize all cases of internal displacement. The requirement of ‘suddenly and unexpectedly in large numbers’ has proved less useful as a criterion for IDPs for a number of reasons: Research on current situations of internal displacement has shown that IDPs do not always flee in large numbers. To limit the IDP concept only to those who had fled their homes ‘suddenly or unexpectedly’ overlooked that in some situations, as was the case in Burma, Ethiopia and Iraq, the displacement of populations was not a spontaneous event but an organized state policy implemented over years or even decades.<sup>61</sup> Similarly, the criterion of being ‘forced to flee’ would exclude all those situations where populations did not flee but were obliged to leave their homes, as for instance with the forced evictions of minorities during the war in Bosnia or in 2005 in Zimbabwe.<sup>62</sup> Also problematic was the notion of people fleeing ‘in large numbers’ because in reality many displaced people flee in small groups or even on an individual basis. According to the report of the RSG on Colombia<sup>63</sup> more than a million people have been internally displaced as result of protracted guerilla and other paramilitary activities in the country. It has been found that a great majority of the people do not flee ‘suddenly or unexpectedly’, but that a different pattern of displacement exists. People may first flee to a nearby town or village in search of security and still go back to their farms during the day to pursue their normal economic activities. If the degree of violence reaches a higher level, people then consider going further and leaving their

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<sup>60</sup> See Comprehensive study prepared by FM Deng, RSG on the human rights issues related to IDPs to Commission on Human Rights res 1992/73 UN Doc E/CN.4/1993/35 (Analytical Report) para 17.

<sup>61</sup> See E Mooney ‘The concept of internal displacement and the case for internally displaced persons as a category of concern’ (2005) 24(3) *Refugee Survey Quarterly* 9, 11.

<sup>62</sup> As above.

<sup>63</sup> See *Internally Displaced Persons: Report of the RSG, Francis Deng, Profiles of Displacement Colombia*, E/CN.4/1995/50/Add.1, 3 October 1994 (First Colombia Report); and *Internally Displaced Persons: Report of the Representative of the Secretary-General, Francis Deng, Follow-Up Mission to Colombia*, E/CN.4/2000/83/Add.1, 11 January 2000 (Second Colombia Report)..

property for a longer period. Moreover people tend to flee in small groups in order not to attract attention.<sup>64</sup>

The element of the 1992 definition which states ‘who are within the territory of their own country’ was found to be problematic and required modification. This was necessitated by the problems raised by the dissolution of states such as the former Soviet Union and the former Yugoslavia at the beginning of 1990s, i.e. at the time when the Secretary-General’s definition was devised. The dissolution of such states blurred the distinction between refugees and IDPs. Persons who moved from the one former republic of the federation to another had an unclear status due to the difficulties related to the recognition of the newly constituted states.<sup>65</sup> The exact date when a state came into existence was not always easy to substantiate.

The International Law Association (ILA) thus improved the definition and defined IDPs as ‘persons or group of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife, systematic violations of human rights, and who have not crossed an internationally recognized stated border.’<sup>66</sup> This definition did not include persons who have been forced to leave their homes as a result of human-made or natural disasters or as result of development projects and need was felt to improve on the definition to include this category of IDPs, who are also in need of protection and assistance.

The more recent definition is offered in the Guiding Principles on Internal Displacement, which define IDPs as:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of, or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.<sup>67</sup>

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<sup>64</sup> See First Colombia Report, note 63 above, para 13.

<sup>65</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 35.

<sup>66</sup> N Geissler ‘The international protection of internally displaced persons’, note 11 above, 455.

<sup>67</sup> See para 2 of the Guiding Principles on Internal Displacement.

It is clearly an improvement of the 1992 definition because it removes the quantitative ('large numbers') and temporal ('suddenly and unexpectedly') elements which had proved problematic. In recognition that people could become internally displaced not only as a consequence of suffering the causes of displacement but also in anticipation of such effects, the Guiding Principles made reference to people having fled 'as a result of or in order to avoid the effects of' the causes listed in the definition. As persons did not necessarily have a home, reference was also made to 'habitual places of residence'.<sup>68</sup> Roberta Cohen, has argued that the definition represents 'the broadest definition in use at the international or regional level.'<sup>69</sup> The definition has further been stated that it reflects 'the descriptive and non-legal nature of the term "internally displaced persons"'.<sup>70</sup> The list of causes of displacement is not exhaustive, as highlighted by the words 'in particular'.<sup>71</sup> Unlike the 1992 definition, the Guiding Principles explicitly refer to development-induced displacement.<sup>72</sup> Displacement caused by development projects is a controversial matter. The Global IDP Project acknowledges that the number of people uprooted by development projects is thought to be much higher than those displaced due to conflict.<sup>73</sup> The World Bank, estimates that 10 Million people have been displaced by development projects every year since 1990 and the number of people uprooted by development projects.<sup>74</sup> It is further estimated that the Three Gorges Dam on Yangtze river in China will cause displacement of about 1.2 million people in 17 cities and 109 towns.<sup>75</sup> The Global IDP Project points out that in the case of

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<sup>68</sup> See E Mooney 'The concept of internal displacement and the case for internally displaced persons as a category of concern', note 61 above, 11.

<sup>69</sup> R Cohen 'The development of international standards to protect internally displaced persons' in AF Bayefsky and J Fitzpatrick (eds) *Human Rights and Forced Displacement* (The Hague: Kluwer Law International, 2000) 76, 82.

<sup>70</sup> W Kälin *Guiding principles on internal displacement: Annotations* Studies in transnational legal policy no. 32 (Washington, D.C.: American Society of International Law and the Brookings Institution Project on Internal Displacement) 3.

<sup>71</sup> As above, 2.

<sup>72</sup> Principle 6(2) of the Guiding Principles on Internal Displacement.

<sup>73</sup> NRC, Global IDP Project, *Internal displacement: Global overview of trends and developments in 2004* (Geneva: Global IDP Project, Norwegian Refugee Council, 2005) 35-37.

<sup>74</sup> W Robinson 'The causes, consequences, and challenges of development-induced displacement', Brookings Institution occasional paper, May 2003, 3.

<sup>75</sup> M Stein 'The three gorges: the unexamined toll of development induced displacement' (January-April 1998) 1 *Forced Migration Review* 7, 7-8; S Steil and D Yuafeng 'Policies and practices in the three gorges resettlement: A field account' (January 2002) 12 *Forced Migration Review* 10, 10.

development-induced IDPs, '[t]heir plight remains largely unnoticed and they often receive even less support from their government and/or international aid agencies than people displaced by conflict or natural disasters.'<sup>76</sup> Again, the central questions should be whether the government really offers assistance to the populations displaced by these projects, whether there is discrimination in the decisions to relocate and more fundamentally, whether such displacement can be described as forced or voluntary.<sup>77</sup>

The inclusion of 'natural or human-made disasters' in the definition of IDPs has generated debate - some in favour and others not. Nils Geissler,<sup>78</sup> argues that persons who leave their homes or places of habitual residence due to natural or human-made disasters face only part of the problems encountered by persons displaced as a result of armed conflicts or systematic human rights violations. They do not find themselves in refugee-like situations, but rather face problems relating to the field of economic and social rights.<sup>79</sup> Maria Stavropoulou<sup>80</sup> further argues that natural and human-made disasters cannot be attributed to the state as they lack an element of coercion and should thus be left out of a definition. UNHCR, one of the leading agencies, providing protection and assistance to IDPs, generally does not act in favour of victims of natural situations as their situation does not require UNHCR's particular expertise.<sup>81</sup> Another argument against inclusion of natural-disasters in the IDPs definition; in the case of natural disasters, the government authorities usually do not hinder the indiscriminate delivery of national or international aid – a situation which regularly occurs in situations of civil war. Rather, governments routinely appeal for international assistance for the victims of natural disasters.<sup>82</sup>

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<sup>76</sup> See NRC, Global IDP Project, *Internal displacement*, note 73 above.

<sup>77</sup> See C Phuong *The international protection of internally displaced persons*, note 41 above, 31.

<sup>78</sup> N Geissler 'The international protection of internally displaced persons', note 11 above, 455.

<sup>79</sup> ILA, Committee on Internally Displaced Persons, Report and Draft Declaration for Consideration at the 1998 Conference, 5.

<sup>80</sup> M Stavropoulou in GE Little 'Forced movement of peoples', (1996) *ASIL proceedings* 549, 559 in N Geissler, 'The international protection of internally displaced persons', note 11 above, 455-6.

<sup>81</sup> See UNHCR *Protection aspects of UNHCR activities on behalf of internally displaced persons* (Geneva, UNHCR, 1996) para 11.

<sup>82</sup> See N Geissler 'The international protection of internally displaced persons', note 11 above, 455-6.

In support of the inclusion of ‘natural or human-made disasters’ in the definition, Francis Deng<sup>83</sup>, argues that cases of massive displacement resulting from a combination of natural and human-made causes in which serious and widespread human rights violations occurred have been documented. In cases involving human-made or natural disasters, the response of government in providing assistance and protection may be affected by discriminatory practices, or the government may be unwilling to provide the assistance and protection or may be unable but decline the instance of the international community or further still may deny the existence of a humanitarian crisis as a result of human-made or natural causes. The massive displacement crisis resulting from the December 2004 tsunami in Southeast Asia helped to focus attention on the needs of these IDPs. It also has confirmed the relevance of bringing together under one definition the different scenarios in which internal displacement can arise.<sup>84</sup> As the current RSG, Walter Kälin, noted after visiting the tsunami-affected region ‘persons forced to flee their homes share many common types of vulnerability regardless of the underlying reasons for their displacement.’<sup>85</sup> Moreover, it is noteworthy that the guidance issued to the UN’s Humanitarian and Resident Coordinators, who are responsible for ensuring an effective UN response to internal displacement in each affected country, recognizes that internal displacement results from a range of causes, and explicitly refers to ‘natural and human-made disasters’.<sup>86</sup> The dividing line between natural and human-made disasters is not always entirely clear. In some cases, the reluctance of the authorities to allow international relief into the country can indirectly trigger internal movements of populations and/or aggravate the consequences of a natural disaster.<sup>87</sup> The determining factor should be whether the state has made assistance and protection available or not.

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<sup>83</sup> FM Deng ‘Dealing with the displaced: A challenge to the international community’, note 57 above, 49.

<sup>84</sup> See E Mooney ‘The concept of internal displacement and the case for internally displaced persons as a category of concern’, note 61 above, 12.

<sup>85</sup> UNOHCHR *Protection of internally displaced persons in situations of natural disasters: A working visit to Asia by the Representative of the United Nations Secretary-General on the human rights of internally displaced persons*, 27 February to 5 March 2005 (Geneva: UNOHCHR, 2005) 9.

<sup>86</sup> See *Supplementary guidance to humanitarian/resident coordinators on their responsibilities in relation to IDPs* para 1 in Annex B, IASC *Protection of Internally Displaced Persons*, IASC Policy Paper Series, no. 2 (New York: UN OCHA, 2000) 27.

<sup>87</sup> See C Phuong *The international protection of internally displaced persons*, note 41 above, 30.

Expanding the IDP definition further to encompass persons who migrate because of extreme poverty or other economic problems had been proposed during the formulation of the definition and to this day is a suggestion that sometimes is put forth.<sup>88</sup> The IDP definition provided in the Guiding Principles, however, does not extend to these groups. This is because in most cases the element of coercion is not so clear.<sup>89</sup> The decision to exclude economic migrants and migrant workers from the IDP definition does not mean there is not a need for special attention to their situation and human rights, but simply that different issues are involved. As Robert Goldman, one of the members of the legal team that drafted the Guiding Principles explained, the reason for framing an IDP definition was to address the plight of a particular group of persons who had distinct protection and assistance needs resulting from forced displacement; to enlarge the definition would risk losing this focus.<sup>90</sup> Indeed, there are cases where a government has categorized IDPs as ‘immigrants’, presumably to deflect attention from the involuntary nature of their movement and thereby to avoid its responsibilities towards them.<sup>91</sup> For these reasons, the distinction between IDPs and economic migrants is important to maintain.

It is important to bear in mind that the definition of IDPs in the Guiding Principles is a descriptive, rather than legal, definition. It simply describes the factual situation of a person being displaced within one’s country of habitual residence. The term does not connote or confer a special legal status in the same way that recognition as a “refugee” does. This is not necessary for IDPs, Walter Kälin explains, because whereas refugees having lost the protection of their own country and being outside of their own state therefore require a special legal status, ‘the rights and guarantees to which IDPs are

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<sup>88</sup> See E Mooney ‘The concept of internal displacement and the case for internally displaced persons as a category of concern’, note 61 above, 13

<sup>89</sup> FM Deng and R Cohen *Masses in flight*, note 1 above, 17.

<sup>90</sup> Regional seminar on internal displacement in the Americas, Mexico City, Mexico, February 18-20, 2004 (Washington, D.C.: Brookings Institution-SAIS Project on internal displacement, 2004) 12 in E Mooney ‘The concept of internal displacement and the case for internally displaced persons as a category of concern’, note 61 above, 13.

<sup>91</sup> See E Mooney ‘The concept of internal displacement and the case for internally displaced persons as a category of concern’, note 61 above, 13.

entitled stem from the fact that they are human beings and citizens or habitual residents of a particular state.’<sup>92</sup>

Another important distinction with the ‘refugee’ concept is that not all situations of internal displacement will necessarily be of concern to the international community.<sup>93</sup> If the needs of internally displaced populations are met effectively by their own government, the international community need not become involved, unless of course the government requests assistance. If, on the other hand, internally displaced persons are denied the protection and assistance of their government, they are of legitimate concern to the international community. Of course, not all IDPs will be of concern to each organization that has a mandate or readiness to engage in situations of internal displacement.

Because the IDP definition is a descriptive rather than legal definition, it allows for organizations to adapt the IDP concept to their particular mandates and institutional perspectives. For instance, the ICRC, given its mandate in armed conflicts, inevitably will focus on those IDPs uprooted by armed conflict. The ICRC acknowledges the broader IDP definition, which it finds to be ‘fully suited for the purposes of the Guiding Principles.’<sup>94</sup> Moreover, the ICRC recognizes that internal displacement results from a number of causes, of which armed conflict is but one and simply the cause with which it is centrally concerned.<sup>95</sup> Similarly, UNHCR answers the question of ‘Who is an IDP?’ by employing a definition that reflects the same array of causes indicated in the Guiding Principles, all the while specifying that UNHCR helps ‘some’ of these people, in particular IDPs uprooted by conflict or persecution.<sup>96</sup> The fact that an organization chooses to conceptualize IDPs based on the organization’s particular mandate and

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<sup>92</sup> See Walter Kälin *Guiding principles on internal displacement: Annotations*, note 70 above, 13-19

<sup>93</sup> FM Deng and R Cohen *Masses in flight*, note 1 above, 18.

<sup>94</sup> ICRC ‘Internally displaced persons: The mandate and role of the International Committee of the Red Cross,’ (2000) *International Review of the Red Cross* 491, 492, available at <http://unhcr.org/home/RSDLEGAL/3decdecbe4.pdf> (accessed 11 December 2007); See also ICRC *Questions and answers: Internally displaced persons* (Geneva: ICRC, 2002) 3.

<sup>95</sup> ICRC *International Red Cross and Red Crescent movement action in favour of refugees and internally displaced persons*, report summary and res 4, Council of Delegates, November 2001 (Geneva: ICRC, 2002) 3.

<sup>96</sup> UNHCR *Internally displaced persons: Questions & answers* (Geneva: UNHCR, 2004) 5-6.

activities does not detract from the definition in the Guiding Principles. To the contrary, it underscores that there is all the more reason to have an operational definition covering all the different aspects of internal displacement.

### **2.2.2 Internally displaced persons and refugees**

The confusion of the refugees and IDPs may be excused granted that refugees and the internally displaced share many similarities and find themselves in the same material conditions. Internal displacement often takes place prior to external displacement which is seen as the last option. To most people, as evident from the media coverage, the term ‘refugee’ refers to anyone who has been forced to his/her home. Whether the person has left the country or not is seen as irrelevant. It has even been argued that the internally displaced should be treated the same as refugees because they would have been refugees had they left their country.<sup>97</sup> Consequently, there has been a considerable legal and political debate on whether IDPs should be legally equated with refugees, or be regarded as a distinct category of persons having special rights under international law.<sup>98</sup> Ambassador Holbrooke’s statements, ‘What is an IDP? What is a refugee? They do not care. They are all homeless and we must address this problem’, while drawing attention to the plight of IDPs, also reignited the debate among advocates as to the nature of the relationship – whether complementary or competitive – between IDP protection and refugee protection.

In responding to Holbrooke’s call for eradication of the distinction between refugees and IDPs, Guy Goodwin-Gill warned of the danger that ‘the distinctive quality enjoyed by the refugee as a subject entitled to international protection will be erased. Rights, duties responsibilities will be eradicated, and the refugee left, once more, unprotected in an era

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<sup>97</sup> See Analytical Report, note 60 above, para 50.

<sup>98</sup> See C Phuong *The international protection of internally displaced persons*, note 41 above, 13-38; See R Plender ‘The legal basis of international jurisdiction to act with regard to the internally displaced’, note 59 above, 345- 360; See M Zard ‘Towards a comprehensive approach to protecting refugees and internally displaced’, note 26 above, 16-18; M Barutciski ‘Tensions between the refugee concept and the IDP debate’ (1998) 3 *Forced Migration Review* 11, 11-14; Response to Bartuciski’s article and his rebuttal in (April 1999) 4 *Forced Migration Review* 29-35.

of uncontrolled discretion.<sup>99</sup> Such concerns may also have muted and undermined the prospects of more unified strategies on the part of the advocacy community to ensure that better protection is provided for both the IDPs and refugees.<sup>100</sup> An official with the ICRC conveys the essence of these concerns by noting:

...as interest in the problem of internally displaced persons grows, the right of asylum is simultaneously being weakened and the obstacles and means used by governments to control migratory flows and contain potential refugees in their countries of origin are being reinforced. 'Preventive measures' and "repatriations" are the order of the day, intended to prevent frontiers from being crossed by drawing the humanitarian organizations into the very heart of conflict situations, and to send refugees back from whence they came in conditions that are less and less compatible with the principles of protection. We and others are entitled to ask whether what lies ahead is the end of 'refugee status'.<sup>101</sup>

Observing the distinctions between the refugee regime and the protection of IDPs should not mean that the concepts and mechanisms of refugee protection cannot, with appropriate adjustments and due care, be placed at the service of IDPs.<sup>102</sup> Neither should the distinctions preclude allusive or symbolic comparisons between the situation and needs of refugees and that of other persons in need of international protection.<sup>103</sup> A comprehensive outlook may open up more ways in which the refugee protection regime and enhanced protection for the IDPs can reinforce one another, even at a normative level.

In order to understand why IDPs were not included in the refugee definition, it is imperative to analyse the refugee definition. The 1951 UN Convention Relating to the Status of Refugees read together with the 1967 Protocol – defines a refugee as any person who,

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<sup>99</sup> G Goodwin-Gill 'UNHCR and the internal displacement: Stepping into a legal and political minefield' (2000) *World Refugee Survey* 1, 26.

<sup>100</sup> As above.

<sup>101</sup> M Hickel 'Protection of internally displaced persons affected by armed conflict: Concepts and challenges' (2001) *ICRC Review* 699, 709.

<sup>102</sup> M Kingsley-Nyinah 'What may be borrowed; what is new?' (April 1999) 4 *Forced Migration Review* 32.

<sup>103</sup> As above.

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, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>104</sup>

A comprehensive analysis of the 1951 UN Refugee Convention is beyond the scope of this study but suffice it to say the Convention has been found inadequate in the definition of a refugee. The wording of the 1951 UN Refugee Convention may have been influenced by events which had just taken place in Europe and resulted in the persecution and killing of millions of people, many of whom were targeted because of some attribute or aspect of their identity.<sup>105</sup> The Convention was a deliberately restrictive instrument, because states wished the granting of refugee status to remain exceptional.<sup>106</sup> It has been argued that the refugee definition was drafted in such a manner so as to address the problem of political dissidents fleeing Communist states.<sup>107</sup> For an asylum seeker to be recognized as a refugee, the Convention requires that, he/she must demonstrate the existence of a ‘well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion.’ This phrase has been the subject of intense debate as it is open to different interpretations and due to lack of supervisory body to ensure common interpretation, states have adopted different definitions.<sup>108</sup> States have, in practice, often construed the Convention in a narrow manner contrary to the guidelines issued by UNHCR,<sup>109</sup> and many persons who are clearly in need of international protection are clearly not covered,

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<sup>104</sup> See art 1(2)(A) of the 1951 UN Convention Relating to the Status of Refugees.

<sup>105</sup> See C Phuong *The international protection of internally displaced persons*, note 41 above, 16

<sup>106</sup> See A Zolberg, A Suhrke and S Aguayo *Escape from violence: conflict and the refugee crisis in the developing world* (New York: Oxford University Press, 1989) 25.

<sup>107</sup> J Hathaway ‘A reconsideration of the underlying premise of refugee law’ (1990) 31 *Harvard International Law Journal* 148-51.

<sup>108</sup> For the various national refugee definitions see J Carlier, D Vanheule, K Hulman and C Galiano (eds) *Who’s a refugee: a comparative case law study* (The Hague: Kluwer Law International, 1997) in C Phuong *The international protection of internally displaced persons*, note 41 above, 17.

<sup>109</sup> See UNHCR Handbook on procedures and criteria for determining refugee status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, HCR/IP/4/Eng/REV.1 (Geneva, , UNHCR 1979 reedited January 1992), available at <http://www.unhcr.org/home/PUBL/3d58e13b4.pdf> (accessed 28 November 2007).

no matter how generous the interpretation.<sup>110</sup> For instance until recently, women suffering gender-related persecution were not considered to fall within the refugee definition. People fleeing generalized armed conflict or violence cannot easily demonstrate that they fear individual persecution under the 1951 Convention.<sup>111</sup> In order to compensate for the deficiencies of the 1951 UN Refugee Convention definition regional variants with a broader definition were devised – the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa<sup>112</sup> and the 1984 Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama.<sup>113</sup>

The 1951 UN Refugee Convention definition is theoretically inadequate since the concept of refugee is broader than the legal definition as captured by the common usage of the term refugee. The legal definition is based on basic premise that the bond between the citizen and the state has been severed and that the only physical manifestations of the severed bond are persecution and alienage and these are ‘the necessary and sufficient conditions for determining refugeehood.’<sup>114</sup> The regional definitions mentioned above demonstrate that the citizen/state bond can be severed in many other ways other than persecution.

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<sup>110</sup> See C Phuong *The international protection of internally displaced persons*, note 41 above, 18

<sup>111</sup> As above, 19.

<sup>112</sup> See Article 1(2) of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, available at [http://www.africa-union.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Refugee\\_Convention.pdf](http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf) (accessed 28 November 2007), which states ‘the term “refugee” shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.’

<sup>113</sup> See section 3 para 3 of the Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, held at Cartagena, Colombia from 19 - 22 November 1984, available at <http://www.acnur.org/biblioteca/pdf/3452.pdf> (accessed 28 November 2007), which states ‘...the definition or concept of a refugee to be recommended for use in the region is one which in addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order.’

<sup>114</sup> A Shacknove ‘Who is a Refugee?’ (1985) 95 *Ethics* 274, 275 in C Phuong *The international protection of internally displaced persons*, note 41 above, 21.

The responsibility to provide protection, which includes not merely the physical security of the individual, is the reason for the existence of sovereign state.<sup>115</sup> It is now settled in international law that the states have obligation not only to protect individual's political and civil rights but also economic, social and cultural rights, hence the inadequacy of solely focusing on political persecution.<sup>116</sup> A more appropriate approach may be the human rights one, which does not consider persecution the only distinguishing feature of refugehood.<sup>117</sup> Following the human rights approach, Shacknove prefers to define a refugee as a 'person whose government fails to protect his basic needs, who has no remaining recourse than to seek international restitution of these needs and who is so situated that international assistance is possible'.<sup>118</sup> This definition challenges the 1951 UN Refugee Convention definition, and in particular the criteria of persecution and border crossing, and this could lead to the inclusion of at least some IDPs – who are within the range of international assistance - in the definition.<sup>119</sup> The principle of sovereignty is thus not completely abandoned, but the formula challenges the existing legal definition.

### 2.2.3 Border crossing

As alluded to earlier in this study the element of border-crossing is very central to the refugee definition because it derives from the principle of state sovereignty, which remains the basis of international refugee law.<sup>120</sup> It has been argued that border-crossing has not always constituted a crucial element in refugee definitions and that this element

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<sup>115</sup> See eg John Locke, who saw the state's *raison d'être* in the 'protection of individuals' rights as laid down by God's will and as enshrined in law', in D Held *States and Societies* (Oxford: Martin Roberson & Co. Ltd, 1983) 10.

<sup>116</sup> According to the Office of the UN Commissioner for Human Rights as at 11 October 2007 there were 66 signatories and 157 parties to the 1966 International Covenant on Economic, Social and Cultural Rights, available at <http://www.ohchr.org/english/bodies/ratification/3.htm> (accessed 29 November 2007).

<sup>117</sup> G Coles 'Placing the refugee issues on the new international agenda' (unpublished) quoted by J Hathaway 'Reconceiving refugee law as human rights protection' in K Mahoney and P Mahoney (eds) *Human Rights in the twenty-first century: a global challenge* (Dordrecht: Martinus Nijhoff Publishers, 1993) 663.

<sup>118</sup> A Shacknove 'Who is a Refugee?', note 114 above, 282.

<sup>119</sup> See C Phuong *The international protection of internally displaced persons*, note 41 above, 21.

<sup>120</sup> As above, 22.

is not so fundamental to the refugee definition and can be dropped.<sup>121</sup> However, Goodwin-Gill argues that alienage has always been an implicit requirement and that no refugee definition has ever included IDPs in its provisions.<sup>122</sup> Hathaway also believes that border-crossing constitutes a crucial element of the refugee definition even though he acknowledges that it does not constitute a conceptual requirement.<sup>123</sup> Presence outside the country represents the manifestation that the bond between state and the citizen has been severed.<sup>124</sup> James Hathaway lists two reasons for non-inclusion of IDPs in the refugee definition.<sup>125</sup> First, states should not address the problem of internal displacement by extending the refugee definition to seek to include the internally displaced because it remains the primary duty of the state to protect its own population. Secondly, it would constitute a violation of national sovereignty as the problems raised by IDPs are invariable part of the internal affairs of the state. In contrast, the refugee is situated within the reach of the international community. It seems that the historical importance of the border-crossing element is imposed by what remain the cardinal principles of international law: state sovereignty, and the closely related principles of territorial integrity and non-intervention.<sup>126</sup>

The border-crossing element establishes a clear legal distinction between refugees and IDPs, which should be maintained for a number of reasons: However, similar their situation may be IDPs and refugees require protection that is different in nature. In the case of refugees they are out of their country thus cannot enjoy national but international protection whereas for IDPs the protection that is required is complementary which exists in parallel with national protection, unless national protection is not available. Crossing an international border means that a person falls under a different sovereign entity that bears towards him or her obligations founded on a legal basis different from

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<sup>121</sup> See LT Lee, 'Internally displaced persons and refugees: Towards a legal synthesis?', note 37 above, 31.

<sup>122</sup> See G Goodwin-Gill *The refugee in international law* (Oxford: Clarendon Press, 1996, 2<sup>nd</sup> ed) 4.

<sup>123</sup> See J Hathaway *The law of refugee status* (Toronto: Butterworths, 1991) 29.

<sup>124</sup> See P Tuitt *False images: The law's reconstruction of the refugee* (London: Pluto Press, 1996) 11.

<sup>125</sup> See J Hathaway *The law of refugee status*, note 123 above, 30-1.

<sup>126</sup> See for instance *Declaration on principles of international law concerning friendly relations and cooperation among states in accordance with the Charter of the United Nations*, GA res 2625 (XXV), 24 October 1970, available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/348/90/IMG/NR034890.pdf?OpenElement> (accessed 30 November 2007).

the one that determines the duties it owes to its own citizens.<sup>127</sup> Internal displacement has specific characteristics, which are discussed later in this study, and can raise special problems which cannot be solved by traditional methods of protection used in the refugee context. The phenomenon constitutes a distinct problem which has to be dealt with not only in conjunction with refugee problem, but also separately as it raises issues of a different nature.<sup>128</sup>

### 2.3 Conclusion

While IDPs often are described as ‘internal refugees’ and share some characteristics, it is not advisable to merge refugees and IDPs into a single legal regime. In the case of IDPs the bond with the state is not completely severed and this has implication on the nature of protection that can be provided to them. Establishment of a comprehensive legal framework for the protection and assistance of IDPs would offer better and effective protection. Internal displacement is not limited to conflict and persecution but covers other causes of forced displacement including natural and human-made disasters and also people forced to relocate by development projects. Despite these very different causes, the various groups of uprooted people should be included together in one definition as they have in common the two core criteria of involuntary movement and being within one’s borders. Enumeration of causes of internal displacement should be indicative rather than exhaustive to give allowance for coverage of a wider population in need of protection. The challenge in defining IDPs is to devise a definition which is neither too broad nor too narrow in order to obtain a definition which covers a wide range of situations in which people are internally displaced and in need of international protection.

The study proposes a definition that includes, first, the involuntary nature of the movement; and second, fact that such movement takes place within national borders – a criterion which distinguished IDPs from refugees who according to international law, by

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<sup>127</sup> R Plender ‘The legal basis of international jurisdiction top act with regard to the internally displaced’, note 59 above, 357.

<sup>128</sup> See R Cohen and FM Deng *Masses in flight*, note 1 above, 26-9.

definition are outside of their country. The definition should focus both on the causes of displacement and the needs of people and not the temporal and/or quantitative elements. In a sense the question ‘who is an IDP?’ cannot be separated from the question ‘who is in need of protection?’ Further, the definition must be precise but flexible enough to cover all IDPs in need of international protection. The definition proffered by the Guiding Principles appears to have taken the above ingredients thus a suitable definition. After identifying who IDPs are, the next chapter examines and appraises the international legal protection that covers this category of people.

## CHAPTER 3: LEGAL PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS

### 3.1 Introduction

Displaced people may have the same need to legal protection as other civilians during conflict, but it goes without saying that, deprived of shelter and their habitual sources of food, water, medicine and money, they have different, and often more urgent, material needs.<sup>129</sup>

The previous chapter dealt with definitional issues of IDPs and proposed the core ingredients that any IDP definition should include. This chapter analyses what is meant by the phrase ‘legal protection’ in the context of IDPs. It further provides an overview of the existing international protection regime that covers IDPs and examines their adequacy and efficacy in providing protection to IDPs.

The protection of IDPs raises several issues. Controversy still prevails among lawyers as to the scope and applicability of existing legal doctrine pertaining to the legally displaced. There are those who believe that the existing standards provide adequate protection and the challenge is implementation while they are those who hold that legal reform is necessary to ensure complete and adequate coverage.<sup>130</sup> It is still not clear what protection of IDPs involves: broad interpretations have been adopted and have included at least protection against displacement and protection for those who are displaced.<sup>131</sup> Understanding what protection entails in relation to IDP is crucial. One reason why international agencies as well as national governments fail to adequately protect internally displaced people may be their limited understanding of what protection means.<sup>132</sup> Governments at times deny protection to internally displaced people by limiting the definition to victims of insurgents, thus excluding, for example, those

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<sup>129</sup> See J Tauxe, ‘We should have humanitarian access to displaced civilians’ *International Herald Tribune* (1 March 2000) 10 in E Mooney ‘The concept of internal displacement and the case for internally displaced persons as a category of concern’, note 61 above, 16.

<sup>130</sup> See FM Deng ‘Dealing with the displaced: a challenge to the international community’, note 57 above, 51.

<sup>131</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 39.

<sup>132</sup> W Kälin ‘The role of the Guiding Principles on Internal Displacement’ (supplement October 2005) *Forced Migration Review* 8.

fleeing the armed forces of the State.<sup>133</sup> International agencies may limit their protection work to saving lives in emergency situations.<sup>134</sup>

Protection of IDPs is a sensitive issue for reasons explained earlier: it has been feared by some that strengthening protection for IDPs i.e. in-country protection, would serve as pretext for denying the possibility of protection abroad, i.e. asylum, hence reluctance of some refugee lawyers to increase focus on IDPs.<sup>135</sup> Lack or denial of protection is a principal feature of internal displacement, and international law aims to substitute its own protection for that which the country of nationality either cannot or will not provide – fill the vacuum in protection. States, non-state actors and the international community have a role in meeting these objectives, even if the precise limits of the protection due are not immediately ascertainable.<sup>136</sup>

### 3.2 Normative legal protection of internally displaced persons

The word ‘protection’ has become something of a term of art. Odhiambo-Abuya argues that protection is a term of art rather than a legal expression capable of precise definition and its meaning may vary depending on who is being protected and where they are situated.<sup>137</sup> However, protection has its origins in a human rights context and is defined with reference to the whole of the range of human rights.<sup>138</sup> What need to be protected are the human rights of the persons concerned, which rights are defined in the corpus of

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<sup>133</sup> As above.

<sup>134</sup> As above.

<sup>135</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 39-40.

<sup>136</sup> G Goodwin-Gill ‘The language of protection’ (1989) 1(1) *International Journal of Refugee Law* 6.

<sup>137</sup> E Odhiambo-Abuya ‘Refugees and internally displaced persons: Examining overlapping institutional mandates of the ICRC and the UN High Commissioner for Refugees’ (2003) 7 *Singapore Journal of International and Comparative Law* 236, 244. For instance

<sup>138</sup> See FM Deng ‘Dealing with the displaced: a challenge to the international community’, note 57 above, 50. For example, the Inter-Agency Standing Committee (IASC), states that protection of the rights IDPs encompasses, ‘all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law’; UNHCR, adopting the human rights approach, defines protection as, ‘all actions aimed at ensuring equal access to and enjoyment of the rights of women, men, girls and boys of concern to UNHCR, in accordance with the relevant bodies of law (including international humanitarian, human rights and refugee law); and according to the ICRC, ‘to protect implies preserving victims of conflicts who are in the hands of an adverse authority from the dangers, sufferings and abuses of power to which they may be exposed, defending them and giving them support.’

international human rights and may vary from state to state, depending on whether the state of the nationality of the person concerned has acceded to a particular instrument.<sup>139</sup> Along with those rights, the human rights that form part of international customary law, by nature binding, also fall in the range of the rights to be protected.<sup>140</sup> For the purposes of this study protection of IDPs envisages all activities aimed at protecting and promoting their rights and the obligations of the international community, states and non-state actors in accordance with the letter and the spirit of the relevant bodies of law.

Despite not being the subject of a specific international convention, as is the case of refugees, IDPs – although not expressly referred to – are protected by various bodies of law, including, most notably, national law, human rights law and, if they are in a state experiencing armed conflict, international humanitarian law. Thus in this regard, governments and non-state actors have the obligation to ensure that violations are prevented; that they cease; that they do not reoccur; and that victims of violations are provided with effective remedies including reparation, rehabilitation or compensation.<sup>141</sup>

### **3.2.1 Protection under human rights law**

International protection of human rights regime is relevant to IDPs because internal displacement raises a wide range of human rights issues. IDPs, like any other human being, benefit from the legal protection of international human rights law without distinction and in almost all circumstances.<sup>142</sup> When humanitarian law is not applicable, for instance in situations of internal strife or unrest which cannot be qualified as armed conflict, human rights law becomes the only source of legal protection and ensures the rights of IDPs are respected. With human rights concerns cutting across all phases of internal displacement from its cause, to the conditions of displacement, to the search for

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<sup>139</sup> FM Deng 'Dealing with the displaced: a challenge to the international community', note 57 above, 50.

<sup>140</sup> As above.

<sup>141</sup> Report of the RSG, Walter Kälin, submitted pursuant to Commission on Human Rights res 2004/55, UN Doc E/CN4/2005/84, 31 December 2004 para 43. For the categorization of these obligations under international human rights law see Human Rights Committee, General Comment No. 31 [80] *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, CCPR/21/Rev.1/Add.13 paras 6, 7 and 15.

<sup>142</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 42.

solutions international human rights law naturally provide an appropriate and useful framework for the protection of IDPs. Human rights are interdependent and equal. However, in certain situations like displacement, the violation of one particular right can lead to whole series of other rights violations. In many cases, the fact of being obliged to leave one's home itself entails violations of certain rights, such as the right to security of person, and the freedom to choose one's residence. Very often, the factors which led to the displacement – discrimination, armed conflict, other forms of generalized violence, etc. – themselves involve violations of human rights. Displacement from one's place of residence may make the internally displaced particularly vulnerable. The following are some of the factors that are likely to increase the need for protection of IDPs:

- IDPs may be in transit from one place to another, may be in hiding, may be forced towards unhealthy or inhospitable environments, or may face other circumstances that make them especially vulnerable;
- The social organisation of displaced communities may have been destroyed or damaged by the act of physical displacement; families may be separated or disrupted; women may be forced to assume non-traditional roles or face particular vulnerabilities e.g. exposure to sexual violence;
- IDPs, and especially groups like children, the elderly, the pregnant women, may experience profound psychosocial distress related to displacement;
- Removal from sources of income and livelihood may add to physical and psychosocial vulnerability for displaced.
- Schooling for children and adolescents may be disrupted.
- Internal displacement to areas where local inhabitants are of different groups or inhospitable may increase risk to IDPs

Unlike refugees who, by definition, flee across an international border and have an established international legal and institutional regime to turn to for protection and assistance, IDPs remain within their national territory and, consequently, it is their own government that bears primary responsibility for their protection and assistance. Human

rights law sets out the obligations of states to ensure the survival, well-being and dignity of all persons subject to their territorial jurisdiction. Its coverage thus necessarily encompasses the internally displaced. The rights and guarantees to which IDPs were entitled before they fled by virtue of being human beings and citizens or habitual residents of a particular state remain intact.

Although forced displacement has never been a focus in the development of human rights instruments, these instruments contain provisions which are of particular relevance to IDPs.<sup>143</sup> The principal sources of existing standards for protection, as well as the foundations for articulation of future of further protections, are found in international human rights law. Among the international instruments that merit mention are: the Universal Declaration of Human Rights (UDHR);<sup>144</sup> the International Covenant on Civil and Political Rights (ICCPR);<sup>145</sup> the International Covenant on Economic, Social and Cultural Rights (ICESCR);<sup>146</sup> the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);<sup>147</sup> the Convention on the Prevention and Punishment of the Crime of Genocide;<sup>148</sup> the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);<sup>149</sup> the Convention on Elimination of Discrimination Against Women (CEDAW);<sup>150</sup> and the Convention on the Rights of the Child (CRC).<sup>151</sup> The ICCPR in particular declares certain fundamental rights as not derogable, including the right to life, freedom from torture or cruel, inhuman and degrading treatment or punishment, freedom from slavery or to be held in servitude, recognition as a person before the law, and non-discriminatory treatment.<sup>152</sup> Where derogation may not be precluded, the ICCPR requires that the ‘public emergency which threatens the life of the nation’ should be officially proclaimed and the derogation must be strictly required by the exigencies of the situation and the relevant state must

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<sup>143</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 43.

<sup>144</sup> GA res 217A (III) UN Doc A/810 (1948).

<sup>145</sup> GA res 2200A (XXI) UN Doc A/6316 (1966) 999 UNTS 171, entered into force 23 March 1976.

<sup>146</sup> (1966) 999 UNTS 3, entered into force 3 January 1976.

<sup>147</sup> GA res 39/46 UN Doc A/329/51 (1984) 1465 UNTS 85, entered into force 26 June 1987.

<sup>148</sup> GA res 260(III) UN Doc A/810 (1948) 78 UNTS 277, entered into force 12 January 1951.

<sup>149</sup> GA res 2106(XX) UN Doc A/6014 (1965) 660 UNTS 195, entered into force 4 January 1969.

<sup>150</sup> GA res 34/180 UN Doc A/34/46 (1979) 1249 UNTS 13, entered into force 3 September 1981.

<sup>151</sup> GA res 44/25 UN Doc A/44/49 (1989) 1577 UNTS 3, entered into force 2 September 1990.

<sup>152</sup> See Article 4(2) of the ICCPR.

report such declaration to the UN.<sup>153</sup> Economic, social and cultural rights are also implicated by the dependency of IDPs due to difficulties resulting from their specific situation. The most urgent survival needs must be met: food, water, emergency shelter, healthcare and sanitation. However, with respect to economic, social and economic rights, there are clear limits, at least in international law.<sup>154</sup> The ICESCR states that the obligation on states to fulfil these rights is subject to available resources and is to be implemented progressively.<sup>155</sup> States should use the ‘maximum’ of available resources. Nevertheless, the duty remains. As one author argues: ‘[E]ven in a situation in which these rights cannot be immediately secured for all [as due to resource constraints]... individuals or institutions are still duty bound to shape their conduct so as best to promote the realisation of these rights.’<sup>156</sup>

The obligations imposed on the states by the international human rights instruments are at three levels: States are expected to respect, protect and fulfil the human rights of those within their jurisdiction - including IDPs. These levels give rise to both ‘negative’ obligations (not to displace, not to discriminate IDPs, not to inflict pain and suffering upon IDPs etc) and positive obligations (to provide sufficient food, health services and shelter to IDPs as well as to prevent non-state actors from displacing IDPs). The duty to ‘promote’ and ‘fulfil’ the rights entails a more positive obligation may include for instance distribution of food, provision of food and clean water and establishment of hospitals to realise the right of everyone to an adequate standard of living;<sup>157</sup> which incorporates the right to food, clothing and housing and right to health.<sup>158</sup>

States should not discriminate against IDPs but should also provide extra protection for these vulnerable populations. Recently, more thought has been given to the responsibilities of private actors. Businesses, directly and indirectly, may have duties,

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<sup>153</sup> See Article 4(3) of the ICCPR.

<sup>154</sup> For a detailed analysis on the limitations of economic, social and cultural rights see section 3.4.2 of the study.

<sup>155</sup> See Article 2 of the ICESCR.

<sup>156</sup> K Raworth ‘Measuring human rights’ (2001) 15 *Ethics and International Affairs* 115.

<sup>157</sup> Article 11 of the ICESCR

<sup>158</sup> Article 12 of the ICESCR

including legal duties, in relation to human rights. Individuals too have a duty to respect human rights and can be held responsible for the most serious human rights crimes.

The jurisprudence of the International Court of Justice has laid out the application of human rights law in situations of armed conflict, occupation and the obligations that arise from occupation,<sup>159</sup> which are of prime importance to the protection of IDPs by states, armed groups and non-state actors. The African Commission has held that displacement is unlawful and that it constitutes a breach of freedom of movement and residence as well as the right to peace and security. Mauritania's responsibility for failing to prevent the forced eviction of persons by armed groups acting on its territory was upheld by the African Commission.<sup>160</sup> The Inter-American Court has taken a similar but far more incisive approach, upholding the legal responsibility of Columbia for massacres and acts of displacement caused by paramilitary or armed groups on the basis of Columbia's failure to act promptly to prevent displacement and create the necessary conditions for displaced persons to return to their homes in safety. It also endorsed the importance of freedom of movement as a standard for providing protection against forced displacement.<sup>161</sup> The European Court of Human Rights has affirmed the protection of displaced persons, as civilians, fleeing Russian military operations in Chechnya, and that the killing of such civilians by Russian armed forces breached its obligation to protect the right to life under the European Convention on Human Rights.<sup>162</sup> These decisions show that the phenomenon of displacement is spread widely, engaging human rights protection mechanisms in Africa, Europe and Latin America. Above all, the decisions illustrate the variety of contexts in which the need for the protection of IDPs and the accompanying responsibilities for states arise.

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<sup>159</sup> Legality of the threat or use of nuclear weapons, advisory opinion, 8 July, 1996; Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion, 9 July, 2004; Armed activities on the territory of the Congo (*Democratic Republic of the Congo v. Uganda*), Judgment, 19 December, 2005.

<sup>160</sup> *Malawi Association and Others v. Mauritania* (2000) AHRLR 149.

<sup>161</sup> *Case of Mapiripan Massacre v. Columbia* (7 March 2005) Inter-AmCtHR (ser C) No 122.

<sup>162</sup> *Isayeva v. Russia* (24 Feb. 2005) ECtHR App No 57950/00.

### 3.2.2 Protection under humanitarian law

International humanitarian law is the body of international law applicable in times of armed conflict that protect persons not or no longer taking part in hostilities – civilians, but also wounded, sick and captured combatants – and which regulates permissible means and methods of warfare and is binding on both states and organized armed groups.<sup>163</sup> Humanitarian law is especially useful because it contains provisions on issues of special relevance to IDPs such as access to humanitarian aid.

The principal instruments of international humanitarian law today are the four Geneva Conventions of 1949<sup>164</sup> and their two Additional Protocols of 1977<sup>165</sup>, as well as various instruments prohibiting or restricting the use of specific weapons like the 1980 Convention on Certain Conventional Weapons and its protocols. Alongside these instruments there exists an important body of customary law which is binding on all states regardless of their ratification of the treaties, which expands the scope of application of some of the rules laid down in these instruments to non-international armed conflict.<sup>166</sup>

IDPs are not expressly mentioned in any international humanitarian law instrument but this does not mean that they are not protected. If they find themselves in a state that is experiencing an armed conflict, and are not taking a direct part in hostilities, IDPs are entitled to protection as civilians, regardless of the fact and cause of their displacement.

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<sup>163</sup> E Gillard 'The role of international humanitarian law in the protection of internally displaced persons' (2005) 24(3) *Refugee Survey Quarterly* 37, 38-9.

<sup>164</sup> Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva (GC I), 12 August 1949; Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva (GC II), 12 August 1949 ; Convention III relative to the Treatment of Prisoners of War (GC III), Geneva, 12 August 1949; and Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV), Geneva, 12 August 1949.

<sup>165</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), 8 June 1977; and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II), 8 June 1977.

<sup>166</sup> For a comprehensive analysis of the customary rules of international humanitarian law see, ICRC and J Henckaerts and L Beck (eds) *Customary International Humanitarian Law* (Cambridge: Cambridge University Press, 2005).

In the context of occupation, article 49 of the Fourth Geneva Convention contains a general prohibition on individual or mass forcible transfers, both within the occupied territory and beyond its borders, either into the territory of the occupying power or, as is more often the case in practice, into third states.<sup>167</sup> There is a limited exception to this rule, which permits an occupying power to ‘evacuate’ the inhabitants of a particular area either if this is necessary for the security of the civilian population or for imperative military reasons. Even in such cases the evacuations should not involve the displacement of civilians outside the occupied territory unless this is impossible for material reasons.<sup>168</sup> Moreover, displaced persons must be transferred back to their homes as soon as the hostilities in the area in question have ceased.<sup>169</sup> The prohibition on displacing the civilian population for reasons related to the conflict unless the security of the civilians or imperative military reasons so demand is also applicable in non-international armed conflicts and also extends to both transfers within a country and deportations across a border.<sup>170</sup>

Unlawful deportation or transfer of protected persons is a grave breach of the Fourth Geneva Convention and is included in the list of war crimes under the Statute of the International Criminal Court.<sup>171</sup> In addition to prohibiting displacement and laying down protections to be granted to displaced civilians, international humanitarian law requires states parties to the Geneva Conventions to criminalise the violation of the prohibition under their national law and to search for and prosecute persons alleged to

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<sup>167</sup> Article 49 of the GC IV provides that: ‘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’. International humanitarian law employs the term ‘transfer’ to refer to displacement within the territory of a state and the term ‘deportation’ to denote displacement across a border into the territory of another state.

<sup>168</sup> The lawfulness of an evacuation of civilians from occupied territory was addressed by the Eritrea Ethiopia Claims Commission. In response to allegations by Ethiopia that some of its civilians had been deported to internally displaced camps in Eritrea, the Commission accepted Eritrea’s argument that at the time of the transfer the increased risks from artillery fire faced by the inhabitants of an area close to the Eritrea-Ethiopia border and to the front line justified their mass relocation to camps and that for material reasons the camps had to be in Eritrea. (Eritrea Ethiopia Claims Commission, Partial Award, Central Front, Ethiopia’s Claim 2, 28 April 2004, 43 *ILM* 1275 (2004) paras 67-68).

<sup>169</sup> Article 49 of GC IV.

<sup>170</sup> Article 17 of AP II.

<sup>171</sup> Article 147 of GC IV.

have violated it.<sup>172</sup> However, violation of the prohibition of displacement in non-international conflict is not criminalised by the Geneva Conventions or Additional Protocols.<sup>173</sup>

In addition to prohibition against unlawful deportation or transfer of persons, the rules of international humanitarian law which aim to cushion civilians from the effects of hostilities also play an important role in the prevention of displacement, as it is often violations of these rules that are at the root of displacements in situations of armed conflict. The following rules are of particular relevance:

- the prohibition on making civilians the target of attacks;<sup>174</sup>
- the prohibition on conducting hostilities in an indiscriminate manner;<sup>175</sup>
- the duty to take precautions in attack to spare the civilian population;<sup>176</sup>
- the prohibition of acts or threats of violence the primary purpose of which is to spread terror among the civilian population;<sup>177</sup>
- the prohibition on civilian property the object of attack;<sup>178</sup>
- the prohibition on the starvation of the civilian population as a method of warfare and of the destruction of objects indispensable to its survival;<sup>179</sup> and
- the prohibition on reprisals against the civilian population and its property.<sup>180</sup>

Also of relevance is the prohibition on collective punishments which, in practice, have often taken form of destruction of homes, leading to displacement;<sup>181</sup> and the rules requiring parties to a conflict, as well as all other states, to allow the unhindered passage of relief supplies and assistance necessary for the survival of the civilian population.<sup>182</sup>

These basic rules for the protection of the civilian population apply in both international

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<sup>172</sup> E Gillard 'The role of international humanitarian law in the protection of internally displaced persons', note 163 above, 43.

<sup>173</sup> As above.

<sup>174</sup> Article 51(2) AP I

<sup>175</sup> Article 51(4) AP I.

<sup>176</sup> Article 57 AP I.

<sup>177</sup> As above.

<sup>178</sup> Article 52 AP I.

<sup>179</sup> Article 54 AP I.

<sup>180</sup> Articles 51(6) and 52 AP I

<sup>181</sup> Article 75(2)(d) AP I.

<sup>182</sup> Article 70 AP I.

and non-international armed conflicts. Additional Protocol II contains similar prohibitions on attacks on civilians, the starvation of the civilian population as a means of warfare and collective punishments, as well as rules requiring parties to a conflict to permit humanitarian relief actions.<sup>183</sup>

Although prohibited by international humanitarian law, displacement of civilians frequently occurs in practice. Once displaced or evacuated, civilians are entitled to various basic protections and rights. The Fourth Geneva Convention lays down rules on the manner in which evacuations must be effected. These safeguards require such transfers to be carried out in satisfactory conditions of hygiene, health, safety and nutrition, that during evacuations persons be provided with appropriate accommodation and that members of the same family not be separated.<sup>184</sup> Additional Protocol II lays down similar basic conditions to be ensured in evacuations in non-international armed conflicts.<sup>185</sup> Although these provisions relate to conditions to be ensured during evacuations – i.e. ‘lawful’ displacements for the safety of the persons involved security or for imperative military necessity - these conditions apply more strongly in situations of unlawful displacement.<sup>186</sup>

IDPs also benefit from the provisions of international humanitarian law on family unity, an issue that is particularly relevant in situations of displacement due to separation of families particularly during flight.<sup>187</sup> In addition to special provisions relating specifically to persons who have been displaced, such persons are civilians and, as such, entitled, even during displacement, to the whole range of protection appertaining to civilians set out under international humanitarian law.

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<sup>183</sup> Articles 4(2)(b), 13-16 and 18 AP II.

<sup>184</sup> Article 49 GC IV.

<sup>185</sup> Article 17 AP II.

<sup>186</sup> See E Gillard ‘The role of international humanitarian law in the protection of internally displaced persons’, note 163 above, 41.

<sup>187</sup> Articles 25 and 140 GC IV and Articles 32 and 74 AP I.

### 3.3 Institutional arrangements for the protection internally displaced persons

There is no specific international agency with a global comprehensive mandate to protect and assist IDPs, like UNHCR for refugees. In the absence of a single agency, a consensus emerged within the UN and IASC during the 1990s that a ‘collaborative approach’ to responding to internal displacement was the most appropriate and, indeed, the only feasible response mechanism.<sup>188</sup> Consequently, pursuant to a decision of the Secretary General, the Inter-Agency Internal Displacement Division (IADD) was established in July 2004 within the Office for Coordination of Humanitarian Affairs (OCHA) with the sole purpose of ensuring that international organizations collaborate to adequately address the needs of IDPs.<sup>189</sup> Under the ‘collaborative approach’ all the UN agencies are expected to work together, coordinated by the UN Emergency Relief Coordinator at headquarters and Resident/Humanitarian Coordinators in the field.<sup>190</sup>

At the global level, the Emergency Relief Coordinator, who also heads the Office for the Coordination of Humanitarian Assistance, is responsible for providing support to the field, including negotiating access to IDPs, advocating for both assistance and protection, and mobilizing resources. The UN Resident Coordinator/Humanitarian Coordinator (RC/HC) works closely with, and provides leadership to, the UN Country Team, which includes representatives of the UN humanitarian agencies present in the affected country. The RC/HC would thus be able to call upon cluster leads for support as required. The UN Resident/Humanitarian Coordinator is responsible for the coordination of protection and assistance to IDPs, in consultation with the Country Team.

Beginning in 2006, UNHCR agreed to enlarge its role with IDPs in accordance with a new international division of labor proposed by the Emergency Relief Coordinator and endorsed by the IASC.<sup>191</sup> The refugee agency agreed to serve as the ‘cluster lead’ in the field for the protection of IDPs, camp management, and emergency shelter. In essence

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<sup>188</sup> See J Egeland ‘Towards a stronger humanitarian response system’ (2005) *Forced Migration Review* 4.

<sup>189</sup> For more information on OCHA and IADD visit <http://www.reliefweb.int/idp/> (accessed 19 December 2007).

<sup>190</sup> As above, 95-96.

<sup>191</sup> J Egeland ‘Towards a stronger humanitarian response system’, note 188 above, 4-5.

UNHCR would coordinate the work of the other agencies in these areas and be held accountable for overall performance. In large measure, the new system is a blending of the collaborative approach, which remains the overarching framework, and the need to ensure that UN agencies assume authority on a regular basis in the sectors with which they have special expertise. Other international agencies agreed to assume the cluster lead with water and sanitation (UNICEF), nutrition (WFP), and early recovery (UNDP) - in line with their areas of expertise.

The next section analyses the inadequacy and challenges to the legal protection and assistance of IDPs.

### **3.4 Gaps in legal protection and assistance of internally displaced persons**

A critical analysis of the applicable legal and institutional framework for the protection and assistance of IDPs reveals that the needs of IDPs are insufficiently protected by existing international legal regime. There are numerous gaps and challenges in both normative and institutional protection regime. The gaps can be divided into: normative, and applicability gaps. The constraints include but are not limited to: The principle of sovereignty and non-intervention; and a weak complaints and enforcement mechanism for human rights particularly for economic, social and cultural rights which are very crucial to the survival and protection of IDPs.

#### **3.4.1 Normative gaps**

Normative gaps refer to such gaps where no explicit norms exist to address identifiable protection needs of the IDPs.<sup>192</sup> A general norm may exist, but no corollary and more specific right is formulated thus unclear how the general norm can apply to in the

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<sup>192</sup> See UN *Internally displaced persons: Compilation and analysis of legal norms*, UN Doc E/CN.4/1996/52/Add.2, 5 December 1998, para 411 (Compilation and Analysis). It was published by the OHCHR as *Internally displaced persons: Compilation and analysis of legal norms* (New York and Geneva: United Nations, 1998). It was further developed by UNHCR in to handbook to be used in the field: UNHCR, *International legal standard applicable to the protection of internally displaced persons: A reference manual for UNHCR staff* (Geneva: UNHCR, 1996).

specific situation of IDPs. The right not to be arbitrarily displaced is not expressly provided for in any general human rights instrument and can only be inferred from a number of provisions. It can be inferred from the general provisions contained in the human rights treaties concerning the freedom of movement and the right to choose one's residence.<sup>193</sup> However, Article 12(3) of the ICCPR which espouses the above rights can be derogated from and can also be subject to some restrictions.<sup>194</sup> The sum effect is that the right not to be arbitrarily displaced is not adequately protected under the current international human rights instruments. No norm could be found explicitly prohibiting the forcible return of IDPs to places of danger.<sup>195</sup> There is no right of restitution of property as a consequence of displacement during armed conflict or to compensation for its loss or any special guarantees for women and children.<sup>196</sup> While there is a general norm prohibiting cruel and inhuman treatment, there is no explicit prohibition against the forcible return of internally displaced persons to places of danger. In the case of the prohibition of arbitrary detention, although this norm is clearly recognized, 'the preconditions for lawful detention of IDPs in closed camps are unclear.' Other grey areas include aspects relating to the protection of life – especially during internal armed conflicts; gender-specific violence; free movement and access to international assistance.<sup>197</sup> There is no explicit protection of the above-mentioned rights that directly apply to the situation of IDPs. Other identified gaps refer to disappearances, the missing and the dead, the use of landmines,<sup>198</sup> the need for personal identification, documentation and registration, humanitarian workers and organizations.<sup>199</sup>

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<sup>193</sup> See Article 13 of the UDHR and Article 12(1) of the ICCPR.

<sup>194</sup> See article 12(3) of the ICCPR which reads 'The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant'.

<sup>195</sup> R Cohen 'The Guiding Principles on Internal Displacement: A new instrument for international organisations and NGOs' (August 1998) 2 *Forced Migration Review* 31.

<sup>196</sup> As above.

<sup>197</sup> This issue was dealt by a separate study, see the Compilation and Analysis II, note 192 above. Its origin is M Stavropoulou 'The right not to be displaced' (1994) 9(3) *American University Journal of International Law and Policy* 689-749.

<sup>198</sup> See S Maselen 'The implications of the 1996 land-mines protocol for refugees and the internally displaced' (1996) 8 *International Journal of Refugee Law* 383.

<sup>199</sup> See the Compilation and Analysis, note 192 above, para 416.

### 3.4.2 Applicability gaps

The status of economic, social and cultural rights in relation to political and civil rights has at times been subject to disagreements.<sup>200</sup> The rights to shelter, health care, an adequate standard of living and other economic, social and cultural rights are protected in international law on the basis that a state will implement them progressively, over time, and in recognition that a state cannot do more than available resources permit.<sup>201</sup> This presents a great challenge to the protection and assistance of IDPs. Due to their desperate situation that IDPs find themselves in, the need for humanitarian aid such as food, clean water, shelter and health care is immediate and cannot afford to wait be realized progressively. The guarantee of the security of the person, for example, stands at the heart of political and civil rights; but it means very little if an individual is starving. The right to security can scarcely be said to exist in the absence of a right to subsistence. As one author points out: ‘The right to life has as much to do with providing the wherewithal to keep people alive as with protecting them against violent death. Dismal expectation about either of these aspects would not be compensated for by sanguine expectation about the other.’<sup>202</sup> Just as subsistence is essential to survival, so it is to the notion of individual autonomy – also an aim of human rights. Malnutrition, lack of shelter and absence of protection from disease render people ‘incapable of engaging in the autonomous activity the protection of which is often thought to justify concern for civil and political rights in the first place.’<sup>203</sup> This statement is even truer in the case of IDPs.

It is often argued that economic, social and cultural rights cannot be enforced in the same way as the civil and political rights; and that they are aspirational because in many societies it would be prohibitively expensive to implement them.<sup>204</sup> It is also claimed

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<sup>200</sup> For a comprehensive analysis see International Council on Human Rights *Policy duties sans frontières human rights and global social justice* (Geneva: Atar Roto Press, 2003) 9 -16.

<sup>201</sup> See article 2 of the ICSECR.

<sup>202</sup> RJ Vincent *Human rights and international relations* (Cambridge: Royal Institute of International Affairs, 1986) 90.

<sup>203</sup> C Jones *Global Justice: Defending Cosmopolitanism* (Oxford: Oxford University Press, 1999) 60.

<sup>204</sup> International Council on Human Rights *Policy duties sans frontières human rights and global social justice*, note 200 above, 9.

that wide disparities in living standards between countries mean that they cannot be guaranteed; and that courts cannot (or should not) adjudicate such rights because this would lead to judicial interference in government budget decisions.<sup>205</sup>

Even when it has been agreed that both sets of rights are valid, there has often been debate about priorities – and in particular about which rights, if any, come first. Others assert that civil and political rights deserve priority. Michael Ignatieff, for example, has argued that civil and political rights alone constitute the ‘defensible core of rights’ and that economic and social needs cannot be similarly defended, ‘That defensible core of rights ought to be those that are strictly necessary to the enjoyment of any life whatever. The claim here would be that civil and political freedoms are the necessary condition for the eventual attainment of social and economic security.’<sup>206</sup>

Another gap in protection is due to the fact that even where legal norms do exist (both international human rights law and international humanitarian law); they may be binding only on certain actors – the parties that have ratified a particular relevant international instrument. The problem of non-ratification can only be circumvented if the provisions in question have attained customary status, in which case they are binding on all states, regardless of the ratification status of the relevant instrument. However not all relevant instruments in the protection of IDPs have attained such status.<sup>207</sup>

The legal protection of the IDPs by the international humanitarian law is diminished and limited primarily because some of the norms are not applicable in all circumstances or apply only to segments of the population. Norms of humanitarian law are applicable only during armed conflict. In situations of generalized violence which fall below the threshold required for the application of the common Article 3 or Protocol II,

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<sup>205</sup> See International Council on Human Rights *Policy duties sans frontières human rights and global social justice*, note 200 above, 9.

<sup>206</sup> M Ignatieff, and A Gutmann (eds) *Human rights as politics and idolatry* (Princeton: Princeton University Press, 2001) in International Council on Human Rights *Policy duties sans frontières human rights and global social justice*, note 200 above, 12.

<sup>207</sup> See generally T Meron *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon Press, 1989) and C Greenwood ‘Customary law status of the 1977 Geneva Protocols’ in A Delissen and G Tanja (eds) *Humanitarian law of armed conflict: Challenges ahead: Essays in honour of Frits Karlshoven* (Dordrecht: Martinus Nijhoff, 1991) 93-114.

humanitarian law does not apply. However, some prolonged situations of low-intensity conflict produce substantial numbers of IDPs, although these situations are not classified as armed conflict they allow states to impose restrictions on certain human rights for instance in Colombia.<sup>208</sup> Governments are often tempted to label a conflict a mere riot or internal disturbance, rather than an internal armed conflict, in order to avoid the application of Article 3 or Protocol II.<sup>209</sup> This common state practice is aggravated by the fact that there is no precise definition of the notion of armed conflicts of an international character, and that no institution exists with the authority to designate a conflict as an armed conflict in the sense of the Geneva Conventions and Additional Protocols.<sup>210</sup>

Some of the provisions of international humanitarian law don't extend protection to IDPs because they only cover non-nationals in international armed conflicts. Under Article 4 of the Fourth Geneva Convention, protected persons are 'those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or Occupying Power of which they are not nationals'. This in effect translates to less protection for civilians against their governments in situations of international armed conflicts. This is however precisely the kind of protection that IDPs may need during such conflicts.<sup>211</sup> Although humanitarian law expressly prohibits transfers of population it only focuses on forced relocation and does not comprehensively address the problem of forced internal displacement during armed conflict.

Another weak aspect concerns the lack of efficient implementing machinery, notwithstanding recent trends to bring perpetrators of human rights abuse to justice.<sup>212</sup> The existing reporting and complaint system fail to adequately address the acute needs

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<sup>208</sup> See L Obregón and M Stavropoulou 'In search of hope: The plight of displaced Colombians' in R Cohen and FM Deng (eds) *The forsaken people: Case studies of the internally displaced* (Washington DC: Brookings Institution, 1998) 399 -453.

<sup>209</sup> N Geissler 'The international protection of internally displaced persons', note 11 above, 460.

<sup>210</sup> See T Meron *Human rights in internal strife: Their international protection* (Cambridge: Grotius Publication Limited, 1987) 50; C Lewis 'Dealing with the problem of internally displaced persons' (1992) 6 *Georgetown Immigration Law Journal* 693, 704-5.

<sup>211</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 46.

<sup>212</sup> N Geissler 'The international protection of internally displaced persons', note 11 above, 459.

of IDPs.<sup>213</sup> The slow and time consuming mechanisms are not constructed to compel states to remedy the often fatal situations.<sup>214</sup> There is no complaints system for economic, social and cultural rights. This is very unfortunate given that, as mentioned earlier, some of the economic and social rights are crucial to the protection and survival of IDPs.

While international human rights law has at least a weak supervisory system, the Geneva Conventions and Additional Protocols do not provide for any complaints or enforcement mechanisms.<sup>215</sup> Mechanisms for monitoring compliance with rules of humanitarian law require the appropriate organizations to have access to the protected persons. However, in order to access to the country in question, organizations are under international law only allowed to offer their services; a fact which complicates the situation of IDPs if the country refuses to allow access.<sup>216</sup> This issue relates to the concept of sovereignty and non –intervention which is discussed below:

### **3.4.3 The concept of state sovereignty and non-intervention**

When asked in 1997 why the UN had not been able to do more for IDPs, Sadako Ogata, the former UN High Commissioner for Refugees, replied, ‘The problem is sovereignty.’<sup>217</sup> Indeed, any discussion on internal displacement must begin with how to conceptualize and address sovereignty. After all, internal displacement takes place within state borders and in most cases under the jurisdiction of functioning governments.

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<sup>213</sup> R Hofmann ‘International humanitarian law and the law of refugees and internally displaced persons’ in European Commission (ed) *Law in humanitarian crises - How can humanitarian law be made effective in armed conflicts* (1995) 249, 286; C Lewis ‘Dealing with the problem of internally displaced persons’, note 210 above, 705.

<sup>214</sup> See C Lewis ‘Dealing with the problem of internally displaced persons’, note 210 above, 705..

<sup>215</sup> See R Hofmann ‘International humanitarian law and the law of refugees and internally displaced persons’, note 267 above, 286 ; C Lewis ‘Dealing with the problem of internally displaced persons’, note 210 above, 706. Here, again recent trends in international criminal law, especially the establishment of international criminal tribunals have to be taken into account see section 3.5 above.

<sup>216</sup> Geissler ‘The international protection of internally displaced persons’, note 11 above, 461.

<sup>217</sup> DA Korn *Exodus within borders* (Washington DC: Brookings Institution Press, 1999) 49.

Public international law is premised on the concept of an independent or ‘sovereign’ state and the relations between that state and other independent states. The international order was created by states that, at least in law, are considered equal and sovereign. States co-operate internationally on this basis. The UN embodies this idea in Article 2(1) of the UN Charter, which proclaims that the UN ‘is based on the principle of the sovereign equality of all its Members.’ Sovereignty is a term that has proven difficult to define, but it has often been found to refer to the independence of a state and its ability to exercise its powers without being held accountable to an outside authority.<sup>218</sup>

Closely related to the concept of sovereignty is that of non-intervention. If a state has complete control over its internal affairs, then it only follows that no other state has a right to intervene in that state's internal matters. This principle is affirmed in Article 2(7) of the UN Charter, which states: ‘Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.’

The principle of non-intervention has been recognized in General Assembly resolutions and declarations.<sup>219</sup> Furthermore, Article 3 of Protocol II of the Geneva Conventions specifically prohibits intervention in the affairs of its member states. From a strict state sovereignty point of view, the creation of an independent international instrument to regulate IDPs within their own countries may constitute an external interference in the domestic affairs, jurisdiction, and autonomy of state guaranteed under Article 2(7) of the UN Charter. This position may lead to an assertion that the management of its IDPs falls well within the domestic jurisdiction and sovereign competence of the state concerned.<sup>220</sup>

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<sup>218</sup> I Brownlie *Principles of public international law* (Oxford: Oxford University Press, 3rd ed, 1979) 80.

<sup>219</sup> See, eg, Declaration on the inadmissibility of intervention in the domestic affairs of States and the protection of their independence and sovereignty, GA res 2131 (XX) UN GAOR 1st Communication, 20th session, Supp no. 14 UN Doc A/6014 (1966) 11.

<sup>220</sup> See G Goodwin-Gill *The refugee in international law*, note 122 above, 264.

The concepts of sovereignty and non-intervention are at the heart of the international community's unwillingness to involve itself with the problem of IDPs. Since a state is responsible for the treatment of its own citizens within its borders, the state may claim that the situation which gives rise to the displacement of its citizens and the needs and difficulties that they encounter once they are displaced are internal matters. Furthermore, the state may claim that no other state has the right to assist or protect persons once they are displaced because to do so would be an intervention in the state's domestic affairs. However, it is governments which frequently cause or tolerate internal displacement and are therefore unwilling or unable to ensure the IDPs' basic rights.<sup>221</sup> The million dollar question is, should the international community act where a government is unable or unwilling to act and/or refuses international assistance.

### **3.5 Gaps in institutional protection and assistance**

As noted earlier in this study, there is no specific international agency with a global mandate for IDPs. The UN employs the collaborative approach which has been found wanting. The IADD set up in July 2004, to co-ordinate humanitarian assistance to IDPs and create operational accountability, has failed to develop a consistent standard and predictable inter-agency approach, effective monitoring, and accountability.<sup>222</sup> Nearly every UN and independent evaluation that has examined the collaborative approach has found that it works poorly.<sup>223</sup> The collaborative approach remains deeply flawed as it epitomises the maxim that no one is responsible when everyone is responsible. To begin with, there is little or no accountability for the internally displaced because no one is really in charge. The result is that the different humanitarian and development agencies whether UNHCR, UNICEF, UNDP, WFP or the ICRC help the displaced in varying degree in some countries and not at all in others.<sup>224</sup> The organizations pick and choose the IDP situations in which they want to become involved - the system is largely ad hoc

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<sup>221</sup> See the Compilation and Analysis, note 192 above, para 10.

<sup>222</sup> M Islam 'The Sudanese Darfur crisis and internally displaced persons in international law: The least protection for the most vulnerable' (2006) 18 *International Journal of Refugee Law* 354, 375.

<sup>223</sup> UN Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M Deng, UN Doc E/CN.4/2004/77, 4 March 2004, paras 24-33.

<sup>224</sup> R Cohen 'Developing an international system for internally displaced persons' (2006) 7 *International Studies Perspectives* 87, 95.

and the results are ad hoc too.<sup>225</sup> Agencies at times resist coordination and the coordinator does not have the authority to tell the powerful operational agencies what to do, for instance, UNHCR was able to say ‘no’ to the coordinator when asked to manage IDP camps with the result that the task went to inexperienced NGOs to the detriment of the displaced.<sup>226</sup> In a background paper prepared for the IASC Working Group meeting of 22-23 June 2005, IADD readily acknowledged ‘the absence of operational accountability and leadership’ and that a ‘pick and choose approach’ by operational agencies had led to ‘significant gaps, inter-agency competition, short-term commitments, and a lack of standard-setting, monitoring, and accountability.’<sup>227</sup>

Neither the political will nor the resources exist to create a new agency for the internally displaced although some continue to propose this persuasively.<sup>228</sup> It is an excellent idea even if such a lead agency would not implement all the humanitarian programmes relating to IDPs, it would be held responsible for making sure that appropriate programmes were in place. However, it may be premature and several reasons dictate against it in the near future.<sup>229</sup> For one the idea would meet with opposition from a number of governments that would object to a specific agency that explicitly involves itself with their internally displaced populations.<sup>230</sup> Second, there would be fears that a new agency would duplicate the work of existing agencies and at a time when the UN system is under pressure to eliminate duplication and cut back on staff.<sup>231</sup> Third, donor governments would be unlikely to put up the resources when their humanitarian funds are so overstretched by ongoing emergencies.<sup>232</sup>

A more frequently suggested option is to enlarge the mandate of an existing agency like UNHCR to assume the responsibility. UNHCR’s long experience with protecting

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<sup>225</sup> R Cohen ‘Developing an international system for internally displaced persons’ note 224 above, 95.

<sup>226</sup> As above

<sup>227</sup> See J Charny ‘New approach needed to internal displacement’ (supplement October 2005) *Forced Migration Review* 20.

<sup>228</sup> Susan Martin, eg, at Georgetown University, recommends the creation of a UN High Commissioner for Forced Migrants to encompass both refugees and IDPs (Martin et al. 2005:120–123).

<sup>229</sup> See R Cohen ‘Developing an international system for internally displaced persons’ note 224 above, 95.

<sup>230</sup> As above.

<sup>231</sup> As above.

<sup>232</sup> As above.

refugees makes it an obvious candidate for dealing with IDPs. Indeed, over the years prominent voices have called for the enlargement of UNHCR's mandate to include 'internal refugees,' but the very idea has triggered strenuous objections from other UN agencies unwilling to yield turf to the refugee agency.<sup>233</sup> These UN efforts at strengthening institutional accountability and response to meeting the challenges of IDPs protection warrant substantive internal reform in the UN, which would take time.

### 3.6 Conclusion

IDPs continue to benefit from all of the international human rights legal protection and international humanitarian law available to other persons, but they do not benefit from the specialized protection of international refugee law because they have not crossed an international border. The fact of being displaced from ones' home places IDPs in a situation of vulnerability to human rights abuse, such that they may be in need of some additional protection above and beyond that available to other members of a population. An analysis of the existing international law and institutional arrangements for the protection and assistance of IDPs, shows that the needs of IDPs are insufficiently protected. There is need to restate general principles of protection in more specific detail to IDPs and directly address the clear protection gaps that have been identified by the study.

Due to concerns with the vulnerability of IDPs, the Commission on Human Rights asked the Representative of the Secretary-General on Internally Displaced Persons to prepare an appropriate normative framework for protection and assistance for IDPs.<sup>234</sup> Accordingly, in 1998 the Representative formulated the Guiding Principles on Internal Displacement. The Guiding Principles were drafted to fill in some the identified gaps and represent an effort to highlight and address the weakness of human rights and

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<sup>233</sup> See R Cohen 'Developing an international system for internally displaced persons' note 224 above, 95. When Richard Holbrooke, the former US Ambassador to the UN, publicly recommended in 2000 that the primary mandate for internal refugees be given to UNHCR the heads of the WFP, UNICEF and UNDP jointly marched into the Secretary-General's office to protest (Holbrooke 2000).

<sup>234</sup> Commission on Human Rights res 1996/52 UN Doc E/CN.4/RES/1996/52, 19 April 1996, called 'upon the RSG to continue, on the basis of his compilation and analysis of legal norms, to develop an appropriate framework in this regard for the protection of internally displaced persons'.

humanitarian law to adequately protect the growing number of IDPs. The following chapter critically analyses the Guiding Principles and their contribution to the protection and assistance of IDPs.

## **CHAPTER 4: GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT**

### **4.1 Introduction**

The previous chapter noted that the existing international legal framework is inadequate and does not provide comprehensive protection and assistance to IDPs. The response by the UN in an attempt to address the stated inadequacy was the drafting of the Guiding Principles on Internal Displacement. Thirty in number, the Guiding Principles are based on international humanitarian law, human rights law, and refugee law by analogy. They set forth the rights of IDPs and explain the obligations of national authorities, the international community and non-state actors towards these populations. They identify the various causes of internal displacement, including natural disasters, human-made disasters, conflict, and violations of human rights. In addition they cover all phases of displacement: the pre-displacement phase, displacement itself, and the return or resettlement and reintegration phase.

Although not legally binding like a treaty, the Guiding Principles reflect and are consistent with international human rights and humanitarian law. They are the first attempt to articulate what protection should mean for the internally displaced and they give international and non-governmental organizations an important tool to use in their advocacy work on behalf of the displaced. Over the years, the Guiding Principles have gained substantial international acceptance and moral authority.

### **4.2 Origins and development of the Guiding Principles on Displacement**

In April 1998 the first international standards for IDPs were introduced into the UN Commission on Human Rights and were unanimously adopted by the 53-member commission.<sup>235</sup> Entitled Guiding Principles on Internal Displacement, they were developed by a team of international lawyers under the direction of the RSG.

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<sup>235</sup> R Cohen 'The Guiding Principles on Internal Displacement: A new instrument for international organisations and NGOs', note 195 above, 31.

The need for international standards for IDPs became apparent in the 1990s due to the large and soaring number of IDPs and increasing violation of their rights. IDPs were easy targets for human rights violations and when relief organizations in the field began to try to help IDPs, they found that they had no clear rules for doing so.<sup>236</sup> Indeed, the UNHCR, the UN Children's Fund (UNICEF), and NGOs began to appeal for a document they could turn to that would define IDPs and their entitlements.<sup>237</sup> A group of NGOs – the Friends World Committee for Consultations (Quakers), the Refugee Policy Group, the World Council of Churches – undertook a joint campaign in 1990 to spotlight the legal and institutional gaps in the international system and to mobilize support both for the appointment of the RSG and for the development of international standards to protect IDPs.<sup>238</sup> The organizations held the view that so many governments were causing or tolerating displacement, or proving unwilling or unable to meet the needs of the displaced and that it was essential to develop institutional arrangements and determine the degree to which the international law provided an adequate basis for the protection of IDPs.

In 1990, after receiving reports from two NGO-sponsored conferences, the UN ECOSOC formally recommended that the UN Secretary-General initiate an internal assessment of the UN's capabilities to provide adequate protection and assistance to the internally displaced.<sup>239</sup> The UN Secretary-General appointed Francis M Deng, the first RSG, in 1992. One of his first tasks was to examine the applicability of international human rights and humanitarian and refugee law to the protection of IDPs.<sup>240</sup> He presented the 'Compilation and Analysis of Legal Norms'<sup>241</sup> applicable to the IDPs to the UN Commission on Human Rights in 1996 and a supplement in 1998. The

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<sup>236</sup> R Cohen 'The Guiding Principles on Internal Displacement: An innovation in international standard setting', (2004) 10 *Global Governance* 459, 461.

<sup>237</sup> As above.

<sup>238</sup> See for example UN Commission on Human Rights, Comprehensive Study prepared by FM Deng, UN Doc E/CN.4/1993/5 21 January 1993, para 79; Statement of the Quakers and the WCC to the UN Commission on Human Rights, UN Doc E/CN.4/1991/NGO/1 (1991); and RPG *Human rights protection for the internally displaced persons: An international conference*, 24-25 June 1991. See also statement of R Cohen 'UN human rights bodies should deal with the internally displaced', before a meeting of the delegates to the UN Commission on Human Rights, organized by the Quakers, UN Office and the WCC, Geneva, 7 February 1990.

<sup>239</sup> UN ECOSOC res. 1990/78, 27 July 1990.

<sup>240</sup> UN Commission on Human Rights, res 1992/73, 5 March 1992

<sup>241</sup> See *Compilation and Analysis*, note 192 above.

Compilation and Analysis report found that IDPs are not explicitly mentioned in international law, and there are significant areas in which the law fails to provide adequate protection.

Although the Compilation and Analysis report did not recommend the precise form a future international instrument should take, it concluded that to improve protection for IDPs, a restatement of the law would be needed to make it more relevant to the IDPs and to clarify the gaps and grey areas.<sup>242</sup> According to Roberta Cohen, a member of the legal team that drafted the Guiding Principles, there were three main reasons for the decision to develop the Guiding Principles as opposed to a treaty.<sup>243</sup> First, there was no support from governments for a convention. The subject of internal displacement was still too sensitive – it was feared that a treaty on IDPs would be an infringement on sovereignty. Thus, the Commission on Human Rights, in requesting the RSG to develop an ‘appropriate’ framework based on the Compilation and Analysis, generally avoided the term legal to modify the word framework in the resolution. International organizations like ICRC also expressed reservations about embarking on a treaty, fearing that it might undermine the Geneva Conventions, whereas restatement of the law through Guiding Principles was viewed very differently: it could reinforce and strengthen existing protections. Second, time was a time factor. Treaty making is normally a lengthy process, whereas there was an urgent need for a document to address the emergency needs of IDPs. Humanitarian organizations in the field that had increasingly become involved in assisting the IDPs needed a clear and concise document to guide their work. Third, sufficient international law applicable to IDPs already existed. What was required was to bring together the myriad of provisions now dispersed in a large number of instruments and to tailor them to specific needs of the internally displaced.

It took two years from, 1996 to 1998, to draft the Guiding Principles and although the actual drafting was done by a core team of lawyers under the direction of the RSG, the process was broad-based and a wide range of international legal and international

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<sup>242</sup> R Cohen ‘The Guiding Principles on Internal Displacement: An innovation in international standard setting’, note 236 above, 464.

<sup>243</sup> As above, 464.

organizational, regional bodies and NGOs were consulted.<sup>244</sup> The Guiding Principles were finalized at a conference of fifty international experts in Vienna hosted by the government of Austria.<sup>245</sup>

### 4.3 Contents of the Guiding Principles on Displacement

The Guiding Principles are 30 in total. They take a very broad approach to internal displacement and cover a wide range of rights that correspond to the needs of the IDPs. They set forth the rights and guarantees relevant to each stage in the ‘life-cycle’ of a displaced person, beginning with protection against displacement, protection during displacement, access to humanitarian assistance, and, finally, conditions for return, resettlement, and reintegration into society.

The first paragraph of each principle restates the general norm which is applicable in the relevant area, whereas the second paragraph formulates the specific application of this norm to IDPs. The implicit guarantees contained in the existing law are thus made explicit – in principle the law is not modified, only clarified and simplified.<sup>246</sup> Simply put, they deduce specific norms from more general principles that are already part of existing international law. This cures the defect of lack of specificity of rights to IDPs and normative gaps that were identified in chapter 3.

The Guiding Principles begin with an introduction that provides guidance to all relevant actors: the RSG in carrying out his mandate; states when faced with the phenomenon of internal displacement; all other authorities (including *de facto* authorities), groups and persons in their relations with IDPs; and inter-governmental and non-governmental organisations. It further provides a description or working definition of IDPs. The two crucial elements of the definition are first, coerced or involuntary movement and second, remaining within one's national borders. The definition also includes the major causes of displacement; armed conflict, generalized violence, violations of human rights and natural or human made disasters. Its use of the qualifier, in particular, however, makes

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<sup>244</sup> R Cohen ‘The Guiding Principles on Internal Displacement: An innovation in international standard setting’, note 236 above, 465.

<sup>245</sup> As above.

<sup>246</sup> See Principle 2(2) of the Guiding Principles.

clear that internal displacement is not limited to these causes alone, so as not to exclude future situations that might need special attention. The definition is in consonance with the recommendation of chapter 2. Chapter 2 proposes a definition that is precise but flexible enough to cover all IDPs in need of international protection and captures the elements of involuntary or forced movement and the movement takes place within national borders. The definition tries to strike a balance between too narrow a framework that risks excluding people and one so broad that it could prove operationally unmanageable.

Section I of the Guiding Principles contains general principles. No person shall be discriminated against in the enjoyment of any rights and freedoms on the ground that they are internally displaced.<sup>247</sup> The Principles further affirm that they apply to all IDPs regardless of their national or ethnic origin, race, religion or political opinion.<sup>248</sup> It would not therefore be acceptable to help some IDPs but decline to help others on discriminatory grounds. Such discrimination often occurs in countries where the government is at war with a minority and is only ready to help those of the same ethnic group as the government. At the same time, the Guiding Principles acknowledge that there are some IDPs who may require special attention - children, especially unaccompanied minors; women, especially expectant mothers, mothers with young children and female heads of household; persons with disabilities; and elderly persons.<sup>249</sup> The general principles also emphasize that the primary duty for providing protection and assistance to IDPs lies with their national authorities, and that IDPs have the right to request and receive such assistance from these authorities.<sup>250</sup> The Principles shall be observed by all authorities, groups and persons – nobody is exempt from responsibility.<sup>251</sup> Section I of the Guiding Principles clarifies the rights of IDPs and makes them more specific by addressing the gray areas that were identified in section 3.2.1 of the study under normative gaps. This section of the Guiding Principles provides for the protection of the vulnerable IDPs particularly women and children and

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<sup>247</sup> Principle 1 of the Guiding Principles.

<sup>248</sup> Principle 4(1).

<sup>249</sup> Principle 4(2).

<sup>250</sup> Principle 3.

<sup>251</sup> Principle 2(1).

emphasizes the principle of non-discrimination which is central to the protection of IDPs. The section makes it clear that national authorities bear the primary responsibility towards IDPs. The section addresses the issue of applicability gaps discussed earlier in this study and clarifies who are the duty-bearers and right-holders in situations of internal displacement.

The Principles then go on to address the different phases of displacement. Section II contains principles relating to protection from displacement and innovatively articulates a right not to be arbitrarily displaced.<sup>252</sup> Indeed, this section provides a list of when displacement is not permissible<sup>253</sup>, for example when it is based on policies of 'ethnic cleansing' or similar practices aimed at altering the ethnic, religious or racial composition of the affected population or when it is used as a collective punishment. The Guiding Principles also provide minimum guarantees to be complied with should displacement occur.<sup>254</sup> Section II provides what can be described as the cornerstone of IDPs' protection. It expressly recognises the right not to be arbitrarily displaced – a right which has not been explicitly provided for by the existing international human rights instruments. The provision fills a large gap or *lacunae* in the protection of IDPs and if respected by states would play a major role in reversing internal displacement.

Section III relating to protection during displacement is the main body of the Guiding Principles. This section sets forth the full range of civil, political, economic, social and cultural rights that all people should enjoy and tailor these general rights to the specific needs of the internally displaced. The Principles provide that IDPs have the right to life, dignity, and access to food, water, shelter, clothing, medical services and sanitation essential to their survival. The Principles further provide that IDPs should be protected against human rights abuse, including direct assault, sexual violence, attacks on their camps and settlements, being arbitrarily detained or held hostage in camps, or being forcibly returned to or resettled to places where their life, safety, liberty and/or health would be at risk. In addition, their property and possessions should be protected against destruction and arbitrary illegal appropriation, occupation or use. The section sets an

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<sup>252</sup> Principle 6(1) of the Guiding Principles.

<sup>253</sup> Principle 6(2).

<sup>254</sup> Principles 7- 9.

international minimum standard for the treatment of IDPs and addresses nearly all the normative gaps that were listed under Chapter 3.2.1.

The section clarifies the implementation of civil and political rights vis-à-vis economic, social and cultural rights in the case of IDPs. This was identified as one of the challenges to the protection of IDPs in chapter 3. This is important because it underscores that the needs of the IDPs encompass both material assistance and protection of physical safety and human rights. Some of the needs of IDPs such as food, clean water and healthcare are urgent and cannot to be realized progressively subject to availability of resources. Delay in provision of these basic needs may mean death.

The issue of progressive realization of economic and social rights was considered in a South African case, *Government of the Republic of South Africa & others v Grootboom & Others (Grootboom case)*<sup>255</sup>. The phrase that the state is obliged ‘to take reasonable legislative and other measures’ to realise the rights was construed by the Constitutional Court. One of the issues was whether the state had taken ‘reasonable legislative and other measures’ to realise the right of access to housing. The State was held to be under duty to devise a comprehensive, well-coordinated and workable plan of action to meet its obligations.<sup>256</sup> The programme must be balanced and flexible; it must take care of the short term, medium term and long-term needs. It must include a component that responds to urgent needs of those in desperate situations.<sup>257</sup> Those in desperate need should not be ignored in the interest of an overall programme focused on medium and long-term objectives.<sup>258</sup> In the case of IDPs they are in desperate need and their economic and social rights should be addressed in the short-term.

Section of the Guiding Principles further reinforces the mainstream view that human rights are interdependent, interrelated, and do not need to be prioritised or placed in

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<sup>255</sup> 2000 (11) BCLR 1169 (CC).

<sup>256</sup> As above para 38.

<sup>257</sup> Para 43.

<sup>258</sup> Para 66.

opposition.<sup>259</sup> In fact, the interaction of all rights may be crucial to the achievement of any. Amartya Sen, for example, argues that human rights are both the primary end and the principal means of development.<sup>260</sup> According to this view, basic civil, political, economic and social rights each have intrinsic value. Each right has an instrumental value in that different types of rights reinforce each other, and respect for one category of rights may be essential to achieving another.

Section IV on the provision of humanitarian assistance reaffirms the primary role of the national authorities in providing humanitarian assistance but affirms that when these authorities are unable or unwilling to provide assistance, international organizations have the right to offer their services and consent shall not be arbitrarily withheld.<sup>261</sup> Indeed, these organizations are supposed to be granted rapid and unimpeded access to the internally displaced. This is important because it underscores that the needs of the IDPs encompass both material assistance and protection of physical safety and human rights and that organizations should focus on both. They are of particular importance given the frequent efforts by governments and insurgent groups to obstruct food and medicines to IDPs at risk and the efforts of the international community to reach such populations when governments are unable or unwilling to provide them with relief. The principles affirm the right of IDPs to request humanitarian assistance, the right of international actors to offer such assistance, and the duty of states to accept such offers. This section also underscores the importance of protecting the humanitarian workers who assist the internally displaced.<sup>262</sup> This is a critical provision given the dangers and insecurities to which humanitarian staffs are increasingly being exposed worldwide in their work on behalf of displaced populations.

Section IV represents adaptations of some of the more controversial aspects of international law relating to the protection of civilians in desperate need, an area historically shielded from international scrutiny by the doctrine of state sovereignty.

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<sup>259</sup> See International Council on Human Rights *Policy duties sans frontières human rights and global social justice*, note 200, 12.

<sup>260</sup> See A Sen *Development as freedom* (Oxford: Oxford University Press, 1999) 11.

<sup>261</sup> Principle 25 of the Guiding Principles.

<sup>262</sup> Principle 27.

Chapter 3 identified the doctrine of sovereignty and non-interference as a major challenge to the protection of IDPs. Guiding Principle under section IV reflect effort to balance state sovereignty with humanitarian imperatives. They clearly acknowledge that primary responsibility for the displaced rests with their governments,<sup>263</sup> but they also stipulate that offers of aid from international humanitarian organizations shall not be regarded ‘as an unfriendly act or an interference in a state’s internal affairs.’ Consent for international aid is not to be ‘arbitrarily withheld,’ particularly when the authorities concerned are “unable or unwilling” to provide the required assistance. Further they emphasize that, in providing assistance, international humanitarian organizations should pay attention to ‘protection needs and human rights’ and take ‘measures’ in this regard.<sup>264</sup> Therefore, under the principles, IDPs must have access not only to material assistance but also to protection from violence and abuse - in summary, to enjoy the full range of human rights.

States can no longer claim that their treatment of their citizens is solely a domestic matter. The fact that these states have granted the international community the right to scrutinize their treatment of the rights and freedoms of their citizens also supports the view that the treatment of a state's citizens is no longer a purely domestic matter.<sup>265</sup> As former UN Secretary-General Javier Perez de Cuellar observed in 1991, ‘We are clearly witnessing what is probably an irresistible shift in public attitudes towards the belief that the defense of the oppressed in the name of morality should prevail over frontiers and legal documents.’<sup>266</sup> The classic picture of sovereignty portrayed the state as protector of its people. Gradually, this norm has evolved: rather than having responsibility for their people, states are expected to be responsible to their people – a shift from rule to representation, from authority derived from power to authority based on democratic accountability and realisation of common interest.<sup>267</sup>

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<sup>263</sup> Principles 3 and 25 of the Guiding Principles.

<sup>264</sup> Principle 27.

<sup>265</sup> Many states have become signatories to international human rights treaties. In so doing, each of these states has agreed to make the subject of the human rights treaty a matter of international law and agreed to scrutiny by the various UN Charter and Treaty monitoring and supervisory mechanisms.

<sup>266</sup> Javier Perez de Cuellar, as quoted in FM Deng and R Cohen *Masses in flight*, note 1 above, 1.

<sup>267</sup> See International Council on Human Rights *Policy duties sans frontières human rights and global social justice*, note 198, 48.

Francis Deng, the former RSG, is helping to construct an alternative to the fundamental organizing principle of sovereignty, which otherwise would dictate non-intervention even when a state abuses its internally displaced citizens – power emanates from underscoring a state's responsibilities and accountabilities to both domestic and international constituencies.<sup>268</sup> A state should not be able to claim the prerogatives of sovereignty unless it meets internationally agreed responsibilities, which include protecting the human rights of and providing life-sustaining assistance to all those within its jurisdiction. If a state is unable to fulfill this responsibility, it is expected to request and accept outside offers of aid. If it refuses or deliberately obstructs access and puts large numbers at risk, the international community has a right - even a responsibility- to step in and assert its concern. International involvement can range from diplomatic dialogue to negotiation of access to bring in relief, to political pressure, to sanctions or in exceptional cases, to military intervention.<sup>269</sup>

Section IV lends credence to the notion of the international community to act when national states fail to protect and assist refugees. As discussed earlier in this study the primary duty falls on the state in which a person lives, but, to different degrees and according to circumstances, obligations may also fall on other actors. Such duties also fall on foreign states and international institutions. Those whose economic and social rights are unfulfilled or violated are entitled, in certain circumstances, to look beyond their own borders for redress. The notion of transnational obligations<sup>270</sup> applies to all types of human rights, not just those promoting economic and social well-being. Serious abuses of civil and political rights give rise to claims on outside states to act to the extent possible to prevent or punish such abuses.

Section V of the Guiding Principles addresses return, resettlement and reintegration and emphasizes the right of IDPs to return voluntarily and in safety to their homes or to

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<sup>268</sup> FM Deng and R Cohen *Masses in flight*, note 1 above, 275-6; R Cohen 'Developing an international system for internally displaced persons', note 224 above, 90.

<sup>269</sup> R Cohen 'Developing an international system for internally displaced persons', note 224 above, 91.

<sup>270</sup> For a detailed discussion on transnational obligations see International Council on Human Rights *Policy duties sans frontières human rights and global social justice*, note 200.

resettle voluntarily in another part of the country. In other words, IDPs have options – they can return to their home areas or resettle in another part of the country. This section further provides for the recovery of property and for compensation or reparation if recovery is not possible.<sup>271</sup> It also provides a role for international organizations and others in return, resettlement and reintegration. Emphasis is also given to the full participation of the internally displaced in the planning and management of their returns or resettlement.<sup>272</sup> This is quite important because the involvement of the displaced will help make their returns or resettlement more sustainable.

Throughout the Guiding Principles, special attention is paid to the needs of women and children. For example, they call for special efforts to ensure the full participation of women in the planning and distribution of food and supplies. And they call for special attention to the health needs of women, and affirm the equal rights of women to obtain documents. With regard to children, they prohibit forced recruitment into armed forces, assert that internally displaced children should receive free and compulsory education at the primary level, and require that special efforts should be made to reunify children with their families. The Principles thus offer more protection to vulnerable groups among the IDPs and the sum effect is enhanced protection to the IDPs.

In light of the above the Guiding Principles have been described as ‘the basic international norm for protection’ of IDPs.<sup>273</sup> The Guiding Principles consolidate into one document all the international norms relevant to IDPs, otherwise dispersed in many different instruments. The principles reflect and are consistent with existing international human rights and humanitarian law. In re-stating existing norms, they also seek to address grey areas and gaps in the protection of IDPs. The Principles have acquired wide recognition and acceptance.

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<sup>271</sup> Principle 29 (2) of the Guiding Principles.

<sup>272</sup> Principle 30.

<sup>273</sup> R Cohen ‘Developing an international system for internally displaced persons’, note 224 above, 91.

#### 4.4 Acceptance and strengths of the Guiding Principles on Displacement

There is evidence that the Guiding Principles have acquired universal acceptance and probably developed to soft law norms. The UN agencies, regional organizations, NGOs, and a growing number of governments have begun to cite them and to use them as the basis for policies, laws, and programs for the IDPs.<sup>274</sup> In his report ‘In Larger Freedom’<sup>275</sup>, Kofi Annan (the UN then Secretary-General), in March 2005 urged member states to accept the Guiding Principles as ‘the basic international norm for protection’ of IDPs. Their significance was further underscored in New York in 2005, when all heads of state and government, in the World Summit Outcome Document, unanimously recognized the Guiding Principles as ‘an important international framework for the protection of internally displaced persons and resolve to take effective measures to increase the protection of internally displaced persons’.<sup>276</sup> In November 2004, the international community invoked the Guiding Principles, when condemning the forced relocation of IDPs in Darfur by the Sudan government.<sup>277</sup> Some of the Special Procedures of the former UN Human Rights Commission (now the Human Rights Council) and in recent times the treaty bodies – the expert committees monitoring the implementation of the ICCPR or the CRC and other UN human rights conventions – have called on states to respect the Guiding Principles.<sup>278</sup> At the regional level, a growing number of intergovernmental organisations began to rely on the principles.<sup>279</sup> The Inter-American Commission on Human Rights of the Organization of American

<sup>274</sup> R Cohen ‘Developing an international system for internally displaced persons’, note 224 above, 91.

<sup>275</sup> UN General Assembly *In larger freedom: towards development, security and human rights for all* Report of the Secretary-General, UN Doc A/59/205, 21 March 2005, para 210

<sup>276</sup> GA res 60/1, 2005 World Summit Outcome, 24 October, 2005 para 132, available at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement> (accessed 19 December 2007).

<sup>277</sup> News release, UN news service, UN Humanitarian Office hears of further forced relocation of displaced in Sudan, 3 November 2004 quoted in H Entwisle ‘Tracing cascades: The normative development of the UN Guiding Principles on Internal Displacement’ (2005) 19 *Georgetown Immigration Law Journal* 369, 370.

<sup>278</sup> See W Kälin ‘The future of the Guiding Principles on Internal Displacement’ (December 2006) *Forced Migration Review/Brookings-Bern Special Issue 5*, available at <http://www.fmreview.org/FMRpdfs/BrookingsSpecial/03.pdf> (accessed 3 January 2008); eg, the Committee on the Rights of the Child, concluding observations of the Committee on the Rights of the Child: democratic republic of Congo, CRC/C/15/Add.153, 9 July 2001, para 63, recommending ‘that the state party make every effort to respect and implement the Guiding Principles on Internal Displacement’.

<sup>279</sup> See UN ECOSOC, Report of the Representative *Specific groups and individuals: Mass exoduses and displaced persons* UN Doc E/CN.4/2002/95, 16 January 2002, paras 41 – 49.

States (OAS) began to use the principles as a benchmark for evaluating conditions in member states and as a basis for advocacy, most notably in Guatemala and Colombia.<sup>280</sup> In Africa, which has more IDPs than any other continent, the OAU (now AU) formally acknowledged the principles;<sup>281</sup> the Economic Community of West African States (ECOWAS) called on its member states to disseminate and apply them;<sup>282</sup> and in the Horn of Africa, the Intergovernmental Authority on Development (IGAD), in a ministerial declaration, called the principles a ‘useful tool’ in the development of national policies on internal displacement. In Europe, the 55 member Organization for Security and Cooperation in Europe (OSCE) acknowledged the principles as ‘a useful framework for the work of the OSCE’ in dealing with internal displacement.<sup>283</sup> In 2003, the Parliamentary Assembly of the Council of Europe urged its member states to incorporate the principles into their domestic laws.<sup>284</sup>

In the field, UN humanitarian and development agencies began to use the principles. UNHCR developed programs based on the principles to benefit IDPs in Sri Lanka.<sup>285</sup> Other agencies used the principles as a checklist to monitor and assess IDP needs. Still others organized training sessions around the principles to raise awareness of the problems of the internally displaced.<sup>286</sup> The OCHA printed 10,000 copies of the principles in various languages and began disseminating them worldwide.<sup>287</sup>

The impact of the principles has begun to be felt at the national level, where a small but increasing number of governments have begun to develop policies based on them and have also incorporated their provisions into national law. In Colombia, for example, the Constitutional Court cited the Guiding Principles as a basis for two of its judgments in support of IDPs who had claimed that social service agencies were not providing them

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<sup>280</sup> See UN ECOSOC, Report of the Representative *Specific groups and individuals: Mass exoduses and displaced persons*, note 279 above, para 44.

<sup>281</sup> As above, para 42.

<sup>282</sup> As above, para 43.

<sup>283</sup> As above para 45.

<sup>284</sup> See R Cohen ‘The Guiding Principles on internal displacement: An innovation in international standard setting’, note 236 above, 470.

<sup>285</sup> As above, 469.

<sup>286</sup> As above.

<sup>287</sup> As above.

with timely, sufficient assistance.<sup>288</sup> In Peru, the Congress in 2004 adopted a law based on the principles that establishes material benefits for IDPs.<sup>289</sup> In Angola, the government incorporated the Guiding Principles into its law on resettlement in order to guide IDP returns after the civil war and in Afghanistan, the principles are being used to draft a decree for safe return.<sup>290</sup> Other governments (e.g., Burundi, Colombia, the Philippines, Sri Lanka, and Uganda) have developed national policies based on the principles<sup>291</sup>.

Even non-state actors have begun to acknowledge and use the principles. The Sudan People's Liberation Movement and Army (SPLM/A) drafted a policy on internal displacement based on the principles, and the Liberation Tigers of Tamil Eelam (LTTE) in Sri Lanka have begun to receive training in them.<sup>292</sup>

Despite the wide and near universal acceptance of the Guiding Principles, they remain just that. The Principles have not successfully addressed the plight of IDPs whose number continues to rise. Below is a discussion on the weaknesses of the principles.

#### **4.5 Weaknesses of the Guiding Principles on Displacement**

The most significant weakness of the Guiding Principles is that it is a non-binding instrument. However useful the Guiding Principles may be states as well as other actors, or even international organizations, are not legally bound to respect them and cannot be held liable for violating them. The obvious danger is that they risk to become dead letter, as there is no mechanism to ensure their proper implementation.<sup>293</sup> No monitoring and

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<sup>288</sup> See R Cohen 'The Guiding Principles on internal displacement: An innovation in international standard setting', note 236 above, 469.

<sup>289</sup> As above.

<sup>290</sup> As above.

<sup>291</sup> As above. The government of Burundi, for example, in 2001 signed a protocol to create a framework for the protection of IDPs and accepted to be 'bound' by 478 *The Guiding Principles on Internal Displacement* the Guiding Principles. The Ugandan government drafted a policy on IDPs in 2003, which commits it to take the Guiding Principles into account. The Sri Lankan government in 2002 adopted a national framework for relief, rehabilitation, and reconciliation based in part on the Guiding Principles.

<sup>292</sup> See R Cohen 'The Guiding Principles on internal displacement: An innovation in international standard setting', note 236 above, 471.

<sup>293</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 66.

supervising mechanism exists for the Guiding Principles and this presents a huge challenge to the implementation of the Principles. As the RSG commented in 2002, ‘While the Guiding Principles have been well received at the rhetorical level, their implementation remains problematic, and often rudimentary.’<sup>294</sup> Some international organizations have found it difficult to translate the principles into practical steps on the ground, and regional organizations in Asia, like the Association of Southeast Asian Nations (ASEAN), have resisted acknowledging them at all, in deference to concerns about sovereignty.<sup>295</sup>

Acknowledging the Guiding Principles and basing laws and policies on them does not guarantee that these laws and policies will be implemented. According to the IDMC, only eight governments of about twenty with laws or policies on internal displacement ‘can be considered to be making a genuine effort to implement them.’<sup>296</sup> Some experts as a result have asked whether compliance with the Principles would be greater if there were a legally binding treaty on internal displacement.<sup>297</sup> In Angola, the government has been slow to implement its law.<sup>298</sup> In Colombia too, the announcement of laws and policies on IDPs has not been matched by the will to carry them out.<sup>299</sup> Much is needed in the way of monitoring, supervising, advocacy, and the engagement of a full range of international and local actors to hold governments and non-state actors accountable. But this would be a difficult task in the absence of a legally binding instrument.

Although the Guiding Principles address most aspects of the problem of internal displacement, some issues are mentioned too briefly or not at all. For instance the protection of minorities appears inadequate while cases of forcible displacement of

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<sup>294</sup> UN Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng, UN Doc E/CN.4/2002/95, 16 January 2002 para 98.

<sup>295</sup> See R Cohen ‘The Guiding Principles on Internal Displacement: An innovation in international standard setting’, note 236, 470.

<sup>296</sup> IDMC (2005) *Global overview of trends and developments in 2005*, 17.

<sup>297</sup> See, eg, LT Lee ‘The case for an international convention on displaced people,’ in JH Williams (ed) *Invisible Refugees* (Washington, DC: Chicago–Kent College of Law and Pax International, 2003).

<sup>298</sup> A Lari ‘Returning home to a normal life? The plight of Angola’s internally displaced’ occasional paper, *African Security Analysis Programme*, 5 February 2004, 9.

<sup>299</sup> R Cohen ‘The Guiding Principles on internal displacement: An innovation in international standard setting’, note 236 above, 470.

minorities are numerous.<sup>300</sup> Minorities are often the first targets of persecution and as a result the first populations to be internally displaced.<sup>301</sup> Minorities are mentioned together with peasants and pastoralists in Principle 9 and Principle 6(2)(a) which prohibits ethnic cleansing thus indirectly addressing minorities. More specific and stronger provisions providing for full respect of minority rights would have been desirable.

Safe areas or havens<sup>302</sup> are not addressed in the Guiding Principles, thus the implications of their establishment on the freedom of movement within the country and on the right to asylum not explored.<sup>303</sup> Consequently there is no position taken by the Guiding Principles on this matter.

Due to their unusual background and development in the history of international standard setting some countries have expressed reservations on the applicability of the Guiding Principles. Although governmental bodies - the 53-Member Human Rights Commission and the UN General Assembly requested the creation of a normative framework for IDPs, the drafting, review process, and finalization were done outside the traditional intergovernmental process. Unlike other standards accepted and widely used by the international community, the Guiding Principles were not drafted by an expert body of the Commission. They were prepared and finalized by outside international experts, albeit under the direction of the RSG. This led a number of governments to raise concerns about the process by which the principles were developed and to question their international standing as a result. Egypt, Sudan, and India in particular expressed concerns about standard setting by non-governmental actors and made a point of reminding states in ECOSOC and the General Assembly that the principles were not legally binding.<sup>304</sup> At base was the concern that the promotion of international standards

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<sup>300</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 65.

<sup>301</sup> As above.

<sup>302</sup> 'Safe-havens' are camps where displaced persons are granted temporary sanctuary and shelter by the UN or by specific countries - often established with the hope that the displaced people will soon be able to return home. For a general discussion of the growing use of 'safe-havens' and the issues they present, see C Tiso 'Safe-haven refugee programs: A method of combating international refugee Crises, 8 (1994) *Georgetown Immigration Law Journal* 575.

<sup>303</sup> C Phuong *The international protection of internally displaced persons*, note 41 above, 65.

<sup>304</sup> As above.

not negotiated by governments and on a subject as sensitive as IDPs could mean an erosion of state sovereignty.<sup>305</sup>

#### 4.6 Conclusion

The Guiding Principles fill a major gap in the international protection system for IDPs. As noted above evidence for the acceptance of the Principles can be found at all levels of the international community. UN member states recognized the Guiding Principles as ‘an important international framework for the protection of internally displaced persons and resolve to take effective measures to increase the protection of internally displaced persons’.<sup>306</sup> Standards have existed for refugees forced to flee their countries in search of international protection abroad. Now those forcibly displaced within their own countries have a document to turn to when they are denied life-saving protection and assistance. However, the Guiding Principles suffer one major weakness – they are not binding. In the absence of its legal enforceability, the competence of IDPs to seek and receive protection and assistance as a matter of right remains uncertain and contingent upon international politics and goodwill.

The unease caused by the Guiding Principles among some states relate to issue of sovereignty. The fact that the principles reinforce the idea that governments have an obligation to protect and assist their displaced populations, and that if they lack capacity or are unwilling to do so the international community has an obligation to become involved. It is this evolution in thinking about sovereignty that is at the core of the controversy about the Guiding Principles.

To make the Guiding Principles more effective in ensuring that the rights of IDPs are respected by all actors it is imperative to address the weaknesses identified in this study and overcome the reservations expressed by some of the states. The international community has to look beyond the Guiding Principles for a more effective international legal regime for the protection and assistance of IDPs.

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<sup>305</sup> See R Cohen ‘The Guiding Principles on internal displacement: An innovation in international standard setting’, note 236 above, 469.

<sup>306</sup> GA res/60/1, 2005 World Summit Outcome, 24 October, 2005, para 132.

## CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

### 5.1 Conclusion

There does not yet exist a reliable or predictable system to provide aid and protection to those trapped inside borders. Lack of consensus over sovereignty, humanitarian action and a collective responsibility to protect continues to thwart the creation of a system. Although the Guiding Principles have been well received, ‘their implementation remains problematic, and often rudimentary’.<sup>307</sup>

One of the major challenges facing the world today is the problem of protecting and offering assistance to persons displaced within their countries. It has become a crisis that is escalating with the high numbers and deteriorating conditions of internally displaced persons (IDPs). International response to the crisis has been hampered with lack of clarity on internal displacement concepts. The lack of specificity and precision in the existing protection regime of IDPs has led to inadequate protection and assistance of IDPs. There is no universal and legal definition of the category of people identified as internally displaced, views vary as what ‘protection’ constitutes and to whom should it be extended to. The sheer number of IDPs in the world today coupled with the human rights violations that they face testifies to the fact that the protections offered by human rights and humanitarian laws are not effective. The violations of human rights and dignity of IDPs continue unabated in many parts of the world. As the study noted, a myriad of imprecise international legal concepts, resource constraint, and institutional inadequacy predicate a very circumscribed protection regime of IDPs in international law.

However, the international community has continued its efforts to set up a functioning system capable of responding to the needs IDPs in a timely, predictable and comprehensive manner when national governments are not able or willing to do so. Although progress was made with the drafting and adoption of the Guiding Principles on Displacement by the UN Commission on Human Rights, implementation of the Guiding Principles remains a challenge because of their non-binding nature. The Guiding

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<sup>307</sup> R Cohen ‘Developing an international system for internally displaced persons’, note 224 above, 100.

Principles have the potential of generating a false expectation of legal coverage and protection that they are currently not in a position to deliver.<sup>308</sup> An obvious disadvantage of the non-binding nature of the Guiding Principles is the fact that states cannot be held accountable if they disregard them and that, as such, the Guiding Principles cannot be invoked in legal proceedings at both the international and domestic levels. Some states have also expressed reservations on the applicability of the Guiding Principles on the basis that they are a violation of their sovereignty. They argue that the international community matters relating to IDPs should be left to the respective national governments to deal with and the international community or other states have no business interfering.

The study concludes that the existing international legal protection and assistance extended to IDPs is inadequate and ineffective. Deficiencies identified by the study need to be addressed and overcome in order to develop a credible protection regime for IDPs. This calls for a reappraisal of relevant principles and practices of international law in order for them to be responsive to the changing needs and shared expectation of the international community in relation to the protection and assistance of IDPs. It would require improved Guiding Principles that establish binding obligations, greater allocation of resources, institutional accountability at the operational level and reconceiving of the principle of sovereignty and non-interference. The next section discusses solutions that the international community may employ towards an effective legal regime for the protection and assistance of IDPs.

## **5.2 Recommendations: Towards an effective international legal framework for the protection and assistance of IDPs**

The previous section concluded that the international legal framework for the protection of IDPs is inadequate. This section explores ways that may improve the protection and assistance of IDPs.

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<sup>308</sup> M Islam 'The Sudanese Darfur crisis and internally displaced persons in international law: The least protection for the most vulnerable' (2006) 18 *International Journal of Refugee Law*, note 222 above, 366.

The crisis and challenges presented by internal displacement to the international community requires a comprehensive, holistic and rights-based approach with in-built strategies for addressing causes of displacement and rights of the displaced. Addressing the immediate needs at the aftermath of displacement is nothing but temporary crisis management. It cannot be a sustainable means of enduring solution to the mounting problem of displacement. The issue of forced internal displacement cannot be solved in isolation from and independent of the existing complexion of international order. It must be placed in the broader context of global problem of insecurity and its underlying causes, such as glaring economic disparity, poverty, overpopulation, environmental degradation, global political and military uncertainty, intolerance of differing systems of governance, inability or unwillingness of states to ensure the peaceful co-existence of their multi-racial populations and the protection of minorities, primacy of violence over peace, and power-driven confrontationalist attitude to dispute resolution.<sup>309</sup> These factors contribute in one way or another to the ongoing problem of involuntary population movements all over the world. Such a holistic and human-rights approach for a long-term solution will depend upon and vary with the extent to which states redefine and reconcile their independent national interests to accommodate them in an inclusive and comprehensive identification with the global good.

In a rights-based approach, human rights determine the relationship between individuals and groups with valid claims (rights-holders) and state and non-state actors with correlative obligations (duty-bearers). It identifies rights-holders and their entitlements and corresponding duty-bearers and their obligations, and works towards strengthening the capacities of rights-holders to make their claims, and of duty-bearers to meet their obligations.<sup>310</sup> States have the primary responsibility in the promotion and protection of human rights of any individual on their territory or in their jurisdiction and therefore are required to ensure the fulfillment of human rights by acting in a way that enables rights-holders to enjoy the rights to which they are entitled. A rights-based approach adds

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<sup>309</sup> See M Islam 'The Sudanese Darfur crisis and internally displaced persons in international law: The least protection for the most vulnerable', note 222 above, 384.

<sup>310</sup> See generally UNDP *A human rights-based approach to development programming in UNDP – Adding the missing link*, available at [http://www.undp.org/governance/docs/HR\\_Pub\\_Missinglink.pdf](http://www.undp.org/governance/docs/HR_Pub_Missinglink.pdf) (accessed 4 January 2008).

legal obligation and accountability. It is based on international standards and thus consists of obligations based on legal entitlements. A human rights-based would lay foundation for a comprehensive international legal framework addressing the specific protection needs of IDPs.

A comprehensive international legal framework should be aimed at protecting and assisting IDPs. It should provide a definition of IDPs that is precise but flexible enough to cover all IDPs in need of international protection. It should establish the scope of the responsibility of states for the protection of IDPs; outline the applicable principles of protection and assistance; and lay out obligations for the member states. The legal framework should proceed on the basis of state responsibility and the responsibility of non-state actors during all phases of displacement, including return, reintegration or relocation elsewhere, reinsertion, and reparations for violations of human rights and humanitarian law. It should establish institutional machinery for coordinating protection and assistance to IDPs. The international organization responsible for assistance and protection to IDPs should have automatic and unqualified access to IDPs, without the prior consent of the state. The ability of the organization to call upon logistical assistance from other states should be considered. The practical measures which would best ensure that assistance and protection are provided to IDPs persons should also be carefully considered. The use of cross-border feeding programs, relief corridors, safe havens and days of tranquility, all of which have been used in the past should be evaluated to determine their effectiveness and perhaps incorporated into a document stating the forms such assistance would assume.<sup>311</sup>

The framework should further provide a means for assistance and for monitoring protection of IDPs as well as for ensuring compliance by the member states. The next section looks at the options that the UN and the international community at large may consider towards establishing such a framework that would comprehensively address the plight of IDPs.

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<sup>311</sup> C Lewis 'Dealing with the problem of internally displaced persons', note 210 above, 719.

### 5.2.1 A binding UN Convention

Whether states should adopt a legally binding treaty on IDPs remains a legitimate and valid question and some commentators have suggested the way to reinforce IDP protection is to enshrine the Guiding Principles in a UN treaty or creation of a IDPs-specific and independent international legal instrument. Those in favor of a convention argue that a binding instrument would have more authority and international recognition and would hold states accountable if they disregard its provisions.<sup>312</sup> Some NGOs also claim that if there were a binding instrument, governments would feel more pressured to take responsibility for IDPs.<sup>313</sup> Advocates of a treaty argue that unlike existing international human rights law and humanitarian law, a treaty on internal displacement would outline enforcement procedures for the rights which it champions.<sup>314</sup> It will also advance notions of state responsibility by codifying with specificity an obligation of states to avoid measures which could lead to displacement of their population. In the event that states fail to meet this responsibility, punitive measures may be formally sanctioned.

The beneficial effects of such a treaty would be manifold. It would elevate the Guiding Principles to treaty law.<sup>315</sup> Individual rights for displaced persons and a doctrine of state responsibility would be formally established and much of the ambiguity within existing legal doctrines relating to displacement will be eliminated, and this will result in greater coherence in the international community's response to crises.<sup>316</sup> There will be greater

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<sup>312</sup> See, eg, LT Lee 'The case for an international convention on displaced people,' note 297 above; P Freedman 'International intervention to combat the explosion of refugees and internally displaced persons' (1995) 9 *Georgetown Immigration Law Journal* 565.

<sup>313</sup> See, eg, PA Gaffar 'Responsibility toward the displaced' (2005) 1 *IDP Newsletter* 17; Pax International *Internally displaced persons – A discussion paper*, Washington DC, March 2002 in C Phuong, *The international protection of internally displaced persons*, note 41 above, 73.

<sup>314</sup> See P Freedman 'International intervention to combat the explosion of refugees and internally displaced persons', note 312 above, 598.

<sup>315</sup> Treaty law carries more weight than customary law. It is not open to the ambiguity and divergent views which often surround customary international law. See Statute of the International Court of Justice, Article 38, providing the basic hierarchy for sources of international law. Article 38 ranks international conventions and treaties foremost, followed by customary international law which consists of generally accepted practices.

<sup>316</sup> See C Lewis 'Dealing with the problem of internally displaced persons', note 210 above, 703.

objectivity and consistency in the international community's response to displacement.<sup>317</sup> Outlining the criteria and standards to which states must adhere will reduce the perceived selectivity with which the international community intervenes and make interventions less ad-hoc.<sup>318</sup> Objective criteria will be established that indicate when intervention is appropriate; formalizing the criteria for intervention will enhance the legitimacy of and support for intervention.<sup>319</sup> A treaty will also foster international solidarity and unanimity in condemning state conduct which generates internal displacement and punishing those responsible.<sup>320</sup>

However, they are those who view a UN treaty as not a viable option.<sup>321</sup> W Kälin, the current RSG, offers several reasons for avoiding the negotiation of a binding instrument at this time.<sup>322</sup> Human rights treaty making, he points out, is a very cumbersome process and has become even more complicated in recent years and could take a decade or more to complete a treaty. There is then no guarantee that the necessary ratifications will be secured or that the states most affected by the problem will ratify the instrument or do so without crippling reservations. Moreover, states do not always comply even with the treaties that they ratify. In addition, the treaty route holds particular dangers. Negotiating a treaty could become a pretext for watering down accepted provisions of international human rights and humanitarian law upon which the Principles are based. Until such time as the international community is ready to adopt a binding instrument that accords with the protection level set forth in the Guiding Principles, the RSG recommends that the most promising approach remains expanding the usage of the Principles. To encourage greater usage, the RSG has developed a Legislator's Manual for lawmakers and policymakers to assist them in translating the rather abstract principles of international law into concrete national policies and laws based on the Guiding Principles.

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<sup>317</sup> See P Freedman 'International intervention to combat the explosion of refugees and internally displaced persons', note 312 above, 598.

<sup>318</sup> As above.

<sup>319</sup> As above.

<sup>320</sup> As above.

<sup>321</sup> See, eg, C Phuong, *The international protection of internally displaced persons*, note 41 above, 73 – 74; W Kälin 'How hard is soft law?' note 45 above, 2-5.

<sup>322</sup> As above.

Given the difficulties in treaty-making other suggestions have been proffered: As a viable alternative, an existing international human rights instrument can be equipped with express mandate to confer the capacity on IDPs to invoke its provisions for protection. Such an instrument must be comprehensive enough to address their diverse problems emanating from internal displacement.<sup>323</sup> Another interesting perspective would be the elaboration of additional protocols to regional human rights conventions that would focus on incorporating the Guiding Principles into the regional human rights law that are not, or only implicitly, covered by the African, Inter-American and European human rights charters and conventions.<sup>324</sup> The added value of such protocols would lie in the fact that IDPs could access the individual complaints procedures more easily and allow the regional human rights courts to develop an IDP-specific body of jurisprudence.<sup>325</sup>

Currently, major legal developments concerning the protection of IDPs are unfolding in the AU as well as in the Great Lakes region of East, Central, and Southern Africa. A Convention on Internally Displaced Persons is being drafted under the AU auspices in the aftermath of a Draft Protocol on Protection and Assistance to Internally Displaced Persons in the Great Lakes Region, 2006. Both of these have spurred the ECOWAS to consider a legal framework for protecting IDPs as well.<sup>326</sup> The steps taken by the AU to conclude and adopt a Convention on the Protection and Assistance of Internally Displaced Persons will lead to a legal landmark in this field of human rights and international humanitarian law.<sup>327</sup> Africa will have scored a first among the regional systems by establishing such a framework. But, the Great Lakes region will justifiably claim this accolade, having concluded a Protocol on the Protection and Assistance to Internally Displaced Persons ahead of the AU. The study hopes that the developments in Africa will inspire the international community to formulate and adopt such an instrument, if not for the world as a whole, then at least for others regions and

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<sup>323</sup> See P Freedman 'International intervention to combat the explosion of refugees and internally displaced persons', note 312 above, 598.

<sup>324</sup> See W Kälin 'The future of the Guiding Principles on Internal Displacement', note 278 above, 6.

<sup>325</sup> As above.

<sup>326</sup> See C Beyani 'Recent developments the elaboration of a legal framework for the protection of internally displaced persons in Africa', note 21 above, 188.

<sup>327</sup> As above, 197.

particularly Asia and Latin America where the problem of the protection of IDPs poses similar challenges.

It is highly advisable that during a period of UN reform, it is timely for the international community to act on ideas for reworking the UN's arrangements for addressing internal displacement. It could not do better than to begin by addressing the needs of IDPs and to address the question posed by the United Kingdom's Secretary of State for International Development, Hilary Benn in 2004: 'Is it really sensible that we have different systems for dealing with people fleeing their homes dependent on whether they happen to have crossed an international border?'<sup>328</sup>

The legal framework and institutional arrangements for protecting and assisting IDPs has been developing over the years. It is our collective responsibility now to learn from the lessons of the past in developing new mechanisms for responding effectively to the challenges of the future. Meeting the needs of the world's IDPs is much more complex than simply providing short-term security and assistance. It is about addressing the underlying causes of displacement in the first place. It is about recognizing the human rights of all men, women and children to enjoy peace, security and dignity without having to flee their homes. This is the task ahead for governments, international organizations and the people of the world in the new millennium. A more reliable and predictable system for those trapped inside borders will require stronger legal, institutional, and protection measures from the international community coupled with total commitment to the protection and respect for human rights.

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<sup>328</sup> Lewis 'Dealing with the problem of internally displaced persons', note 210 above, 719

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### **International and regional human rights instruments/declarations**

The 1948 Universal Declaration of Human Rights.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

The 1949 Geneva Conventions (I-IV) and their two Additional Protocols of 1977.

The 1951 Convention Relating to the Status of Refugees.

The 1965 International Convention on the Elimination of All Forms of Racial Discrimination.

The 1966 International Covenant on Civil and Political Rights.

The 1966 International Covenant on Economic, Social and Cultural Rights.

The 1967 Protocol Relating to the Status of Refugees.

The 1969 OAU (now AU) Convention Governing the Specific Aspects of Refugee Problems in Africa.

The 1969 Vienna Convention on the Law of Treaties.

The 1979 Convention on Elimination of Discrimination Against Women.

The 1984 Cartagena Declaration on Refugees.

The 1984 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

The 1989 Convention on the Rights of the Child.

The 1998 Guiding Principles on Internal Displacement.

### **International law decisions**

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*Malawi Association and Others v. Mauritania* (2000) AHRLR 149.

### **Municipal decisions**

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