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## **The internally displaced in International law – do they require enhanced protection?**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

## The Internally Displaced in International Law

### Do they Require Enhanced Protection?

*“If one considers how far the world community has journeyed since 1989 it just might be possible that by the end of the 20<sup>th</sup> century the senseless abuse of people within borders will be a strictly historical phenomenon.”<sup>1</sup>*

David J. Scheffer

### Introduction

The image is familiar. A line of exhausted people dragging their possessions down a dirt road in an attempt to flee armed conflict, internal strife, ethnic tensions or large scale abuses of human rights. One usually associates refugees with this image. And indeed, in 1982, nine out of ten of these people were refugees while only one in ten represented an internally displaced person (IDP).<sup>2</sup> At the time, the number of IDPs amounted to 1.2 million and 11 countries were reported to be affected by internal displacement.<sup>3</sup>

In only 15 years, these figures had changed dramatically. By 1997, the number of IDPs had risen to over 20 million people, found in at least 35 countries.<sup>4</sup> At the turn of the century, the number of IDPs had mushroomed again – this time to roughly 25 million.<sup>5</sup> There it has remained without significant changes and today IDPs outnumber refugees by more than two to one.<sup>6</sup> Some 50 countries are reported to be affected worldwide.<sup>7</sup> Africa, where conflicts combined with poverty abound more than anywhere else in the world, is the continent most burdened by internal displacement. It hosts an IDP population of over 13 million in 19 of its countries.<sup>8</sup>

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<sup>1</sup> Scheffer 'Toward a Modern Doctrine of Humanitarian Intervention' (1992) 23 *U. Tol. L. Rev.* 293.

<sup>2</sup> Mass Exoduses and Displaced Persons, Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng, U.N. Doc. E/CN.4/2003/86 para. 4.

<sup>3</sup> Mass Exoduses and Displaced Persons (no. 2) para. 4.

<sup>4</sup> Cohen & Deng *The Forsaken People* 1.

<sup>5</sup> Internal Displacement Monitoring Centre (IDMC), Global Statistics available at [www.internaldisplacement.org/8025708F004CE90B/\(httpPages\)/22FB1D4E2B196DAA802570BB005E787C?OpenDocument&count=1000](http://www.internaldisplacement.org/8025708F004CE90B/(httpPages)/22FB1D4E2B196DAA802570BB005E787C?OpenDocument&count=1000).

<sup>6</sup> Mass Exoduses and Displaced Persons (no. 2) para. 4.

<sup>7</sup> Mass Exoduses and Displaced Persons (no. 2) para. 4.

<sup>8</sup> IDMC Global Overview of Trends and Developments in 2004 at 10, available at [www.internaldisplacement.org/8025708F004BE3B1/\(httpInfoFiles\)/5136B3B276CF8B9580257090004E66A8/\\$file/Global\\_overview\\_2004\\_final\\_low.pdf](http://www.internaldisplacement.org/8025708F004BE3B1/(httpInfoFiles)/5136B3B276CF8B9580257090004E66A8/$file/Global_overview_2004_final_low.pdf).

However, internal displacement can by no means be labeled an African problem. In Latin America 3.7 million people are internally displaced, in Asia and the Pacific the number reaches 3.3 million, Europe has an IDP population of 3 million and in the Middle East over 2 million displaced can be counted at present.<sup>9</sup> Thus, it is safe to say that the crisis of internal displacement is global in dimension.

The enormous increase in numbers is, at least in part, deemed to be a consequence of the collapse of the Soviet Union and the subsequent end of the Cold War.<sup>10</sup> Conflicts that had previously been suppressed by the superpowers resurfaced and the number of civil wars, triggering displacement, ballooned.<sup>11</sup> It is also considered to be a result of increasing reluctance to grant asylum, on the part of refugee receiving nations.<sup>12</sup> As more and more people tried to seek asylum the attitude towards refugees changed. They were suddenly perceived and depicted as threats to the financial, cultural and moral standing of a country. Over time, more restrictive asylum policies have been pursued which now further internal displacement.<sup>13</sup>

Forced to leave their homes, land and belongings behind, IDPs are a particularly vulnerable group of victims of conflict or abuse. Some even contend that they constitute the single largest at-risk population in the world.<sup>14</sup> Displaced persons are frequently deprived of adequate shelter, food and health services.<sup>15</sup> They also face poor prospects for employment and education.<sup>16</sup> Moreover and in contrast to refugees, the internally displaced tend to remain close to or become trapped in zones of conflict.<sup>17</sup> This increases the risk of physical assault, sexual violence, abduction and forced conscription, to name only a few of the horrors they face. Not surprisingly, the internally displaced suffer significantly higher rates of mortality than the general population.<sup>18</sup>

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<sup>9</sup> IDMC Global Statistics (no. 5).

<sup>10</sup> Freedman 'International Intervention to Combat the Explosion of Refugees and Internally Displaced Persons' (1995) 6 *Geo. Immigr. L. J.* 565. See also: Mass Exoduses and Displaced Persons (no. 2) para. 8

<sup>11</sup> Freedman (no. 10) 565; Mass Exoduses and Displaced Persons (no. 2) para. 8.

<sup>12</sup> Phuong *The International Protection of Internally Displaced Persons* 4.

<sup>13</sup> Freedman (no. 10) 566.

<sup>14</sup> Korn *Exodus within Borders* 2; Internal Displacement Monitoring Centre, Global Statistics (no. 5).

<sup>15</sup> Mass Exoduses and Displaced Persons (no. 2) para. 5.

<sup>16</sup> Korn (no. 14) 16.

<sup>17</sup> Mass Exoduses and Displaced Persons (no. 2) para. 5.

<sup>18</sup> Toole & Waldman 'The Public Health Aspects of Complex Emergencies and Refugee Situations' (1997) 18 *Annual Rev. Public Health* 289-291.

Despite the alarming number of IDPs and their heightened vulnerability they enjoy no specific legal protection under international law. In this respect the internally displaced are distinct from refugees who are protected through the 1951 Refugee Convention<sup>19</sup> and the 1967 Protocol relating to the Status of Refugees.<sup>20</sup> At first this may seem surprising as both groups are forced to leave their homes and communities behind and subsequently face similar problems. However, a person can only obtain the status of refugee by crossing a state border.<sup>21</sup> The internally displaced have, by definition, not crossed the border into another country, thus remain excluded from the refugee protection regime.

As a result, they depend on their own governments to protect and assist them. However, these governments are often unable or unwilling to provide the necessary assistance and in some cases even constitute the source of displacement.<sup>22</sup> This leaves IDPs with nothing but the international community to turn to. In the eyes of the international community, however, internal displacement has long been perceived as a matter falling within the realm of state sovereignty.<sup>23</sup> The principle of state sovereignty, which denotes that a state has full and unchallengeable authority over its territory and all the persons therein, affords governments wide leeway when it comes to the treatment of people within the state.<sup>24</sup> Seen as a purely internal matter, displacement was felt to be beyond international scrutiny.

This attitude has only changed over the last two decades, when IDPs virtually forced themselves into the attention of the international community. Due to their growing numbers and their enormous suffering, an international community, who had already taken up the task to promote and protect human rights, could no longer ignore the plight of the internally displaced.<sup>25</sup>

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<sup>19</sup> Refugee Convention available at [www.unhcr.ch/html/menu3/b/o\\_c\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_c_ref.htm).

<sup>20</sup> Protocol relating to the Status of Refugees available at [www.unhcr.ch/html/menu3/b/o\\_p\\_ref.htm](http://www.unhcr.ch/html/menu3/b/o_p_ref.htm). The Refugee Convention is only applicable to people fleeing events which occurred in Europe before 1 January 1951. Article 1 (2) of the Protocol deleted the temporal and territorial limitations, thus, broadened its scope.

<sup>21</sup> See Article 1 A. (2) of the Refugee Convention.

<sup>22</sup> Cohen 'International Protection for Internally Displaced Persons' at 18 in *Human Rights: An Agenda for the Next Century*.

<sup>23</sup> Deng 'International Response to Internal Displacement: A Revolution in the Making' (2004) 11 No. 3 *Hum. Rts. Brief* 24.

<sup>24</sup> Dixon *International Law* 144.

<sup>25</sup> Article 1 (3) of the U.N. Charter reads:

"The Purposes of the United Nations are to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinctions as to race, sex, language or religion."

Article 55 (c) of the U.N. Charter reads:

This work will examine the situation of the internally displaced from the perspective of international law. Chapter one will provide a brief outline of how the meaning of the term IDP developed<sup>26</sup> and then explain who, in the context of this paper, is covered by the term IDP. Chapter two will then put forth the legal framework applicable to IDPs and examine whether these rules grant sufficient protection. Chapter three will address if and how the international community can enhance their protection. In this context it must be explored whether the principle of state sovereignty still presents a serious challenge to the ability of the international community to intervene on behalf of the internally displaced. Finally, the focus will turn to the situation in the Sudan. It is the country with the largest population of IDPs, estimated at over five million.<sup>27</sup> The example of the Sudan will provide insight into the causes of displacement, the needs of the displaced and whether they receive adequate assistance and protection.

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“The United Nations shall promote universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.”.

<sup>26</sup> As to date no formal legal definition of the term IDP exists. Thus, the outline will refer to what can be called a descriptive definition.

<sup>27</sup> IDMC Global Statistics (estimating 5.355.000 million IDPs in Sudan, August 2005) (no. 5) .

## Chapter I

### Defining 'Internally Displaced Persons'

#### 1. Overview of the Ongoing Controversy

In the early 1990s, a decade after the dimensions of internal displacement were first assessed, the issue emerged onto the international agenda. In March 1991, the United Nations Commission on Human Rights called upon the Secretary-General to prepare a report on internal displacement which then triggered more active involvement by the U.N. on the issue.<sup>28</sup> It led, for example, to the appointment of a Special Representative on Internally Displaced Persons who was given the mandate to analyse the normative framework of protection applicable to the situation of internal displacement and also to suggest appropriate action.<sup>29</sup>

Establishing the internally displaced as a category of international concern brought about a need to define who is included in this category. At the time, a working definition, put forth by the Secretary-General, existed. It defined IDPs as:

'Persons or groups who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disaster, and who are within the territory of their own country.'<sup>30</sup>

However, this definition has been criticized for numerous reasons. On the one hand, it was perceived as too narrow mainly because of its temporal ('suddenly and unexpectedly') and numerical ('in large numbers') criteria.<sup>31</sup> Restricting the definition to those who fled their homes 'suddenly or unexpectedly' ignored displacement which was not spontaneous but rather the result of an organized state policy implemented over years or possibly even decades.<sup>32</sup> Under the military junta in Burma, for example, hundreds of thousands were forcibly removed, at times with considerable

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<sup>28</sup> CHR Res. 1991/25; Analytical Report of the Secretary-General on IDPs U.N. Doc E/CN.4/1992/23.

<sup>29</sup> U.N. Doc A/48/579 (1993) para. 4.

<sup>30</sup> Analytical Report of the Secretary-General on IDPs U.N. Doc E/CN.4/23 (1992).

<sup>31</sup> Mooney 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern' (2005) 24 No. 3 *Ref. Surv. Q.* 11.

<sup>32</sup> Mooney (no. 31) 11.

advance notice.<sup>33</sup> In Iraq, internal displacement is largely the result of 30 years of state policies of expulsion of groups, particularly ethnic Kurds, Assyrians and Turkmen, which were considered "disloyal" to various Iraqi regimes.<sup>34</sup>

By requiring that the displaced fled 'in large numbers' the definition ignored that in reality many of them flee in smaller numbers, sometimes even on an individual basis. In Colombia, for example, people purposely flee in small numbers hoping to remain inconspicuous.<sup>35</sup> Furthermore, it was argued that the numerical criterion would give rise to an element of imprecision since determining what exactly is a large number involves a subjective evaluation.<sup>36</sup>

On the other hand, the definition was considered too broad. The main criticism toward this end was aimed at the inclusion of natural or man-made disaster as a separate cause of displacement. It was contended that such cases of displacement hardly result in a state depriving its citizens of assistance and protection.<sup>37</sup> Usually, the opposite is the case. States make their own resources available and routinely call for support from the international community if they cannot cope with the disaster alone.<sup>38</sup>

Another argument against including disaster is the apparent lack of a coercive element on the part of the authorities or others in power, which underlies all other causes listed in the definition.<sup>39</sup> Even though persons displaced by disaster leave their homes involuntarily, the force that drives them to do so is of a very different nature from that in the other situations of displacement.

In addition to the criticism voiced with regard to certain elements of the definition, Luke Lee – Special Advisor to the US Department of State, put forward the proposal to abandon it altogether.<sup>40</sup> Instead of two separate definitions, one for the internally and one for the externally displaced, he advocated to include all the displaced in one definition, regardless of whether they happened to be within or

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<sup>33</sup> Korn (no. 14) 12.

<sup>34</sup> Cohen 'Status of Internal Displacement in Iraq' IRIN News, 21 May 2004, available at [www.brook.edu/fp/projects/idp/20040521cohen.htm](http://www.brook.edu/fp/projects/idp/20040521cohen.htm)

<sup>35</sup> Korn (no. 14) 12.

<sup>36</sup> Comprehensive Study Prepared by the Representative of the Secretary-General on the Human Rights Issues Related to IDPs U.N. Doc E/CN.4/1993/35 para. 35.

<sup>37</sup> Lewis 'Dealing with the Problem of Internally Displaced Persons' (1992) 6 *Geo.Immigr.L.J.* 694.

<sup>38</sup> Lewis (no. 37) 694.

<sup>39</sup> Koskinen 'Internally Displaced Persons and the Right to Housing and Property Restitution' 13 available at [www.abo.fi/instut/imr/degree\\_programmes/norfa/paivi.pdf](http://www.abo.fi/instut/imr/degree_programmes/norfa/paivi.pdf). 'See also 'Are International Institutions Doing Their Job: Forced Movement of Peoples: Discussion' (1996) 90 *Am. Soc'y Int'l L. Proc.* 559.

<sup>40</sup> Lee 'Internally Displaced Persons and Refugees: Toward a Legal Synthesis' (1996) 9 *J.Ref.S.* 27.

outside their country.<sup>41</sup> The reason for eliminating the border-crossing element was his conviction that it created an unwarranted distinction in the standard of human rights protection between refugees and IDPs.

However, crossing a border means that the person is subject to a different sovereign entity, whose obligations to an “outsider” are founded on a different legal basis from the one which a state owes its own citizens. As Phuong observed correctly, the protection given to refugees is a *surrogate* protection for persons who lost the protection from their own country while the protection of IDPs is of *complementary* nature and only needed when the national protection is insufficient or unavailable.<sup>42</sup>

The definition which eventually emerged after six years of deliberation is contained in the introduction to the 1998 Guiding Principles on Internal Displacement (Guiding Principles).

‘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>43</sup>

Notably, the temporal and numerical qualifications have been deleted from the definition. However, no change was made with respect to natural or man-made disaster as a cause of displacement. On the contrary, the 1998 definition even expanded the possible causes by providing a non-exhaustive list through the words “in particular”.

Although the Guiding Principles have gained wide recognition as a tool for addressing internal displacement it would be bold to say that the definition therein has been fully accepted.<sup>44</sup> The lack of acceptance for what comes rather close to a catch all phrase is reflected in the global statistics on internal displacement which count only those uprooted by conflict and human rights violations.<sup>45</sup> The incorporation of persons displaced by disaster has also been rejected in one of the

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<sup>41</sup> Lee (no. 40) 36-40.

<sup>42</sup> Phuong (no. 12) 25.

<sup>43</sup> Guiding Principles on Internal Displacement U.N. Doc E/CN.4/1998/53/Add.2.

<sup>44</sup> An account for their recognition will be given later on.

<sup>45</sup> See, for example, IDMC Global Statistics (no. 5). Notably, the Reports of the Representative on IDPs use and rely on these numbers as well, thus, do not include disaster displaced.

most recent studies on internal displacement, for essentially the same arguments that were advanced earlier in this section.<sup>46</sup>

Notwithstanding its common use, the broad definition of the term IDP has attracted criticism and cannot be regarded as completely accepted. In an acknowledgement of this criticism, this paper will rely on a narrower definition.

## **2. Meaning of the Term in the Present Context**

In the context of this work the term IDP shall not refer to persons displaced by natural or man-made disaster. The key issue which renders IDPs a category of utmost concern to the international community is their vulnerable position. Although disaster displaced persons may well be vulnerable they do not face threats, such as physical attacks, sexual assault, abduction or forcible recruitment, constantly faced by persons displaced because of armed conflict or massive human rights abuses. Because of the different causes of suffering, remedies will naturally differ. Moreover, when it comes to the root causes and how they can be prevented, different prevention strategies are required if prevention is possible at all – natural disasters may prove to be beyond the realm of prevention.

Here, the term IDP will refer to persons who, as a result of armed conflict, internal strife or gross human rights violations, have been forced to flee or leave their homes or usual place of residence but who remain within the borders of their own country.

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<sup>46</sup> Developing DFID's Policy Approach to Refugees and Internally Displaced Persons: Consultancy Report and Policy Recommendations – Vol.1 (Refugees Studies Centre, University of Oxford, February 2005) p. 12 at 2.2.4 available at [www.rsc.ox.ac.uk/PDFs/Policy%20Approaches%20to%20Refugees%20and%20IDPs%20RSC-DFID%20Vol%20I.pdf](http://www.rsc.ox.ac.uk/PDFs/Policy%20Approaches%20to%20Refugees%20and%20IDPs%20RSC-DFID%20Vol%20I.pdf)

## Chapter II

### International Legal Framework Applicable to IDPs and Its Protection Gaps

As pointed out earlier, IDPs do not benefit from a specific regime of legal protection. However, this does not mean that international law provides them with no protection. Most cases of internal displacement coincide with situations of armed conflict, which prompt the applicability of international humanitarian law.<sup>47</sup> Furthermore, IDPs are entitled to the protection of the expansive body of international human rights law, since human rights, being the birthrights of all human beings, apply to everyone without distinction.<sup>48</sup> In addition, the rapidly developing body of international criminal law proscribes certain practices which time and again occur during situations of internal displacement. The first part of this chapter will take a closer look at the different branches of international law. The second part will examine whether they in fact afford sufficient protection to the internally displaced.

#### Part I

##### 1. Protection under International Humanitarian Law

International humanitarian law, enshrined in the four Geneva Conventions<sup>49</sup> and their two Additional Protocols,<sup>50</sup> regulates which conduct is permissible in times of armed conflict. Its main purpose is to minimize the effects of violence stemming from such conflict on the civilian population.<sup>51</sup> How this is accomplished with regard to the internally displaced will be explored below. In this context, one must bear in mind that humanitarian law deals with two distinct situations, international and internal

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<sup>47</sup> Lavoyer 'Protection under International Humanitarian Law' in *Internally Displaced Persons* 26. See also Phuong (no. 12) 41.

<sup>48</sup> See Vienna Declaration and Programme of Action U.N. Doc A/CONF.157/23 (12 July 1993) para. 1. See also Phuong (no. 12) 42. The fact that human rights apply equally to all individuals also derives from the wording of the human rights instruments ('all human beings' 'everyone' 'no one').

<sup>49</sup> The Geneva Conventions were adopted on 12 August 1949, entry into force on 21 October 1950. For the purpose of this work the fourth Geneva Convention relative to the protection of civilian persons in time of war will be of specific relevance.

<sup>50</sup> Protocol I Additional to the Geneva Conventions of 1949 relates to the protection of victims of international armed conflict, Protocol II Additional to the Geneva Conventions of 1949 relates to the protection of victims of non-international armed conflict, adopted on 8 June 1977, entry into force on 7 December 1978.

<sup>51</sup> Lavoyer (no. 47) 27.

armed conflict, which are governed by different rules. The protection afforded to the internally displaced, thus, varies depending on the situation that triggers displacement.

### 1.1. Protection during International Armed Conflict

According to Article 2 common to the four Geneva Conventions an international armed conflict involves a declaration of war. In the absence of such a declaration, any confrontation involving armed force between two or more states is deemed international armed conflict.<sup>52</sup> With the end of the Cold War, the number of international armed conflicts has declined considerably.<sup>53</sup> However, they have not vanished completely. The conflict between Ethiopia and Eritrea is only one example of an inter-state conflict that has generated substantial internal displacement.<sup>54</sup> The rules that pertain to the protection of civilians during an international armed conflict are enshrined in the fourth Geneva Convention. Notably, and to the detriment of the internally displaced, most of them were designed for non-nationals. Article 4 of the fourth Geneva Convention provides:

‘Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of conflict or occupation, in the hands of a party to the conflict or occupying power of which they are not nationals.’

As a result, most provisions contained in the fourth Geneva Convention are not applicable to IDPs who stay in areas controlled by their own government. This is unfortunate as some of these provisions address the most urgent needs of displaced populations. Article 55, for example, stipulates the obligation to ensure the food and medical supplies of the population. Furthermore, Article 59 provides that in cases where the whole or part of the population is inadequately supplied, passage to humanitarian operations must be granted.

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<sup>52</sup> See common Article 2 of the Geneva Conventions.

<sup>53</sup> Korn (no. 14) 123.

<sup>54</sup> At the height of the 1998-2000 border war between the two countries over one million people were internally displaced on the Eritrean side of the disputed border. On the Ethiopian side, the number was estimated at over 300.000 people. These numbers have declined sharply after the two countries agreed to a cease-fire. However, acute tensions along the border have raised fears of renewed internal displacement in both countries. See IDMC Ethiopia and Eritrea country profiles as well as IDP News Alert: 17 November 2005 available at [www.internal-displacement.org](http://www.internal-displacement.org).

Only a few provisions contained in Part II of the fourth Geneva Convention have a broader applicability as Part II 'covers the whole of the population of the countries in conflict.'<sup>55</sup> They provide for, *inter alia*, the protection of the wounded, sick, infirm and expectant mothers<sup>56</sup> and measures related to child welfare.<sup>57</sup>

Moreover, Additional Protocol I becomes operative in situations of inter-state conflicts. It abandons the concept of protected persons used in the fourth Geneva Convention and instead opts for an all-encompassing notion of civilian, as distinguished only from combatant.<sup>58</sup> Therefore, all the provisions aimed at the protection of the civilian population are applicable to IDPs. They are contained in Part IV of Protocol I and provide, in substance, many of the safeguards that, under the fourth Geneva Convention, are only provided to protected persons.

## 1.2. Protection during Internal Armed Conflict

A situation can be classified as an internal armed conflict when government forces fight dissident forces within national territory and the fighting reaches a certain level of intensity.<sup>59</sup> Mere acts of banditry or unorganized and short-lived rebellions are not covered under humanitarian law.<sup>60</sup> Compared to international armed conflicts, internal armed conflicts are subject to a more limited legal regime.<sup>61</sup> In a time where most of the conflicts that lead to massive displacement take place within the borders of a state, this is regrettable.<sup>62</sup>

In fact, the only applicable provision out of the four Geneva Conventions is common Article 3. Notably, it binds every party to the conflict and applies to the entire civilian population.<sup>63</sup> First and foremost, Article 3 guarantees humane treatment which has to be afforded without discrimination. However, it does not define what constitutes humane treatment. It only provides a short list of acts which

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<sup>55</sup> See Article 13 of the fourth Geneva Convention.

<sup>56</sup> See Articles 16, 18 – 22 of the fourth Geneva Convention.

<sup>57</sup> See Article 24 of the fourth Geneva Convention.

<sup>58</sup> Provost *International Human Rights and Humanitarian Law* 40. See also: Article 50 of Protocol I.

<sup>59</sup> Greenwood *Humanitarian Law in Armed Conflicts* 47.

<sup>60</sup> Pictet *Commentary IV* 36.

<sup>61</sup> Greenwood (no. 59) 49.

<sup>62</sup> Cohen & Deng (no. 4) 5; Phuong (no. 12) 45.

<sup>63</sup> See Article 3 common to the four Geneva Conventions and Pictet *Commentary IV* 34.

are incompatible with humane treatment. Article 3 prohibits, *inter alia*, violence to life and person, in particular murder, mutilation, cruel treatment and torture.<sup>64</sup>

Despite its vagueness common Article 3 is of utmost importance for the protection of the internally displaced because it enshrines customary international law.<sup>65</sup> This is significant because once a rule becomes a rule of customary international law, states are bound regardless of whether they have ratified a treaty regarding the rule in question or not.<sup>66</sup> As a consequence, all states are bound by the fundamental guarantees contained in common Article 3.

Besides common Article 3 the Additional Protocol II becomes applicable during non-international armed conflicts. It is the only international agreement which deals exclusively with the conduct of the parties to an internal conflict.<sup>67</sup> It offers more detailed rules than common Article 3 but, at the same time, is of a more limited applicability.<sup>68</sup> The latter is due to a number of requirements which confine the applicability of Protocol II to a virtual civil war situation.<sup>69</sup>

Protocol II explicitly prohibits acts such as rape and enforced prostitution.<sup>70</sup> It also provides that children shall, *inter alia*, receive an education and be spared from recruitment in the armed forces if under the age of fifteen.<sup>71</sup> These provisions are of particular importance because women and children constitute the overwhelming majority of the internally displaced and are worst affected by displacement.<sup>72</sup>

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<sup>64</sup> See Article 3 common to all four Geneva Conventions.

<sup>65</sup> Meron *Human Rights and Humanitarian Norms as Customary Law* 34. The ICJ held in *Military and Paramilitary Activities in and against Nicaragua* that common Article 3 represents a 'minimum yardstick' also in international armed conflicts and reflects 'elementary considerations of humanity' (1968) ICJ Reports 14 para. 218. It, thus, broadened the applicability of common Article 3 and classified it as customary international law – the only law it could apply to the case because a multilateral treaty reservation of the United States precluded it from applying the Geneva Conventions as treaties. See also: *Prosecutor v Akayesu* Case No. ICTR-96-4-T available at [www.ictj.org](http://www.ictj.org).

<sup>66</sup> Meron (no. 65) 3.

<sup>67</sup> Green *The Contemporary Law of Armed Conflict* 61.

<sup>68</sup> Provost (no. 58) 261.

<sup>69</sup> Article 1 of Protocol II reads: "This Protocol ... shall apply to armed conflicts ... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups, which under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." See also Provost who contends that for its high threshold Protocol II can be considered a regression (no. 58) 261-264.

<sup>70</sup> See Article 4 (1) of Protocol II.

<sup>71</sup> See Article 4 (3) of Protocol II

<sup>72</sup> Korn (no. 14) 14-17. In situations of internal armed conflict men often join or are drafted into the fighting ranks. Others are killed while again others flee to avoid their recruitment. Women and children are left defenseless. Many children are separated from their mothers due to the upheaval caused by their flight.

Last but not least, Article 17 of Protocol II is of special relevance to IDPs. It states:

- '1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.'

In sum, humanitarian law largely covers IDPs under the rules pertaining to civilians and provides for their protection concerning basic needs such as safety and subsistence.

## **2. Protection under International Human Rights Law**

While international humanitarian law is only applicable in situations that qualify as armed conflict, international human rights law is of broader applicability. First of all, it applies alongside humanitarian law. Moreover, it provides protection in situations that fall short of armed conflict but involve violence and other repressive measures. These situations are often referred to as situations of tension and disturbance or internal strife. They include riots, isolated and sporadic acts of violence as well as violent ethnic conflicts not amounting to hostilities.<sup>73</sup> A great number of the internally displaced live in these situations which involve, by their very nature, certain human rights violations.<sup>74</sup>

Human rights law developed at great speed after the end of the Second World War. Its rapid growth was prompted by the conviction that spelling out human rights and fundamental freedoms would contribute to preventing atrocities like the ones associated with the Second World War.<sup>75</sup> Today a wide range of conventional and customary norms are in place to provide protection to all individuals.

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<sup>73</sup> Internally Displaced Persons, Compilation and Analysis of Legal Norms, Part I, U.N. Doc E/CN.4/1996/52/Add.2 para. 28.

<sup>74</sup> Phuong (no. 12) 42.

<sup>75</sup> Brownlie *Principles of Public International Law* 529.

The Universal Declaration of Human Rights,<sup>76</sup> the International Covenant on Civil and Political Rights<sup>77</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>78</sup> form the foundation of international human rights protection and are often referred to as the International Bill of Rights.<sup>79</sup> The latter two elaborate the rights contained in the UDHR in more detail and in, at least theoretically, a legally enforceable manner.<sup>80</sup> Other important instruments are, for example, the International Convention on the Elimination of All Forms of Racial Discrimination<sup>81</sup> and the Convention Against Torture and Other Cruel, Inhuman or Degrading Punishment.<sup>82</sup> In addition to the international conventions, regional human rights instruments reinforce and enhance protection.<sup>83</sup> To ensure the implementation of the above mentioned human rights standards, international and regional monitoring and enforcement bodies have been set up.<sup>84</sup>

Finally, it is important to note that the vast majority of states and authoritative authors recognize that the fundamental principles of human rights form part of customary international law.<sup>85</sup> Accordingly, it can be concluded that IDPs enjoy protection under an extensive net of human rights norms applying to a wide range of situations.

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<sup>76</sup> GA Res. 217 A (III), 10 December 1948 (UDHR). It is noteworthy that the UDHR is not a legally binding instrument. It is rather meant to be 'a common standard of achievement for all peoples and all nations.' (Preamble of the UDHR). Enshrining a consensus on the content of internationally recognized rights owed to the whole of mankind, it is, however, of strong moral force. See: Smith *International Human Rights* 39-40.

<sup>77</sup> 999 UNTS 171, 16 December 1966 (ICCPR).

<sup>78</sup> 993 UNTS 3, 16 December 1966 (ICESCR).

<sup>79</sup> Smith (no. 76) 30.

<sup>80</sup> Smith (no. 76) 30.

<sup>81</sup> 660 UNTS 195, 21 December 1965 (CERD).

<sup>82</sup> 23 ILM 1027 and 24 ILM 535, 10 December 1984 (CAT).

<sup>83</sup> These are the European Convention of Human Rights and Fundamental Freedoms (213 UNTS 222, 4 November 1950), the American Convention on Human Rights (1144 UNTS 123, 22 November 1969) and the African Charter on Human and Peoples' Rights (21 ILM 58, 27 June 1981).

<sup>84</sup> Many of the treaties provide for treaty-monitoring bodies (e.g. ICCPR, ICESCR, CAT and CERD). Through the European Court of Human Rights member states can be held accountable for violations of the rights set forth in the ECHR. Being confined to a more restricted role than its European counterpart the Inter American Court of Human Rights nonetheless has dealt with violations of human rights. See: Steiner & Alston *International Human Rights in Context* 881.

<sup>85</sup> Brownlie (no. 75) 535-536.

### 3. Protection under International Criminal Law

International criminal law is a relatively new and still scant branch of international law.<sup>86</sup> Apart from piracy, only war crimes were traditionally considered international crimes, thus, incurring individual criminal responsibility.<sup>87</sup> It was the end of the Second World War that first triggered the development of new categories of crimes.<sup>88</sup> The recent establishment of the International Criminal Court (ICC) has been another driving force for the development of a body of international criminal rules.<sup>89</sup>

According to the ICC Statute, which entered into force on 1 July 2002, the Court has jurisdiction over genocide, crimes against humanity, war crimes and (for the purpose of this work, of less relevance) the crime of aggression.<sup>90</sup> Two categories of relevance to IDPs, namely crimes against humanity and war crimes, will be further considered below.

#### 3.1. Crimes Against Humanity

The acts which constitute crimes against humanity, when committed as part of a widespread or systematic attack directed against any civilian population, are spelled out in Article 7 of the ICC Statute. Not surprisingly, they include acts such as torture and rape. More notably, they also include deportation and forcible transfer of population which are defined as:

‘Forced displacement of the persons concerned by expulsion or other coercive acts from the area in which they are lawfully present, without grounds permitted under international law.’<sup>91</sup>

While other acts are relevant for IDPs simply because they are part of the civilian population, this provision explicitly declares the practice of forcibly displacing a population punishable and is, thus, of extra importance for IDPs.

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<sup>86</sup> Cassese *International Criminal Law* 16-17.

<sup>87</sup> Jescheck ‘International Crimes’ in *Encyclopedia of Public International Law* 1119-1122.

<sup>88</sup> Cassese (no. 86) 16.

<sup>89</sup> Kaul ‘The International Criminal Court – Current Perspective’ in *International Criminal Law and the Current Development of Public International Law* 15-16. See also: Cassese (no. 86) 19.

<sup>90</sup> See Article 5(1) of the ICC Statute.

<sup>91</sup> See Article 7(1)(d) of the ICC Statute.

### 3.2. War Crimes

War crimes, in general, are serious violations of rules that govern conduct in armed conflicts. In the case of international armed conflicts, these crimes are provided for in the Geneva Conventions and Additional Protocol I. They are termed 'grave breaches' and they have to be directed at protected persons.<sup>92</sup> As explored earlier on, IDPs do not properly fit within concept of protected persons contained in Article 4 of the fourth Geneva Convention. Article 85 of the Additional Protocol I, however, provides that willfully making civilians the object of attack or launching indiscriminate attacks that affect the civilian population, with the knowledge that such an attack will cause excessive loss of life or injury, shall be regarded as grave breaches.<sup>93</sup>

In the case of internal armed conflict, serious violations of common Article 3 and of the laws and customs applicable to internal conflict, such as intentionally attacking the civilian population, committing rape or enlisting children under the age of fifteen, constitute war crimes.<sup>94</sup>

All in all, it can be said that outrages perpetrated against IDPs in times of armed conflict are not just prohibited by international humanitarian and human rights law but also punishable under international criminal law.<sup>95</sup>

In declaring certain acts that contravene fundamental obligations of international humanitarian and human rights law criminal and by making them punishable, international criminal law can serve as a powerful deterrent when it comes to the perpetration of such acts. In this way, it reinforces the protection that the two other bodies of law provide for IDPs and, thus, contributes to their protection.

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<sup>92</sup> See Article 147 of the fourth Geneva Convention.

<sup>93</sup> See Article 85(3)(a)&(b) of Additional Protocol I.

<sup>94</sup> See Article 8 (2)(c)&(e) of the ICC Statute. See also: Cassese (no. 86) 56.

<sup>95</sup> It should be noted that international criminal law not only attributes responsibility to those who commit crimes but also to those who induce or attempt the commission of international crimes or aid, abet or otherwise assist toward their commission. See Article 25 of the ICC Statute.

## Part II

Thus far everything points toward a wide array of protection afforded to IDPs. The question that remains to be answered is whether this protection is indeed effective. The focus will now turn to potential protection gaps.

### 1. Ratification Gaps

One thing international legal instruments have in common is that they need to be ratified before their obligations are binding. In other words, the absence of ratifications results in a lack of protection. Hence, the instruments discussed in part one of this chapter will only provide effective protection to the internally displaced if ratified.

#### 1.1. International Humanitarian Law

In the case of international humanitarian law, the problem of ratification gaps mainly arises in relation to the Additional Protocols since virtually all states have ratified the Geneva Conventions.<sup>96</sup> Even though the Additional Protocols have attracted a substantial amount of ratifications they do not, at present, provide sufficient protection for all the internally displaced as a number of states that have not ratified them are host to large populations of IDPs, displaced as a result of armed conflict. A text book example is the Sudan, where internal armed conflict, stretching over more than two decades, has led to the displacement of millions.

The inapplicability of the Additional Protocols considerably weakens the protection framework available to IDPs. As examined earlier on, it was Additional Protocol I that brought IDPs close to the status of protected persons which enjoy wide protection under the fourth Geneva Conventions.<sup>97</sup> In the more common case of internal armed conflict IDPs will be unable to benefit from the detailed provisions

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<sup>96</sup> The Geneva Conventions have been ratified by 192 states. Additional Protocol I has been ratified by 163 and Additional Protocol II by 159 states. Available at [www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party\\_gc/\\$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf).

<sup>97</sup> This affects, for example, the internally displaced in Eritrea. For the status of ratification see (no. 96).

of Additional Protocol II and be confined to the protection offered by common Article 3.

## 1.2. International Human Rights Law

Ratification gaps also exist within the ambit of human rights law. Although some of the international treaties have attracted significant numbers of ratifications none of the instruments has reached a ratification status comparable with the almost universal one of the Geneva Conventions.<sup>98</sup> Taking up the previously cited assertion that the fundamental principles of human rights form part of customary international law, the question arises to what extent customary law, which binds states regardless of whether they have ratified a treaty or not, may fill ratification gaps. In this respect, one must be aware that no general agreement exists on the identity of the exact rules that constitute customary law.<sup>99</sup> However, there is a small core of rules that can be classified as custom beyond doubt, *inter alia*, the prohibition of torture and systematic racial discrimination.<sup>100</sup> While these rules surely benefit the internally displaced they can hardly be considered sufficient to overcome the gap caused by non-ratification.

## 1.3. International Criminal Law

Currently, only 100 states have ratified the ICC Statute.<sup>101</sup> Thus, it seems, its deterrent effect as regards the commission of crimes subject to the Court's jurisdiction would apply merely to half of the states worldwide. However, in the case of international criminal law a tool can be used to overcome this protection gap. According to Article 13(b) the Security Council acting under Chapter VII of the U.N. Charter can refer a situation in which crimes within the jurisdiction of the Court appears to have been committed to the prosecutor. In this very case the binding

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<sup>98</sup> For example, the ICCPR has been ratified by 152 states and is closely followed by the ICESCR which has been ratified by 149 states. Numbers are available at [www.unhchr.ch/pdf/report.pdf](http://www.unhchr.ch/pdf/report.pdf).

<sup>99</sup> Brownlie (no. 75) 537, Meron (no. 65) 94-99, Oraá *Human Rights in States of Emergency in International Law* 214-216,

<sup>100</sup> Meron (no. 65) 94-95.

<sup>101</sup> Available at [www.iccnw.org/countryinfo/worldsignsandratifications.html](http://www.iccnw.org/countryinfo/worldsignsandratifications.html). It should be noted, that the number of signatories already amounts to 139.

powers of the Security Council when acting under Chapter VII allow the Court to proceed even if the states concerned have not ratified the ICC Statute.<sup>102</sup>

Before getting too optimistic about this possibility one must, however, bear in mind that political considerations are more than likely to bring the Security Council to decide against seizing the Court.<sup>103</sup> Its discretionary power to determine whether Chapter VII actions are to be invoked gives it ample opportunity to refrain from approaching the Court, even if it appears that crimes within its jurisdiction have been committed.<sup>104</sup>

As a result, the problem posed by ratification gaps is common to all three branches of international law identified as providing protection to IDPs. It deprives them of important legal safeguards that should be at their disposal.

## **2. Claims as to the Inapplicability of Humanitarian Law**

The protection provided by humanitarian law, is not just hampered by ratification gaps. On the contrary, states faced with conflict often assert that the conflict in question is either different from the conflicts that are regulated by humanitarian law or has not reached the necessary intensity to render it applicable.<sup>105</sup> Baxter summed it up well when he noted that “the first line of defense against international humanitarian law is to deny that it applies at all.”<sup>106</sup>

What greatly facilitates this option of denial is the complexity of certain conflicts which may render it difficult to identify which category they belong.<sup>107</sup> Nowadays, such denial is particularly common, in regard to Additional Protocol II which, as pointed out previously, raises the threshold of the applicability of humanitarian law to an exceptionally high level and in this way becomes prone to claims of inapplicability.

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<sup>102</sup> Condorelli & Villalpando *The Rome Statute of the International Criminal Court: A Commentary* 634.

<sup>103</sup> Condorelli & Villalpando (no. 102) 632.

<sup>104</sup> Condorelli & Villalpando (no. 102) 630-632

<sup>105</sup> Aldrich 'Human Rights and Armed Conflict: Conflicting Views' (1973) 67 *ASIL Proc.* 141-142; Meron *Human Rights in Internal Strife: Their International Protection* 43-47.

<sup>106</sup> Baxter *Some Existing Problems of Humanitarian Law* in: *The Concept of International Armed Conflict: Further Outlook 2*. Cited in Meron (no. 105) 43.

<sup>107</sup> Meron (no. 105) 43-44. He names international armed conflict, internationalized-internal conflict, internal conflict of an armed character, internal strife accompanied by violence or internal tensions not accompanied by violence as examples for possible conflicts. Some of them may not, at all times, fit square within one of the concepts envisaged by international humanitarian law.

The response of the Russian authorities to the ongoing conflict in Chechnya, in which hundreds of thousands have been displaced, is only one example of this trend.<sup>108</sup> Instead of acknowledging the fact that an internal armed conflict is raging in the region the Russian government is insisting that the current military activities are part of an anti-terror operation.<sup>109</sup> In this respect, it is interesting to note that the Russian Constitutional Court has characterized the first Chechen conflict, which preceded the current one, as fulfilling the conditions required by Protocol II and furthermore contended that the Protocol was not duly respected.<sup>110</sup> The conflicts hardly differ to an extent that would justify a new classification.

Thus, even if ratified, the prospects for the application of humanitarian law, above all Additional Protocol II, are poor. Given the frequent and cruel nature of internal armed conflicts and the extent to which they generate internal displacement this is particularly deplorable.

### **3. Derogation from Human Rights**

As in the case of humanitarian law, human rights instruments can be ineffective for other reasons than ratification gaps. Some of the major international and regional treaties contain derogation clauses which permit states to suspend certain rights during a state of emergency.<sup>111</sup> This concept deserves closer consideration as it is precisely during emergencies when people are more prone to abuses and when the protection of human rights is needed most.

The question that first comes to mind is what circumstances can generate a state of emergency. To date, there exists no exhaustive list or definition for such circumstances. What can be observed is that there are a few grounds that typically provoke the declaration of a state of emergency and derogation from human rights

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<sup>108</sup> Whose responsibility? Protection of Chechen Internally Displaced Persons, Asylum Seekers and Refugees; Report by the Norwegian Refugee Council (May 2005) available at [www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/8FB80DD0A132B095802570B70059FA5F/\\$file/NRC+May+2005.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/8FB80DD0A132B095802570B70059FA5F/$file/NRC+May+2005.pdf). Estimates of the number of the people displaced since 1999 (beginning of the second conflict) vary from 350.000 to 600.000.

<sup>109</sup> Whose Responsibility (no. 108) 11. See also: Chechnya and the Laws of War available at [www.crimesofwar.org/expert/chechnya-print.html](http://www.crimesofwar.org/expert/chechnya-print.html) and [www.hrw.org/press/2003/01/russia012903.htm](http://www.hrw.org/press/2003/01/russia012903.htm).

<sup>110</sup> Constitutional Court of the Russian Federation, Judgement on the Constitutionality of the Presidential Decrees and the Resolutions of the Federal Government Concerning the Situation in Chechnya (31 July 1995) available at [www.icrc.org/ihl-nat.nsf/0/ac8db8b32b8a2a5d432564dc0048bda4?OpenDocument](http://www.icrc.org/ihl-nat.nsf/0/ac8db8b32b8a2a5d432564dc0048bda4?OpenDocument).

<sup>111</sup> See Article 4 of the ICCPR, Article 15 of the ECHR and Article 27 of the ACHR.

standards, namely international and civil war, internal unrest, grave threats to the public order and subversion.<sup>112</sup>

Needless to point out, many cases of internal displacement occur in the above mentioned situations. Therefore, the protection of IDPs is at stake when a government proclaims a state of emergency. This is even more so since experience has shown that governments, through pleas of emergency, frequently reject any criticism regarding their human rights record.<sup>113</sup> It may, after all, not be unthinkable that authorities would fabricate a crisis in order to justify the denial of rights.<sup>114</sup>

Having said this, it must be remembered that even in time of emergency a state cannot derogate from all aspects of human rights protection.<sup>115</sup> Each of the three conventions referred to provide for a number of rights that cannot be suspended. All of them stipulate that, *inter alia*, no derogation is possible from the right to life and the freedom from torture.<sup>116</sup> Notably, in its latest General Comment on Article 4 of the ICCPR, the Human Rights Committee extended the list of non-derogable rights from those expressly prescribed. To this end it gives some illustrative examples, one of which is crucial to the issue of internal displacement:

‘As confirmed by the Rome Statute of the International Criminal Court, deportation or forcible transfer of population without grounds permitted under international law, in the form of forced displacement by expulsion or other coercive means from the area in which the persons concerned are lawfully present, constitutes a crime against humanity. The legitimate right to derogate from Article 12 of the Covenant during a state of emergency can never be accepted as justifying such measures.’<sup>117</sup>

Bearing in mind that the General Comments of the Human Rights Committee serve, among others, the function to clarify, interpret and elaborate the provisions of the ICCPR, this is a significant improvement for IDPs.<sup>118</sup>

To further curb the abuse of emergency powers certain requirements have been put forward to delineate situations that may properly be termed an emergency.

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<sup>112</sup> Oraá (no. 99) 30-33.

<sup>113</sup> Fitzpatrick ‘Protection Against the Abuse of the Concept of Emergency’ in *Human Rights an Agenda for the Next Century* 203. Meron (no. 105) 52.

<sup>114</sup> Fitzpatrick (no. 113) 203.

<sup>115</sup> Smith (no. 76) 174-175.

<sup>116</sup> Article 4(2) of the ICCPR, Article 15(2) of the ECHR, Article 27(2) of the ACHR.

<sup>117</sup> Human Rights Committee, General Comment 29, States of Emergency (Article 4 of the ICCPR) U.N. Doc CCPR/C/21/Rev.1/Add.11 (2001) para. 13 (d).

<sup>118</sup> Steiner & Alston (no. 84) 732-737.

These include, for example, the existence of an exceptional threat of imminent character and the condition that the ordinary mechanisms of the state are overwhelmed, thus the continued stability of that community is fundamentally jeopardised.<sup>119</sup>

Nonetheless, the state of emergency, being an 'eminently indeterminate notion, lends itself easily to abuse by states anxious to provide a façade of legality for the perpetration of human rights abuses.'<sup>120</sup> Therefore, it is likely that IDPs would suffer from diminished protection in a state of emergency.

#### **4. Minimum Humanitarian Standards – a Remedy for Protection Gaps?**

The two independent bodies of human rights and humanitarian law allow for their simultaneous application and one would assume that in conflict situations, regularly involving displacement, at least one of them is applicable. However, it may turn out that both systems are (at least close to) inapplicable. This would namely occur in situations where a state derogates from its human rights obligations without recognizing the applicability of humanitarian law.<sup>121</sup> Needless to mention, the combined effect of such actions is highly detrimental concerning the protection of IDPs.

In an acknowledgment of this protection gap scholars have advocated that an irreducible core of rights must be formulated and recognized as applicable, at least, in the twilight zone between war and peace.<sup>122</sup> Their efforts resulted in the Declaration of Minimum Humanitarian Standards which was submitted to the U.N. for further discussion.<sup>123</sup> Article 1 (1) of the Declaration declares:

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<sup>119</sup> Provost (no. 58) 270-273.

<sup>120</sup> Provost (no. 58) 273.

<sup>121</sup> A recent example for such a situation is Nepal. In 2004, the Supreme Court of Nepal ruled that the Geneva Conventions are not applicable to the on-going conflict between the government and the Maoist rebels. Shortly after the ruling a state of emergency was declared. As a result IDPs in Nepal lack the protection of humanitarian and human rights law with the exception of a few non-derogable rights and rules of customary international law. See [www.hrdc.net/sahrdc/hrfeatures/HRF98.htm](http://www.hrdc.net/sahrdc/hrfeatures/HRF98.htm) (South Asia Human Rights Documentation Centre) and [www.internal-displacement.org/8025708F004CE90B/\(httpCountries\)/E545F30B5618B71D802570A7004BD25C?OpenDocument](http://www.internal-displacement.org/8025708F004CE90B/(httpCountries)/E545F30B5618B71D802570A7004BD25C?OpenDocument).

<sup>122</sup> Meron 'The Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument' (1983) 77 *AJIL* 603.

<sup>123</sup> Declaration of Minimum Humanitarian Standards in (1995) 89 *AJIL* 219-223.

'This Declaration affirms minimum humanitarian standards which are applicable in all situations, including internal violence, ethnic, religious and national conflicts, disturbances, tensions and public emergency, and which cannot be derogated from under any circumstances. These standards must be respected whether or not a state of emergency has been proclaimed.'

The Declaration draws on fundamental rules of both humanitarian and human rights law.<sup>124</sup> Among the rules of particular relevance for IDPs are the prohibition of violence aimed at spreading terror within the population and the guarantee of humanitarian assistance.<sup>125</sup> The Declaration also prohibits displacement unless imperative security reasons demand such displacement.<sup>126</sup> In that case the displaced shall be relocated under satisfactory conditions, they shall be free to move around in the area of relocation and families must be allowed to remain together.<sup>127</sup> As soon as the conditions that prompted their displacement have ceased, they must be allowed to return to their homes.<sup>128</sup> In view of the nature of contemporary conflicts the Declaration, moreover, provides that:

'These standards shall be respected by and applied to all persons, groups and authorities irrespective of their legal status and without any adverse discrimination.'<sup>129</sup>

This provision seeks to overcome another major difficulty inherent in the system of human rights protection, namely that the norms designed to protect individuals are binding only upon states.<sup>130</sup> Abuse of human rights stemming from the actions of non-state actors is not envisaged in this concept. However, such abuses occur all too frequently and contribute to the problem of internal displacement.<sup>131</sup> Therefore, the extension of the binding force of fundamental human rights would be an additional benefit for IDPs.

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<sup>124</sup> Eide, Rosas & Meron 'Combating Lawlessness in Gray Zone Conflicts through Minimum Humanitarian Standards' (1995) 89 *AJIL* 217.

<sup>125</sup> See Article 6 and Article 15 of the Declaration of Minimum Humanitarian Standards.

<sup>126</sup> See Article 7 of the Declaration of Minimum Humanitarian Standards.

<sup>127</sup> See Article 7 of the Declaration of Minimum Humanitarian Standards.

<sup>128</sup> See Article 7 of the Declaration of Minimum Humanitarian Standards.

<sup>129</sup> Article 2 of the Declaration of Minimum Humanitarian Standards.

<sup>130</sup> Eide, Rosas & Meron (no. 124) 216.

<sup>131</sup> The population of Sierra Leone, for example, suffered greatly from deliberate attacks of rebel forces. Typical actions of the Revolutionary United Front (RUF) included forcing young boys into the ranks of the rebel forces, driving women and girls into sexual slavery and amputating arms at the wrist or elbow depending on whether the victim chose long or short sleeves. Such human rights abuses

Meaningful debate on the minimum standards at an international level began in 1996 when governments, scholars, U.N. agencies and NGOs met to discuss them.<sup>132</sup> In the end, the participants requested an analytical report from the Secretary-General as regards the need for a U.N. document setting out and promoting minimum humanitarian standards.<sup>133</sup> Even though the report concluded that a protection problem exists, it triggered no subsequent action apart from a request by the Human Rights Commission that the Secretary-General continue to study and consult on the matter.<sup>134</sup>

At this point, the question that needs to be answered is whether a set of minimum humanitarian standards is likely to be approved by the United Nations. As recent experience has shown that the environment in the U.N. is largely hostile to new standard-setting initiatives, skepticism toward that end is well founded.<sup>135</sup> Thus, it seems unlikely that minimum humanitarian standards will be in place any time soon to remedy the effect of protection gaps on IDPs.

## 5. The Guiding Principles on Internal Displacement

It emerges that despite the abundance of applicable norms, protection of IDPs can by no means be labelled complete. In response to the identified weaknesses of the law, the U.N. Representative on IDPs introduced the Guiding Principles on Internal Displacement in 1998.<sup>136</sup> In contrast to the bodies of law discussed in part one they do not constitute treaty law. Instead, they are a soft law instrument and, therefore, not legally binding.<sup>137</sup>

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have been one of the main causes of internal displacement in Sierra Leone. See Shawcross *Deliver us from Evil: Warlords and Peacekeepers in a World of Endless Conflict* 169-182. See also [www.internal-displacement.org](http://www.internal-displacement.org) and <http://web.amnesty.org/library/Index/engAFR5102211998>. Another example is Colombia, where over 30 percent of internal displacement have been attributed to violence stemming from non-state actors, namely the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN). See Obregon & Stavropoulou 'In Search of Hope: The Plight of Displaced Colombians' 410-413 in: Cohen & Deng (no. 4).

<sup>132</sup> Petrasek 'Moving Forward on the Development of Minimum Humanitarian Standards' (1998) 92 *AJIL* 558-559.

<sup>133</sup> Petrasek (no. 132) 559

<sup>134</sup> CHR Res. 1998/29.

<sup>135</sup> Petrasek (no. 132) 562-563.

<sup>136</sup> Bagshaw 'Internally Displaced Persons at the Fifty-Fourth Session of the United Nations Commission on Human Rights, 16 March – 24 April 1998' (1998) 10 *Int'l J. Ref. L.* 548 – 549.

<sup>137</sup> The legal status of the Guiding Principles has generated some confusion. On the one hand, it is clearly a non-legally binding instrument to which state consent to be bound has never been expressed (see Article 11 of the Vienna Convention on the Law of Treaties (1969) 9 ILM 679). On the other hand, they do not constitute typical soft law because they have not been negotiated by states or another

At first this may seem surprising. There are, however, a number of sensible reasons why the Representative and his team of legal experts did not opt for a binding treaty. In light of the urgency of the situation they wanted to avoid prolonged negotiations associated with the drafting of a treaty.<sup>138</sup> What made that decision easier was their conviction that the existing treaties already covered many aspects relevant to the protection of IDPs.<sup>139</sup> A compilation and clarification of the rules, which at the time were scattered among numerous instruments, was what they believed to be necessary to effectively address the situation of the internally displaced.<sup>140</sup>

Moreover, they feared that an attempt to negotiate a treaty drawing upon existing law would provide states with the opportunity to put some of that law into question.<sup>141</sup> To prevent the new document from becoming an opportunity to renegotiate old documents they refrained from pursuing the treaty option. Most importantly, even if a text could be adopted within a reasonable time, it would be prone to weaknesses, already discussed here in view of the other treaties, such as ratification gaps.<sup>142</sup>

The Introduction to the Guiding Principles clarifies that they reflect, and are consistent, with international human rights law and international humanitarian law.<sup>143</sup> Notably, the Guiding Principles apply refugee law by analogy.<sup>144</sup> This appears reasonable since the situation of refugees is, in many cases, very similar to the situation of IDPs. The Guiding Principles do, for example, prohibit forcible returns to places where the life and/or liberty of IDPs would be at risk.<sup>145</sup> This provision strongly resembles the principle of non-refoulement contained in Article 33 of the 1951 Refugee Convention.

The Introduction also states that the purpose of the Principles is to provide guidance to, *inter alia*, states and other authorities or groups who face internal

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international body. As a result they have also been termed “very soft” law. See Kälin ‘How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework’ 5-6 available at [www.brookings.edu/fp/projects/idp/articles/Kaelin12-19-01.pdf](http://www.brookings.edu/fp/projects/idp/articles/Kaelin12-19-01.pdf).

<sup>138</sup> Freedman (no. 10) 495.

<sup>139</sup> Mass Exoduses and Displaced Persons (no. 2) para.13.

<sup>140</sup> Mass Exoduses and Displaced Persons (no. 2) para.13.

<sup>141</sup> Kälin (no. 137) 2.

<sup>142</sup> Kälin (no. 137) 3.

<sup>143</sup> See Introduction to the Guiding Principles para. 3.

<sup>144</sup> Mass Exoduses and Displaced Persons (no. 2) para. 13.

<sup>145</sup> See Article 15(d) of the Guiding Principles.

displacement.<sup>146</sup> Hence, their applicability is not limited to states. This is an important feature when striving for a complete protection of IDPs as they may be displaced to areas controlled by non-state actors who are not bound by human rights treaties. Another factor that contributes to a more complete protection is that the Guiding Principles address all phases of displacement, from protection against displacement and protection during displacement to issues crucial during the post-displacement phase.<sup>147</sup>

When first presented to the Commission on Human Rights in 1998, the Commission, instead of adopting the Principles, did nothing but take note of them.<sup>148</sup> However, recent responses have been more encouraging. The General Assembly, for example, has expressed its appreciation of the Guiding Principles, encouraged all relevant actors to make use of them when faced with internal displacement and welcomed the fact that an increasing number of states are applying them as standard.<sup>149</sup>

The growth in acceptance of the Guiding Principles over the last years has indeed been remarkable. Supportive resolutions have been adopted by regional organisations and various states have adopted policies and/or laws based at least in part on the Guiding Principles while others consider following suit.<sup>150</sup> Moreover, the Inter-American Commission on Human Rights has used them to evaluate the treatment of IDPs by the Colombian authorities.<sup>151</sup> Even non-state actors have been receptive of the Guiding Principles. The Sudan People's Liberation Army, for example, considered them in its internal rule making.<sup>152</sup>

## Conclusion

Notwithstanding the progress made, numbers of the internally displaced have not declined and abuse and violations of their rights remain pervasive. While the Guiding

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<sup>146</sup> See Introduction to the Guiding Principles paras. 3(b)&(c).

<sup>147</sup> See Introduction to the Guiding Principles para. 1.

<sup>148</sup> CHR Res. 1998/50 para. 1.

<sup>149</sup> A/Res/56/164 paras 6 & 7.

<sup>150</sup> Among these countries are Angola, Burundi, Georgia and Uganda. See Schmidt 'The Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment' (2004) 35 *Geo. J. Int'l L.* 493; Deng (no. 23) 25.

<sup>151</sup> See Inter-American Commission on Human Rights 'Third Report on the Situation of Human Rights in Colombia' (1999) Chapter VI available at [www.cidh.oas.org/countryrep/Colom99en/chapter-6.htm](http://www.cidh.oas.org/countryrep/Colom99en/chapter-6.htm).

<sup>152</sup> Schmidt (no. 150) 493; Deng (no. 23) 25.

Principles are important as they shift attention to a vulnerable group and compile and clarify protection mechanisms based on their needs, they do not have the potential to effectively tackle the examined protection gaps.

In fact, no document whether legally binding or not, can, by itself, prevent a government determined to abuse its citizens from doing so. Many violations occur not because of protection gaps within the legal framework, but rather because of an unwillingness to comply with the existing rules. Therefore and above all, what has to be dealt with are gaps in the implementation of the law designed to protect IDPs – something that can hardly be achieved by drafting more rules.

As indicated earlier, international and regional monitoring bodies which were established to ensure the implementation of human rights law. Unfortunately, their means to do so are limited. The predominant system for overseeing a state's performance in the arena of human rights is the reports system. Here, the monitoring bodies examine compliance on the basis of reports submitted by states and can, post examination, name those who fall short of their obligations and give recommendations as to what must be done to achieve compliance.<sup>153</sup> Although the so-called 'naming and shaming' can be an effective tool to further the implementation of human rights standards, it will hardly be an overall solution to the crisis of internal displacement. Stronger enforcement mechanism will be needed because there are always states that do not respond to recommendations and polite requests.

With respect to international humanitarian law the situation is even worse. Neither the Geneva Conventions nor Additional Protocol II contain any mechanism for enforcing the obligations contained in these instruments.<sup>154</sup> To soothe the deplorable conditions in which IDPs live and to provide them with effective protection where states do not fulfill their obligations one must, thus, turn to different protection mechanisms than those discussed so far.

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<sup>153</sup> Smith (no. 76) 146.

<sup>154</sup> Lewis (no. 27) 706. In how far the ICC can contribute to the implementation of humanitarian law by providing accountability for violations remains to be seen.

## **Chapter III**

### **Towards a More Effective Protection**

Ensuring that the internally displaced receive adequate assistance and protection in cases where their governments fail to provide it will, in reality, require a more active involvement on the part of the international community. Most likely such involvement will take in the form of intervention. This is exactly where the inherent tension between the concept of *international* protection and *internal* displacement surfaces. By putting up the banner of state sovereignty and invoking its corollary principles of territorial integrity and non-intervention, states commonly seek to prevent outside intervention in cases where internal displacement coincides with governments reluctance to live up to their international obligations.<sup>155</sup>

The question that arises is whether resistance to implementation of international humanitarian and human rights standards by means of intervention can still be based on the notion of state sovereignty. If sovereignty truly means that a state has the unfettered right to treat individuals within its borders as it pleases, it would, in fact, pose an insuperable obstacle to any attempts to fill the protection vacuum for IDPs. The endeavour to provide effective protection to the internally displaced who lack assistance and protection from their own governments must start with an examination of the concept of sovereignty itself.

#### **1. The Concept of Sovereignty**

Sovereignty for a long time implied 'independence all round' and its indivisibility was fiercely defended over centuries.<sup>156</sup> However, with regard to its place in the twentieth century, which was marked by the growth of international law, Oppenheim noted:

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<sup>155</sup> In 1988, the Sudanese government, for example, sought to prevent foreign interference (aimed to assist the displaced population in areas under control of the rebel groups) on the basis that such action would violate its sovereignty. Similar claims were made again in 1990, when the government alleged that the (by then ongoing) relief efforts had provided cover for support to insurgents. Shortly after invoking these claims it suspended the international relief efforts. Ruiz 'The Sudan: Cradle of Displacement' 144-149 in: Cohen & Deng (no. 4).

<sup>156</sup> Oppenheim *International Law* 119-22 paras. 64, 68-70.

'The question which is now confronting the science of law and politics is in how far sovereignty ... is compatible with the normal functioning and development of international law and organisation.'<sup>157</sup>

In 1960, the International Court of Justice held the following, concerning the principle of state sovereignty:

'Sovereignty, as a basic concept of present international law, as a legal concept, is a bundle of competences conferred by international law. Any a priori or unlimited political concept of sovereignty must, with inescapable logic, lead to the non-existence of international law as law. Sovereignty is, therefore, essentially a relative notion; its content depends on the stage of development of international law.'<sup>158</sup>

In other words, the principle of sovereignty exists within but not above the system of international law. As a result, by claiming sovereignty a state cannot exempt itself from obligations under treaties it consented to and customary international law. As regards the internally displaced, this implies that the international rules, identified in chapter two as affording them protection, are an appropriate subject for international concern. This finding is consistent with Article 55 and Article 56 of the U.N. Charter, the constituent document of the United Nations which imposes upon the U.N. and its members the obligation to promote, respect and observe human rights and fundamental freedoms, thereby bringing the relationship of man and state under the umbrella of the United Nations.<sup>159</sup>

However, the fact that international law is set up against an absolute concept of sovereignty does not mean that the concept has been entirely superseded. While affording protection to individuals, one must not lose sight of the fact that international law also contains rules that enshrine certain aspects of sovereignty. Again a look at the U.N. Charter is instructive. The relevant part of Article 2(7) reads:

'Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within

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<sup>157</sup> Oppenheim (no. 156) 122-23 para. 70.

<sup>158</sup> Kunz 'The Nottebohm Judgement' (1960) 54 *American Journal of International Law* 545.

<sup>159</sup> Higgins *The Development of International Law through the Political Organs of the United Nations* 118-119.

the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter.’

Clearly, Article 2(7) affirms the principle of non-intervention in the internal affairs of another state. It allows, however, for one exception, that is, an intervention which represents an enforcement action under Chapter VII of the U.N. Charter.<sup>160</sup> Chapter VII empowers the Security Council to intervene in situations that pose a threat or constitute a breach of peace provided that the intervention is a suitable means to maintain or restore international peace and security.<sup>161</sup>

Moreover, Article 2(4) prohibits the threat or use of force, *inter alia*, against the territorial integrity of states. It is unlikely that governments who deny their displaced citizens assistance and protection will yield to outsiders who try to remedy this situation. Therefore, outside intervention on behalf of the internally displaced will in all likelihood entail the use of force. The attempt to enforce humanitarian and human rights standards by means of force may conflict with Article 2(4).

The ambiguity deriving from the aforementioned provisions leads to the question of whether the legitimate concern for the observance of humanitarian law and human rights can be lawfully expressed and remedied through outside intervention. The next section will examine a range of theories which have been advanced toward this end.

## **2. Justifications of Intervention**

### **2.1. Forfeiture of Sovereignty**

One approach that seeks to make the two conflicting ends, respect for humanitarian and human rights standards and respect for sovereignty, meet, asserts that sovereignty ought to be regarded as conditional. A state’s failure to adhere to international standards and obligations will result in the loss of sovereignty.<sup>162</sup> Applied to the issue of internal displacement, it means that a state that is unwilling to ensure the rights of a displaced population forfeits its sovereignty. Thereafter, the

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<sup>160</sup> See Article 2(7) of the U.N. Charter.

<sup>161</sup> See Article 39 of the U.N. Charter. See also Article 41 and Article 42 of the U.N. Charter.

<sup>162</sup> Cohen & Deng (no. 4) 6. See also Korn (no. 14) 125.

doors are open for the international community which can, without interfering with sovereignty, intervene in order to protect and assist IDPs.

The assertion that a state can forfeit its sovereignty is a novel and bold concept. States have numerous obligations under contemporary international law. If unwillingness to observe these obligations could result in a loss of sovereignty and justify international intervention, claims of a right to intervene could become dangerously common.<sup>163</sup> In other words, the approach implies considerable potential for outside intervention. The prevailing reluctance to tamper with the concepts of sovereignty and non-intervention makes it unlikely that this approach will gain any significant support. Therefore, it seems it will be confined to the ambit of legal thinking and theory rather than practice.

If, as Ruddick suggests, the concept of forfeiture of sovereignty were to be interpreted more conservatively, for example, as the temporary surrender of sovereignty for a particular purpose, it may some day attract more support.<sup>164</sup> However, as a legal basis for an intervention aimed at assisting and protecting the internally displaced the concept is, at present, of no practical relevance.

## 2.2. Abuse of Rights

The concept of abuse of rights exists in several systems of law and has also attracted backing from international tribunals.<sup>165</sup> It holds that the exercise of a lawful right can become unlawful if it impedes the enjoyment of other rights.<sup>166</sup> When applied to the present context it means that a state, which generally has the right to claim respect for its sovereignty, cannot do so if such a claim masks an arbitrary refusal to permit international assistance to the internally displaced.<sup>167</sup> While the concept does not advocate a complete loss of sovereignty, it can still be used as the

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<sup>163</sup> Ruddick 'The Continuing Constraint of Sovereignty: International Law, International Protection and the Internally Displaced' (1997) 77 *B.U.L. Rev.* 467.

<sup>164</sup> Ruddick (no. 163) 466.

<sup>165</sup> Brownlie (no. 75) 429. See also: *Certain German Interests in Polish Upper Silesia* (1926) Judgement of the PCIJ, Series No. 7, p. 30 and *Free Zones of Upper Savoy and the District of Gex* (1932) Judgement of the PCIJ, Series No. 46, p. 167. Moreover, individual judges of the ICJ have repeatedly referred to it, as for example, Judge Azevedo in the *Admissions Case* ICJ Reports, 1948, pp. 79-80 and Judge Alvarez in the *Admission Case* ICJ Reports, 1950, p. 15.

<sup>166</sup> Ruddick (no. 163) 468-469.

<sup>167</sup> Plender 'The Legal Basis of International Jurisdiction to Act with Regard to the Internally Displaced' (1994) 6 *Int'l J. Ref. L.* 356.

basis for an argument in support of interventions aimed at protecting humanitarian and human rights standards.<sup>168</sup>

To endorse this approach and to underline that sovereignty is not an immutable concept one scholar drew an analogy to classical property law: although a landowner has the absolute right to exclude trespass upon its property this right may be violated in cases of necessity, such as avoiding imminent disaster or serious harm to another person.<sup>169</sup> Accordingly, intervention does not conflict with the concept of sovereignty where the latter is clearly exploited in bad faith.

The concept of abuse of rights appears to have the potential to solve the question of how outside intervention to assist the internally displaced can be undertaken in a lawful manner. However, a closer look at the concept reveals that it has, so far, only been applied to administrative action and environmental law.<sup>170</sup> That makes it difficult to invoke the concept as a precedent extending to situations where states refuse to assist and protect the internally displaced. Therefore, whether or not the concept of abuse of rights constitutes a general principle of international law must be examined. Only then may it be used more widely and applied to cases of internal displacement.

Scholars have expressed conflicting opinions to this end. However, the majority tend to refuse the notion of abuse of rights recognition as an independent principle and rather perceive it as an application of other concepts such as, for example, good faith.<sup>171</sup> Moreover, no international judicial decision has been explicitly founded on the concept of abuse of rights – which also counters its quality as a general rule of international law. In the *Anglo-Iranian Oil Case*, Judge Alvarez, a proponent of the concept, even acknowledged that it is still ‘finding its way into international law.’<sup>172</sup>

In light of this, it would be unfounded to claim that the concept of abuse of rights applies to cases where a government fails to assist the internally displaced. Whether the concept will gain broader applicability in the future remains, at best, uncertain. Here, it is illustrative to read Brownlie’s view on the abuse of rights:

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<sup>168</sup> Ruddick (no. 163) 469.

<sup>169</sup> Helton ‘The Legality of Providing Humanitarian Assistance Without the Consent of the Sovereign’ (1992) 4 *Int’l J. Ref. L.* 374-375.

<sup>170</sup> Ruddick (no. 163) 470-471.

<sup>171</sup> Kiss *Encyclopedia of Public International Law* 5-7.

<sup>172</sup> *Anglo-Iranian Oil Co. Case* ICJ Reports, 1952, p. 133.

'The doctrine is a useful agent in the progressive development of the law, but, as a general principle, it does not exist in positive law. Indeed, it is doubtful if it could be safely recognized as an ambulatory doctrine, since it would encourage doctrines as to the relativity of rights and results, outside the judicial forum, in instability.'<sup>173</sup>

In addition to the problem of where exactly the concept of abuse of rights stands in international law, it holds just as much potential for abuse as the aforementioned concept of forfeiture of sovereignty. This further minimizes the likelihood that the concept can, one day, be used to aid IDPs. In conclusion, the concept of abuse of rights does not legitimize outside intervention aimed at providing assistance and protection to the internally displaced.

### 2.3. Humanitarian Intervention

Notwithstanding the shift from an absolute to a rather relative notion of sovereignty the question of on what basis intervention can be lawfully undertaken turns out to be difficult to answer. In seeking to solve the problem of how IDPs can be assisted, it is worth examining the concept of humanitarian intervention as it may provide a viable solution. Humanitarian intervention has traditionally been defined as one state's:

'reliance upon force for the justifiable purpose of protecting the inhabitants of another state from treatment which is so arbitrary and persistently abusive as to exceed the limits of that authority within which the sovereign is presumed to act with reason and justice.'<sup>174</sup>

As the traditional concept of sovereignty has changed, the understanding of humanitarian intervention has become broader. It is currently understood to include actions such as the delivery of humanitarian aid.<sup>175</sup>

In contrast to the other approaches which have been advanced only recently, the concept of humanitarian intervention and its lawfulness have been debated for centuries. Different times have generated different answers to this question. Arguably, humanitarian intervention was believed to be lawful before the signing of

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<sup>173</sup> Brownlie (no. 75) 430.

<sup>174</sup> Stowell *Intervention in International Law* cited in: Wright 'A Contemporary Theory of Humanitarian Intervention' (1988/1989) 4 *Fla. Int'l L. J.* 436.

<sup>175</sup> Gordon 'Intervention by the United Nations: Iraq, Somalia and Haiti' (1996) 31 *Tex. Int'l L. J.* 43-45.

the U.N. Charter.<sup>176</sup> This belief has changed and, more interestingly, may be changing again. The following sections will examine the concept's place in recent history and the present before addressing where it may go in the future.

### 2.3.1. Humanitarian Intervention and the U.N. Charter – Approach during the Cold War Era

The U.N. Charter contains no explicit reference to humanitarian intervention. It is, however, widely perceived as fundamentally non-interventionist in its approach.<sup>177</sup> Article 2(4) is the most frequently cited provision to evidence that an intervention encompassing the use of force contravenes the U.N. Charter. Article 2(4) provides that:

‘All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or any other matter inconsistent with the purposes of the United Nations.’

Proponents of humanitarian intervention have asserted that an intervention on strictly humanitarian grounds is neither aimed at the ‘territorial integrity’ nor the ‘political independence’ of the target state, and thus is not in conflict with Article 2(4).<sup>178</sup> However, in light of the *travaux préparatoires* this reading of Article 2(4) cannot be upheld. The two alternatives were introduced at the request of several smaller states that wanted to emphasize ‘territorial integrity’ and ‘political independence’ but had no intention of restricting the general scope of Article 2(4).<sup>179</sup>

Another argument that attempts to reconcile the concept of humanitarian intervention with Article 2(4) stresses that such interventions are undertaken in adherence to other Charter provisions.<sup>180</sup> Article 1(3), for example, stipulates that the achievement of international co-operation in promoting and encouraging respect for human rights is one purpose of the United Nations. As Article 2(4) only prohibits

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<sup>176</sup> Beyerlin *Encyclopedia of Public International Law* 927.

<sup>177</sup> Roberts ‘The So-Called Right of Humanitarian Intervention’ (2000) 3 *Yearbook of International Humanitarian Law* 7.

<sup>178</sup> Reisman & McDougal ‘Humanitarian Intervention to Protect the Ibos’ in *Humanitarian Intervention and the United Nations* 177.

<sup>179</sup> Beyerlin (no. 176) 927. See also: Randelzhofer *The Charter of the United Nations* 123-124.

<sup>180</sup> Reisman & McDougal (no. 178) 177; Beyerlin (no. 176) 927; Randelzhofer (no. 179) 123-124.

the threat or use of force inconsistent with the purposes of the United Nations, it is maintained that it cannot be illegal if triggered by gross human rights violations. This, however, has been countered by the argument that the non-use of force is the predominant principle.<sup>181</sup> Henkin summed it up well:

'Article 2(4) is the most important norm of international law, the distillation and embodiment of the primary value of the inter-state system, the defence of state independence and state autonomy. The Charter contemplated no exceptions. It prohibits the use of force for selfish state interests as well as for benign purposes, human values. It declares peace as the supreme value, to secure not merely state autonomy, but fundamental order for all. It declares peace to be more compelling than inter-state justice, more compelling even than human rights or other human values.'<sup>182</sup>

Therefore, even in the case of conflicting values, Article 2(4) cannot be put in jeopardy.

Under the provisions of the U.N. Charter it was only Chapter VII that left some room to permit interventions on humanitarian grounds. It is Article 39 that entitles the Security Council to take action when it deems a certain situation to be a threat to, or a breach of, the peace. According to Article 42 this action may include the use of force. Moreover, as has been indicated before, Article 2(7) recognizes the possibility that the Security Council can authorize these measures within a sovereign state.

The question of whether a humanitarian crisis, as the crisis of internal displacement, can constitute, at minimum, a threat to peace, thus, enabling the Security Council to authorize an intervention does not need to be answered in the Cold War context. Obtaining Security Council authorization for carrying out a humanitarian intervention was, in practice, due to the prevailing climate of mistrust, not a viable option.<sup>183</sup> The great powers would have impeded interventions by using their veto power.

To circumvent the problems posed by the U.N. Charter, some scholars contended that humanitarian interventions were lawful under customary international law.<sup>184</sup> However, this position has been widely rejected because the necessary

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<sup>181</sup> Chesterman *Just War or Just Peace* 52-53.

<sup>182</sup> Henkin *International Law: Politics and Values* 146.

<sup>183</sup> Byers *War Law* 97. Charney 'Anticipatory Humanitarian Intervention in Kosovo' (1999) 93 *Am. J. Int'l L.* 838.

<sup>184</sup> Beyerlin (no. 176)

conditions to establish a rule of customary international law were lacking. Custom is created by state practice and *opinio iuris*.<sup>185</sup> Although one could cite a handful of possible precedents to support the requirement of state practice, for example, the interventions by India in East Pakistan (1971), Vietnam in Cambodia (1978) and Tanzania in Uganda (1979) one would not be able to establish *opinio iuris* in its support. While the intervening states could have argued that they got involved for humanitarian reasons they rather claimed that they had acted in self-defense.<sup>186</sup> In addition to the absence of *opinio iuris* on the part of the acting powers, the actions were opposed as unlawful by, at least, parts of the international community. It is, therefore, impossible to claim that humanitarian interventions were permitted under customary international law.

In conclusion, none of the arguments that the concept of humanitarian intervention is compatible with Article 2(4) was considered to be convincing. As a result, the prevailing view considered humanitarian intervention illegal, unless undertaken in the (unlikely) event of Security Council authorization.

### 2.3.2. Humanitarian Intervention and the UN Charter – Post Cold War Approach

The end of the Cold War stalemate and subsequent events led to a revival of the debate on humanitarian intervention. Several cases strikingly demonstrated the urgent need for outside help in cases where people are threatened or not assisted by their own government.<sup>187</sup> In fact, over the past 15 years a number of interventions under humanitarian auspices have occurred.<sup>188</sup> State practice has developed at great speed and even given way to the claim that there is an emerging right of humanitarian intervention without Security Council permission.<sup>189</sup> Some of these

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<sup>185</sup> Bernhardt *Encyclopedia of Public International Law* 898. State practice, the objective element of custom, generally refers to positive acts of a state but can also be evidenced by silence and inactivity. If the practice in question is accepted as law, in other words, when a sense of legal obligation to behave in a certain way exists, the *opinio iuris* requirement is fulfilled and a rule of customary international law established.

<sup>186</sup> Beyerlin (no. 176) 928, Byers (no. 183) 93-98.

<sup>187</sup> For example, the repression of Kurds and Shi'ites by the Iraqi authorities and the suffering of the Kosovars at the hands of the Serbs.

<sup>188</sup> These include, *inter alia*, northern Iraq (1991), Bosnia & Herzegovina (1992-95), Somalia (1992-93), Rwanda (1994), Kosovo (1998-99) and East Timor (1999) and Sierra Leone (1999-2000).

<sup>189</sup> Cassese 'Ex iniuria ius oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?' (1999) 10 *E. J. Int'l L.* 27; Wedgwood 'NATO's Campaign in Yugoslavia' (1999) 93 *Am. J. Int'l L.* 828.

interventions will be briefly examined to demonstrate how recent developments have influenced the debate on the lawfulness of humanitarian intervention.

### Somalia

In 1991, after being in power for two decades, the government of Mohammed Siad Barre was overthrown and Somalia plunged into a clan-based civil war, as a result central authority collapsed entirely.<sup>190</sup> The effects of the civil war were exacerbated by a famine, largely caused by the warring factions who employed the destruction of farmland and looting of food stocks as means of warfare.<sup>191</sup> These conditions led to large-scale displacement and many of those uprooted lived on the verge of starvation.<sup>192</sup> The humanitarian crisis which unfolded soon captured the world's attention.

In December 1992 the Security Council unanimously adopted Resolution 794. After recognizing the unique character of the situation, it determined

'that the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security.'<sup>193</sup>

This finding gave the Security Council authority to decide what measures had to be taken to maintain or restore international peace and security.<sup>194</sup> Acting under Chapter VII of the U.N. Charter it then authorized

'the Secretary-General and member states ... to use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia.'<sup>195</sup>

Thereafter, U.S. President George Bush ordered 28,000 troops into Somalia to ensure the safe delivery of international aid.<sup>196</sup>

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<sup>190</sup> Vesel 'The Lonely Pragmatist: Humanitarian Intervention in an Imperfect World' (2004) 18 *BYU J. Pub. L.* 20-21.

<sup>191</sup> Vesel (no. 190) 21. See also: IDMC Internal Displacement Profile for Somalia at 80 available at [www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/E48865A53BA24F36C12570F20050D956/\\$file/Somalia+-January+2006.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/E48865A53BA24F36C12570F20050D956/$file/Somalia+-January+2006.pdf).

<sup>192</sup> See IDMC Internal Displacement Profile (no. 191).

<sup>193</sup> U.N. Doc S/Res/794 (1992).

<sup>194</sup> See Article 39 of the U.N. Charter.

<sup>195</sup> U.N. Doc S/Res/794 (1992) at 10.

At first sight the intervention in Somalia, undertaken with the authorization of the Security Council, may not seem to contribute to a progressive development of humanitarian intervention. After all, interventions authorized by the Security Council have always been lawful. The intervention in Somalia is, however, significant for two reasons. First, it clarified that an internal humanitarian crisis can qualify as a threat to international peace and security. As pointed out in the previous section such a finding would have hardly been possible in the climate of mistrust that prevailed during the Cold War. Moreover and for the first time in its history, the Security Council used its powers under Chapter VII to sanction an intervention aimed at the delivery of humanitarian aid.<sup>197</sup> Thus, by adopting Resolution 794 the Security Council broke new ground concerning the concept of humanitarian intervention.

However, its value as a progressive approach to humanitarian intervention, namely one that would benefit IDPs, is limited. By emphasizing the exceptional character of the situation in Somalia the Security Council implied that it did not want its actions to form a precedent for future situations. Furthermore, it is important to note that the intervention in Somalia did not threaten the rights and privileges associated with state sovereignty because state authority in Somalia had practically collapsed.<sup>198</sup> Presumably, this made it easier for the community of states to take what were bold steps in view of the traditional approach to intervention. Nonetheless, the case of Somalia is significant as it indicates the departure from the traditional reluctance to intervene for strictly humanitarian purposes.

### Sierra Leone

Sierra Leone has been in a state of civil war since 1991 when the Revolutionary United Front (RUF), led by the former Sierra Leonean army corporal Foday Sankoh, invaded the country from neighbouring Liberia.<sup>199</sup> In 1992, shortly after the invasion, the military ousted the government of Joseph Momoh and took up the battle against the rebel forces.<sup>200</sup> The military rule lasted for four years. In 1996, Ahmed Kabbah

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<sup>196</sup> Chesterman *Just War or Just Peace* 142.

<sup>197</sup> Nanda, Muther & Eckert 'Tragedies in Somalia, Yugoslavia, Haiti, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention in International Law – Part II' (1998) 26 *Denv. J. Int'l L. & Pol'y* 834.

<sup>198</sup> Vesel (no. 190) 25.

<sup>199</sup> Chesterman (no. 196) 155.

<sup>200</sup> Vesel (no. 190) 26.

was elected president.<sup>201</sup> His government, however, only remained in power until 1997, when it was overthrown by the Armed Forces Revolutionary Committee (AFRC).<sup>202</sup> The instability led to further RUF rampages and a massive humanitarian crisis was under way which eventually left more than half of the country's population displaced.<sup>203</sup>

In response to the deplorable conditions in Sierra Leone, the Security Council, in October 1997, unanimously adopted Resolution 1132. It stated that the Council was:

'gravely concerned at the continued violence and loss of life in Sierra Leone following the military coup of May 25, 1997, the deteriorating humanitarian conditions in that country and the consequences for neighbouring countries.'<sup>204</sup>

The Security Council then deemed the situation a threat to international peace and security.<sup>205</sup> In acknowledging transboundary effects of the situation, the invocation of Article 39 was less exceptional than in the case of Somalia. However, humanitarian considerations were in the forefront, when the situation in Sierra Leone was designated a threat to international peace and security.<sup>206</sup> To maintain international peace and security, an arms embargo was imposed to cut off foreign supplies to the warring factions.<sup>207</sup> The resolution then expressly authorized the Economic Community of West African States (ECOWAS) to ensure the strict implementation of the embargo.<sup>208</sup>

Here one peculiarity of the situation in Sierra Leone surfaces. ECOWAS was already engaged in the country prior to obtaining U.N. authorization. It had acted in advance of its Council mandate which, in light of Article 2(4) of the U.N. Charter was *prima facie* illegal.<sup>209</sup> However, the international community did not condemn the

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<sup>201</sup> Vesel (no. 190) 27.

<sup>202</sup> Chesterman (no. 196) 155.

<sup>203</sup> Chege 'Sierra Leone: The State that Came Back from the Dead' (2002) 25 *Wash. Q.* 149-150.

<sup>204</sup> U.N. Doc S/Res/1132 (1997).

<sup>205</sup> U.N. Doc S/Res/1132 (1997).

<sup>206</sup> Vesel (no. 190) 28.

<sup>207</sup> U.N. Doc S/Res/1132 (1997) para. 6.

<sup>208</sup> U.N. Doc S/Res/1132 (1997) para. 8.

<sup>209</sup> ECOWAS contended that the intervention was not only justified on humanitarian grounds but also because it was undertaken at the request of the legitimate government. Notably, international law is not violated when a government asks for military assistance. However, a 'government's authority to seek external assistance ... comes into question when the government faces internal armed opposition sufficient to cast serious doubt on the government's ability to maintain itself in power

intervention but instead gave it, through Resolution 1132, *post facto* sanctioning. Moreover, the Secretary-General commended ECOWAS' intervention as 'laudable' and urged other states to contribute to its efforts.<sup>210</sup> This deserves further examination as it may lead to a broader concept of permissible humanitarian interventions.

The fact that the Security Council was willing to endorse the ECOWAS activity implies that the international community came to accept humanitarian intervention by regional actors, even if initially undertaken without its authorization. However, when considering the specific features that make up the situation in Sierra Leone, this assumption may be inaccurate. Similar to Somalia, Sierra Leone at the time of the intervention had no functioning central government. Its legal ruling authority had lost the support of its own military in the protracted civil war against the RUF.<sup>211</sup> Eventually it was ousted and, as a result, lost complete control over the events occurring in the country.

Thus, a strong argument can be made that it was, again, the lack of state authority that spurred the support for the intervention.<sup>212</sup> States did not have to fear an erosion of the concept of sovereignty by approving the intervention. It is rather difficult, to see their approval in isolation from its perceived effects on the concept of sovereignty. The value of the ECOWAS intervention for a broader concept of lawful interventions is, thus, limited to the context of collapsed state authority accompanied by gross violations of humanitarian and human rights standards. In this respect, it reinforces that humanitarian catastrophes within a state can give rise to outside intervention.

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without foreign assistance.' (See Wippman 'Change and Continuity in Legal Justifications for Military Intervention in Internal Conflict' (1996) 27 *Colum. Hum. Rts. L. Rev.* 446.) In light of the facts, it can hardly be asserted that the government of Sierra Leone could maintain without outside help. Its request can, therefore, not be used to justify the intervention. See also Berger 'State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone' (2001) 11 *Ind. Int'l & Comp. L. Rev.* 623-624.

<sup>210</sup> Fourth Report of the Secretary-General on the Situation in Sierra Leone U.N. Doc S/1998/249 paras. 48-49.

<sup>211</sup> Berger 'State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone' (2001) 11 *Ind. Int'l & Comp. L. Rev.* 624.

<sup>212</sup> Vesel (no. 190) 31.

## Kosovo

Ethnic tensions in Yugoslavia had long been suppressed but with the end of the Cold War, problems that had been simmering boiled over into war, when Slovenia, Bosnia and Croatia sought their independence from Yugoslavia.<sup>213</sup> Kosovo, in contrast to Slovenia, Bosnia and Croatia not a republic of the Yugoslav Federation but a province of Serbia, also wanted independence.<sup>214</sup> Although the region was experiencing unrest, no war broke out which is probably why, in 1995, when the Dayton Peace Accords were signed to end the war, no mention was made of Kosovo, though it was widely acknowledged to be one of the most sensitive areas in the Balkans.<sup>215</sup>

In the late 1990s, the conflict between Serbs and Kosovars escalated into an armed conflict between Serb forces and the Kosovo Liberation Army (KLA). More than 200.000 Kosovars fled their villages to escape indiscriminate Serb attacks.<sup>216</sup> With the fighting and its humanitarian consequences increasing, the Security Council, in 1998, adopted Resolution 1199. It declared the conflict in the Kosovo a threat to *regional* peace and security, thus, stopped short of invoking Article 39 of the U.N. Charter.<sup>217</sup>

The Security Council did, however, demand action to improve the humanitarian situation. It, *inter alia*, required the Federal Republic of Yugoslavia (FRY) to facilitate the return of displaced persons and to allow free and unimpeded access for humanitarian organizations and supplies.<sup>218</sup> At the conclusion of the resolution, it also decided 'to consider further action and additional measures to maintain and restore peace in the region' if the measures demanded in this resolution were not be taken.<sup>219</sup>

Assuming that the Security Council would not take more decisive measures because Russia or China (or both) would veto any resolution that supported military intervention, the North Atlantic Treaty Organization (NATO) intervened without

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<sup>213</sup> Vesel (no. 190) 41.

<sup>214</sup> The population of the Kosovo is primarily made up of ethnic Albanians (Kosovars) accounting for 85-90 percent. Serbs are the second largest ethnic group accounting for 5-10 percent of the population. See Krieger *The Kosovo Conflict and International Law* 521.

<sup>215</sup> Holbrooke *To End a War* 357 cited in Chesterman (no. 196) 207.

<sup>216</sup> Krieger (no. 214) Introduction at xxxi. See also: Wedgewood (no. 189) 829.

<sup>217</sup> U.N. Doc S/Res/1199 (1998).

<sup>218</sup> U.N. Doc S/Res/1199 (1998).

<sup>219</sup> U.N. Doc S/Res/1199 (1998) para. 16.

Security Council authorization.<sup>220</sup> When NATO acted, the Security Council met in an emergency session, where China and Russia, indeed, opposed the intervention as a violation of international law.<sup>221</sup> Notably, some of the states taking part in the intervention justified it on the basis of the concept of humanitarian intervention. The UK delegate stated:

The action being taken is legal. It is justified as an exceptional measure to prevent an overwhelming humanitarian catastrophe. Under present circumstances in Kosovo, there is convincing evidence that such a catastrophe is imminent. Renewed acts of repression by the authorities of the FRY would cause further loss of civilian life and would lead to displacement of the civilian population on a large scale and in hostile conditions.

Every means short of force has been tried to avert this situation. In these circumstances, and as an exceptional measure on grounds of overwhelming humanitarian necessity, military intervention is legally justifiable. The force now proposed is directed exclusively to averting a humanitarian catastrophe and is the minimum judged necessary for that purpose.<sup>222</sup>

No official condemnation of the intervention followed and supporters of the action claimed it as a new precedent for humanitarian intervention.<sup>223</sup> However, in light of the U.N. Charter the intervention usurped the authority of the Security Council and violated Article 2(4). In contrast to the situation in Sierral Leone, no explicit *post facto* authorization was granted. Although the Secretary-General stated that 'there are times when the use of force may be legitimate in the pursuit of peace' he emphasized that the Security Council should be involved in any decision pertaining to the use of force.<sup>224</sup>

As there is no legal basis for the NATO intervention in the Charter, one can only argue that interventions, such as NATO's are nowadays justified under customary international law. The Kosovo intervention may be evidence of state practice and *opinio iuris*. However, more state practice and *opinio iuris* will be needed before interventions in functioning states without the authorization of the Security Council can be considered a new rule and thus an exception to the corollary

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<sup>220</sup> Henkin 'Kosovo and Law of Humanitarian Intervention' (1999) 93 *Am. J. Int'l L.* 825.

<sup>221</sup> U.N. Doc S/PV.3988 (1999).

<sup>222</sup> U.N. Doc S/PV.3988 (1999)

<sup>223</sup> For example, Reisman 'Kosovo's Antinomies' (1999) 93 *Am. J. Int'l L.* 862.

<sup>224</sup> Secretary-General's Statement on NATO Military Action Against Yugoslavia U.N. Press Release SG/SM/6938 available at [www.globalpolicy.org/security/issues/kosovo2.htm](http://www.globalpolicy.org/security/issues/kosovo2.htm).

principles of sovereignty, in particular the prohibition of use of force against the territorial integrity and political independence of a state.<sup>225</sup>

### 2.3.3. Future Trends

While the NATO intervention was unlawful it has, nonetheless, been characterized as an emerging rule of international law, consistent with contemporary trends on the international plane.<sup>226</sup> Among these trends the following were identified: first, human rights are increasingly perceived to be of concern to the world community and second, large-scale abuses may prompt a form of state responsibility different than that of delictual responsibility, to which international organizations or groups of states have to respond in a more decisive fashion.<sup>227</sup> The latter trend is clearly evidenced by the growing number of interventions through international organizations, in domestic conflicts where human rights are at stake.<sup>228</sup>

Based on these trends, Cassese has submitted that:

'under certain strict conditions resort to armed force may gradually become justified, even absent any authorization by the Security Council.'<sup>229</sup>

An established set of criteria is crucial to prevent a broader concept of humanitarian intervention from being employed for abusive purposes.<sup>230</sup> With regard

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<sup>225</sup> Byers (no. 183) 102.

<sup>226</sup> Cassese (no. 189) 27.

<sup>227</sup> Cassese (no. 189) 26.

<sup>228</sup> Cassese (no. 189) 26.

<sup>229</sup> Cassese (no. 189) 27.

<sup>230</sup> Among the criteria suggested by Cassese are:

- (i) gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people and amounting to crimes of humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support;
- (ii) the Security Council is unable to take any coercive action because of disagreement among the permanent members;
- (iii) all peaceful avenues which may be explored consistent with the urgency of the situation have been exhausted;
- (iv) a group of states decides to try to halt the atrocities with the support or at least the non-opposition of the majority of member states of the U.N.;
- (v) armed force is exclusively used for the limited purpose of stopping atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose.

See Cassese (no. 189) 27. See also: Roberts (no.177 ) 33-44; Poltak 'Humanitarian Intervention: A Contemporary Interpretation of the Charter of the United Nations' (2002) 60 *U. Toronto Fac. L. Rev.* 30-36.

to the crisis of internal displacement, the day when a broader concept of humanitarian interventions emerges will only be welcomed.

## Conclusion

Over the last few years, the Security Council has expanded its criteria for occasions justifying intervention. It is now willing to characterize serious violations of humanitarian and human rights law in the wake of internal conflicts, almost inevitably accompanied by mass displacement, as threats to international peace and security. It has, in fact, declared that the following scenarios may fall under Article 39 of the U.N. Charter: the deliberate denial of humanitarian access to civilians and situations where IDPs are under the threat of harassment or where their camps are at risk of infiltration by armed elements.<sup>231</sup>

Hence, situations of internal displacement can today give rise to humanitarian interventions under Chapter VII. Experience has shown that this is most likely to happen in cases where states have lost their governing authority since in such cases an encroachment on the concept of sovereignty is not evident. However, humanitarian interventions under Chapter VII can be undertaken on a broader basis. In the end, it will depend on the will of states as to whether humanitarian interventions authorized by the Security Council will become an effective tool to alleviate the suffering of the internally displaced, not just in cases where a state is unable but also in cases where a state is unwilling to assist and protect IDPs.

Moreover, humanitarian interventions carried out by regional organizations or groups of states have been legitimized, even in the absence of prior approval by the Security Council, in cases where state authority has collapsed and humanitarian catastrophes persist.<sup>232</sup> In addition to Sierra Leone, Liberia provides a similar example for this phenomenon.<sup>233</sup> Nonetheless, acting in such circumstance is still subject to certain precariousness as it is possible that future interventions of that kind will not gain *post facto* authorization.

Beyond the aforementioned instances, it is much more difficult to assert that humanitarian interventions can be considered legal. The U.N. Charter does not allow

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<sup>231</sup> U.N. Doc S/Res/1296 (2000).

<sup>232</sup> Wedgewood (no. 189) 832.

<sup>233</sup> Chesterman (no. 196) 134-137.

interventions other than those authorized by the Security Council and evidence for their legality under customary international law remains weak. Bearing in mind how easily such a rule could be used to disguise abusive interventions it is unlikely that it will emerge any time soon. Nonetheless, the concept could become commandingly persuasive with the advent of future interventions.

Thus far, humanitarian interventions in functioning states aimed at assisting and protecting the internally displaced cannot be undertaken in a legal manner, without having the authorization of the Security Council. On one hand, this can be welcomed because the Council's authorization affords the strongest safeguard against abusive interventions, shielded as humanitarian, that the contemporary system provides. On the other hand it makes it harder to alleviate the plight of the internally displaced as obtaining authorization can prove to be a difficult endeavour. As mentioned earlier, the effectiveness of humanitarian interventions authorized by the Security Council, aimed to assist the internally displaced, will now be dependent upon the will of states.

The recent trends and their significance for the plight of the internally displaced are captured well by Dacyl:

'The post Cold War responses to internally displaced persons ... seem to denote increased international concern to safeguard their human rights and simultaneous – albeit not necessarily intentional – questioning of the sanctity of the sovereignty principle with regard to the state unable or unwilling to protect its own citizens.'<sup>234</sup>

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<sup>234</sup> Dacyl 'Sovereignty Versus Human Rights: From Past Discourses to Contemporary Dilemmas' (1996) 9 *J. Ref. Stud.* 159.

## **Chapter IV**

### **Internal Displacement in the Sudan – A Case Study**

Few, if any, countries have suffered greater internal displacement than the Sudan. At present, more than five million people in the Sudan are uprooted from their homes but never crossed the border into another country. In outlining the history of the conflict the case study will exemplify typical causes of displacement. It will provide insight into the circumstances in which displaced populations live, thereby demonstrating some of their most urgent needs. After exploring how international law protects them, it will address what has been done to ensure that the Sudan's internally displaced receive adequate protection. The issues that have been dealt with in the previous chapters will resurface in the context of this particular case.

#### **1. Causes of Displacement**

Like many other conflicts that generate displacement, the conflict in Sudan can be depicted as: regional, religious, racial, ethnic and cultural.<sup>235</sup> About 70 percent of the population is Muslim, 25 percent Animist and 5 percent Christian.<sup>236</sup> While Muslims live predominantly in the more populous north, Christians and Animists live in the south.<sup>237</sup> In addition to religion, language and culture divide the country. People in the north speak Arabic and their culture is based on the Islamic faith whereas people in the south speak English and African languages and adhere to Christian or traditional African cultures.<sup>238</sup> Furthermore, the Sudan is divided when it comes to political influence and economic power. Political power was given to the northern elite even before the country gained independence, in 1956.<sup>239</sup> The north has, thereafter, continued to dominate the political and economic life of the Sudan.<sup>240</sup>

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<sup>235</sup> Ruiz (no. 155) 139.

<sup>236</sup> International Crisis Group 'Conflict History: Sudan' available at [www.crisisgroup.org/home/index.cfm?action=conflict\\_search&l=1&t=1&c\\_country=101](http://www.crisisgroup.org/home/index.cfm?action=conflict_search&l=1&t=1&c_country=101).

<sup>237</sup> International Crisis Group (no. 236).

<sup>238</sup> IDMC Internal Displacement Profile: Sudan at 18 available at [www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/10BBAF86B293EC3F802570BA00541711/\\$file/Sudan+-October+2005.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/10BBAF86B293EC3F802570BA00541711/$file/Sudan+-October+2005.pdf).

<sup>239</sup> International Crisis Group (no. 236).

<sup>240</sup> Ruiz (no. 155) 139.

In light of these divisions, it comes to no surprise that frustration with northern domination, suppression and exploitation led to the first civil war which ended with the signing of the Addis Ababa Agreement, in 1972.<sup>241</sup> First and foremost, the agreement granted regional autonomy to the south.<sup>242</sup> Moreover, it recognized English instead of Arabic as the main language of the south and provided that the southern Sudanese insurgents (Anyanya) be absorbed into the army and serve in the south.<sup>243</sup> However, the government consistently undermined the agreement and as a consequence peace lasted no longer than a decade.<sup>244</sup>

### 1.1. Conflict and Displacement during the 1980s

In 1983, the Arab-led government broke up the south, transforming it from one into three separate administrative regions.<sup>245</sup> Although each region had its own governing body they were deprived of most of the autonomy they had gained through the Addis Ababa Agreement.<sup>246</sup> Moreover, Arabic was, again, declared to be the only official language of the country and *Shari'a* (Islamic) law was introduced as the sole source of law.<sup>247</sup>

When the government learned of the planned uprising of southern officers it ordered the officers involved, together with their forces, from their bases in the south to others in the north.<sup>248</sup> One battalion, led by John Garang, resisted the orders to be rotated to the north and instead broke with Khartoum and left for the Ethiopian border, where it was subsequently joined by members of other battalions.<sup>249</sup> Thus, the Sudanese People's Liberation Army (SPLA) was born and the second civil war unfolded.

As the SPLA gained strength (by 1986 it was estimated to have the support of 12,500 men) it shifted its activities from rural areas to attacking government garrison towns in the south.<sup>250</sup> At the same time, the government started to supply automatic

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<sup>241</sup> Ruiz (no. 155) 142-143.

<sup>242</sup> Prolonged Wars: The War in Sudan, Chapter III available at [www.fas.org/irp/world/para/docs/97-0588.pdf](http://www.fas.org/irp/world/para/docs/97-0588.pdf)

<sup>243</sup> Prolonged Wars: The War in Sudan (no. 242).

<sup>244</sup> International Crisis Group (no. 236).

<sup>245</sup> Ruiz (no. 155) 143.

<sup>246</sup> Ruiz (no. 155) 143.

<sup>247</sup> International Crisis Group (no. 236).

<sup>248</sup> Ruiz (no. 155) 143.

<sup>249</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 18. See also: Ruiz (no. 155) 143.

<sup>250</sup> Profiles in Displacement: Sudan (no. 238) 18-19 and Ruiz (no. 155) 143.

weapons and other military supplies to Arab raiders, as part of its general campaign against the south.<sup>251</sup> The raiders, already responsible for killings, rape, arson and theft of cattle used the increased firepower to depopulate hundreds of African villages.<sup>252</sup>

Due to these developments internal displacement abounded, the government, however, remained inactive. Not so the SPLA. In 1986 the SPLA's nascent humanitarian arm, the Sudanese Relief and Rehabilitation Association (SRRA), was providing food to about 20.000 internally displaced.<sup>253</sup> When the SPLA asked the United Nations to help assist IDPs it was strongly supported by the head of the Office of U.N. Emergency Operations in the Sudan who was in return declared a persona non grata by the Sudanese government. While displacement continued international aid did not materialise.

By the late 1980s, the SPLA's military capacity had grown significantly. Its man-power was estimated at 20.000 to 30.000 and its activities threatened major district and provincial capitals.<sup>254</sup> At this point, the character of the conflict changed from local to countrywide. Ongoing peace efforts were squashed when, in 1989, a military coup ousted the government and brought the National Islamic Front (NIF) to power which promptly proclaimed a holy war against the non-Muslim south.<sup>255</sup> Thus, the stage was set for the conflict to enter the 1990s.

## 1.2. Conflict and Displacement during the 1990s until today

By 1991, the SPLA's strength had reached 50.000 to 60.000 men and it controlled large parts of the south.<sup>256</sup> As a result, many displaced persons were able to return to their homes.<sup>257</sup> However, in 1991, international and internal events weakened the SPLA. The fall of the Mengistu regime in Ethiopia deprived the SPLA of military support and transit possibilities.<sup>258</sup> Furthermore, a power struggle within the leadership of the SPLA escalated and led to the split of the group.<sup>259</sup> In the following

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<sup>251</sup> Ruiz (no. 155) 143-144.

<sup>252</sup> Ruiz (no. 155) 144.

<sup>253</sup> Ruiz (no. 155) 144.

<sup>254</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 18-19 and Ruiz (no. 155) 145.

<sup>255</sup> International Crisis Group (no. 236)

<sup>256</sup> International Crisis Group (no. 236) and Ruiz (no. 155) 150.

<sup>257</sup> Ruiz (no. 155) 150.

<sup>258</sup> International Crisis Group (no. 236) and Ruiz (no. 155) 150-151.

<sup>259</sup> International Crisis Group (no. 236) and Ruiz (no. 155) 151.

years, more southerners died at the hands of the fighting factions than at the hands of the Sudanese military, although the government had started a massive campaign aimed at regaining the lost territory.<sup>260</sup> Because of its weakness, the SPLA returned to the guerilla tactics of its early days which only added to the factors that once again prompted tens of thousands of southerners to flee their homes.<sup>261</sup>

By the later half of the 1990s, the number of IDPs in the Sudan had risen to four million.<sup>262</sup> For years to come, negotiations between the government and SPLA made little or no progress, it was only in January 2005, after a decade of on and off negotiations that a peace agreement was signed.<sup>263</sup> At that time the number of IDPs had mushroomed to over five million, largely due to the crisis in Darfur, the western region of the country, where in 2003 conflict between rebels and the government erupted.<sup>264</sup>

The Sudan Liberation Army (SLA) and the Justice and Equality Movement (JEM), mainly made up of African tribes, started to fight the government on grounds of economic, political and social marginalization of the Darfur region.<sup>265</sup> The government, which still had many of its forces located in the south, reacted by arming Arab militia to eradicate alleged rebel support bases among the African tribes.<sup>266</sup> Subsequently, a campaign of killing, rape and pillage ensued. A humanitarian ceasefire agreement and multiple other agreements were negotiated, signed and then violated.<sup>267</sup> Peace talks have gone into the sixth round but as of today, daily life is characterized by violence, lawlessness and human suffering.<sup>268</sup> It is safe to say that peace in Darfur still is illusive.

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<sup>260</sup> Ruiz (no. 155) 151.

<sup>261</sup> Ruiz (no. 155) 151-152.

<sup>262</sup> Ruiz (no. 155) 155.

<sup>263</sup> International Crisis Group (no. 236).

<sup>264</sup> International Crisis Group (no. 236), IDMC Internal Displacement Profile: Sudan (no. 238) 25-27.

<sup>265</sup> International Commission of Inquiry para. 215 available at

[www.un.org/News/dh/Sudan/com\\_inq\\_darfur.pdf](http://www.un.org/News/dh/Sudan/com_inq_darfur.pdf). IDMC Internal Displacement Profile: Sudan (no. 238) 25.

<sup>266</sup> International Crisis Group (no. 236). See also: IDMC Internal Displacement Profile: Sudan (no. 238) 26.

<sup>267</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 25.

<sup>268</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 42.

## 2. Conditions of Displacement

Sudan's over five million internally displaced live under dreadful conditions.<sup>269</sup> They suffer from forced removals at the hands of the government.<sup>270</sup> They are continuously harassed by both government and rebel forces and live under the persistent threat of abductions, rapes and killings.<sup>271</sup> Furthermore, their poor living conditions in or outside of camps render them prone to malnutrition and diseases.<sup>272</sup> The following section will take a closer look at two specific situations currently harming Sudan's internally displaced and examine each of them in light of the protection mechanisms discussed in chapter two.

Of the instruments discussed in chapter two the Sudan is a party to the four Geneva Conventions but has neither signed nor ratified the Additional Protocols.<sup>273</sup> As the situation in the Sudan constitutes an internal armed conflict, only common Article 3 will be considered here. The Sudan is also bound by the ICCPR, ICESCR and CERD.<sup>274</sup> On the regional level the Sudan is bound by the African Charter on Human and Peoples' Rights.<sup>275</sup> Furthermore the Sudan has signed the ICC Statute, in 2000. However, as to date, it has not been ratified.<sup>276</sup>

### 2.1. Forced Removals

#### Account of the Situation

Shortly after gaining power, the NIF government announced that all displaced southerners would be removed from areas in and around Sudan's capital city, Khartoum.<sup>277</sup> The purpose of this policy was to effectively cleanse the city of

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<sup>269</sup> For a general overview see: IDMC Internal Displacement Profile: Sudan (no. 238).

<sup>270</sup> IDMC Internal Displacement Profile: Sudan (no. 238).

<sup>271</sup> IDMC Internal Displacement Profile: Sudan (no. 238).

<sup>272</sup> IDMC Internal Displacement Profile: Sudan (no. 238).

<sup>273</sup> See

[www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party\\_gc/\\$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf).

<sup>274</sup> See [www.unhchr.ch/pdf/report.pdf](http://www.unhchr.ch/pdf/report.pdf).

<sup>275</sup> See *Human Rights Law in Africa* 107.

<sup>276</sup> See [www.iccnw.org/countryinfo/worldsignsandratifications.html](http://www.iccnw.org/countryinfo/worldsignsandratifications.html).

<sup>277</sup> Ruiz (no. 155) 154.

undesirable non-Muslim elements.<sup>278</sup> In 1992, Human Rights Watch reported on the impact of this policy:

‘the military government of Sudan has in recent months bulldozed and burned the homes of about 500,000 of its poorest citizens in a forcible and often violent program of expulsions from Khartoum to new camps located outside the city.’<sup>279</sup>

After five years of continuous removals which displaced the already displaced for a second time, Human Rights Watch observed that the conditions of the relocation sites

‘were significantly harsher than in the demolished shantytowns, the government has literally bulldozed its way to its goal, which appears to be cleansing Khartoum of undesirable poverty-stricken migrants who arrived because ... of war from their rural places of origin.’<sup>280</sup>

Despite these actions, IDPs kept fleeing north to move beyond the war zones, in particular to Khartoum.<sup>281</sup> As a result, the destruction of homes in and around Khartoum and the subsequent removal of IDPs to isolated areas continues to be a reality.<sup>282</sup> In fact, 250,000 displaced persons have been affected since the end of 2003.<sup>283</sup>

### Assessment under International Law

The only applicable provision of humanitarian law, common Article 3, makes no reference to the forced relocation of civilians.<sup>284</sup> However, human rights instruments enshrine the freedom of movement and residence in Article 13(1) of the UDHR, Article 12 (1) of the ICCPR and Article 12(1) of the African Charter. As human rights apply to all individuals without distinction, internally displaced persons are entitled to

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<sup>278</sup> Profiles in Displacement: Sudan (no. 238) 120.

<sup>279</sup> Human Rights Watch Report 'If We Return We, Will Be Killed' available at [www.hrw.org/backgrounder/africa/darfur1104/4.htm](http://www.hrw.org/backgrounder/africa/darfur1104/4.htm).

<sup>280</sup> Human Rights Watch (no. 279).

<sup>281</sup> In 1996 an estimated 1,8 million IDPs lived in and around Khartoum. Despite the removals the number remained virtually unchanged, due to the influx of new IDPs. See Ruiz (no. 155) in 1996, Deng, Report on the Mission to the Sudan para. 1 U.N. Doc E/CN.4/2002/95/Add.1 in 2002.

<sup>282</sup> Sudan: Demolitions Render Thousands of IDPs Homeless [www.irinnews.org/report.asp?ReportID=43641](http://www.irinnews.org/report.asp?ReportID=43641).

<sup>283</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 120.

<sup>284</sup> See common Article 3 of the Geneva Conventions.

the enjoyment of the right to freely choose their place of residence. The freedom of residence means that anyone can set up a temporary or permanent residence.<sup>285</sup> Although the articles do not explicitly refer to protection against forced removals they are broad enough to encompass such protection.

However, the freedom of movement and residence is subject to restrictions.<sup>286</sup> If the government had carried out the removals in accordance with the requirements set out in the restriction clause the removals would be justified. According to the requirements, restrictions must be provided by law.<sup>287</sup> They must also be necessary for protecting values such as national security or public order.<sup>288</sup> Finally, the restrictions must be consistent with other rights.<sup>289</sup> The Sudanese government's actions do not fulfill these criteria. Most obvious, they are not aimed at protecting public values but at furthering the government's discriminatory policies against southerners. Failing justification under the restriction clause, the government's actions constitute a breach of its obligation under the aforementioned provisions.

Furthermore, Article 11(1) of the ICESCR recognizes 'the right of everyone to an adequate standard of living for himself and his family, including ... housing.' It stipulates that state parties are required to take appropriate steps to ensure the realization of this right.<sup>290</sup> Forced removals can hardly be considered an appropriate step to ensure the right to housing. Notably, the Committee on Economic, Social and Cultural Rights stated in its General Comment on Article 11(1) that 'instances of forced eviction are prima facie incompatible with the requirements of the Covenant.'<sup>291</sup> Thus, the forced removals also contravene the government's obligation under Article 11(1) of the ICESCR.

Finally, Article 5(d)(i) of the CERD provides that the exercise of the freedom of movement and residence ought to be enjoyed without discrimination. In light of the fact that the government's policies clearly discriminate against southerners by not allowing them to settle in Khartoum, it also breaches this provision.

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<sup>285</sup> See Nowak *CCPR Commentary* 203.

<sup>286</sup> See, for example, Article 12(3) of the ICCPR.

<sup>287</sup> See Article 12(3) of the ICCPR.

<sup>288</sup> See Article 12(3) of the ICCPR.

<sup>289</sup> See Article 12(3) of the ICCPR.

<sup>290</sup> See Article 11(1) of the ICESCR.

<sup>291</sup> CESCR General Comment No. 4 (1991) para. 18.

In conclusion, human rights law protects IDPs against forced removals. The Sudanese government, by forcibly relocating IDPs from the south, clearly violates its obligations under human rights law.

## 2.2. Personal Security

### Account of the Situation

With the signing of the peace-agreement the active conflict between the government and the SPLA ceased. However, hostilities are still raging in Darfur and the personal safety of the region's internally displaced remains at risk.<sup>292</sup> Their camps have been the targets of systematic attacks.<sup>293</sup> Rape and other forms of sexual abuse occur all too frequently.<sup>294</sup> Victims of sexual violence are regularly insulted and humiliated, beaten and in some cases even killed.<sup>295</sup> Abuse of women and girls is facilitated by the fact that it is mainly women and girls who leave the camps to collect firewood since they have a better chance to survive attacks than men and boys who risk being killed.<sup>296</sup> In the majority of cases, perpetrators belong either to government forces or pro-government militia.<sup>297</sup>

The government has claimed that police are deployed around the camps to protect IDPs.<sup>298</sup> However, police forces have not confronted the militias which often stay around camps to prevent people from returning to their villages.<sup>299</sup> As a result, anyone leaving the camp is a potential target for the militias. In addition, it has been reported that policemen assigned to protect IDP camps leave their posts towards the evening, thus, facilitating militia assaults over night.<sup>300</sup> Finally, police forces have reportedly shot into the camps allegedly responding to rebels attacking, but in reality killing IDPs.<sup>301</sup>

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<sup>292</sup> IDMC Internal Displacement Profile: Sudan (no. 238).

<sup>293</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 68.

<sup>294</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 64-65.

<sup>295</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 65.

<sup>296</sup> International Commission of Inquiry (no. 265) para. 346.

<sup>297</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 65.

<sup>298</sup> International Commission of Inquiry (no. 265) para. 426.

<sup>299</sup> International Commission of Inquiry (no. 265) para. 284.

<sup>300</sup> IDMC Internal Displacement Profile (no. 238) 68.

<sup>301</sup> International Commission of Inquiry (no. 265) para. 284.

## Assessment under International Law

Article 3 common to the four Geneva Conventions proscribes that the parties to an internal armed conflict treat anyone who is not taking an active part in hostilities humanely without any adverse distinction.<sup>302</sup> It expressly prohibits acts of violence to the life and person, in particular murder of all kinds, cruel treatment and torture as well as outrages upon human dignity, in particular humiliating and degrading treatment.<sup>303</sup> Accordingly, humanitarian law protects IDPs against the acts frequently imposed upon them, as long as they are not participants in the conflict.

In an attempt to justify why it targets the camps, the Sudanese government has asserted that rebels use IDP camps as bases from which to launch their attacks.<sup>304</sup> However even if this allegation proves to be true, IDPs would still be entitled to protection under common Article 3 as they are not active participants in the conflict.

The physical security of IDPs is also protected by human rights law. First and foremost, the right to life is affirmed in Article 3 of the UDHR, Article 6(1) of the ICCPR and Article 4 of the African Charter. The ICCPR and the African Charter furthermore elaborate that arbitrary deprivations of the right to life are never allowed.<sup>305</sup> In this respect the Human Rights Committee noted that:

‘the protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity.’<sup>306</sup>

The fundamental importance of the right to life is underlined by the fact that Article 4(2) of the ICCPR renders it underogable. Thus, even in times of emergencies threatening the life of a nation, governments are obliged to respect the right to life. The death of IDPs at the hands of the Sudanese armed forces and police clearly constitutes a violation of this right.

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<sup>302</sup> See Article 3 common to the Geneva Conventions.

<sup>303</sup> See Article 3(1)(a) and (c) common to the Geneva Conventions.

<sup>304</sup> International Commission of Inquiry (no. 265) para. 210.

<sup>305</sup> See Article 6(1) of the ICCPR and Article 4 of the African Charter.

<sup>306</sup> CCPR General Comment No. 6 para. 3.

Notably, Article 4 of the African Convention by providing that 'human beings are inviolable' and that 'every human being shall be entitled to respect for his life and the integrity of his person' provides a more general protection than the other provisions. For example, encompassing protection against rape and beatings, as such acts clearly disrespect an individual's integrity.

However, Article 5 of the UDHR, Article 7 of the ICCPR fill this gap as they expressly prohibit other forms of violence by prohibiting torture and cruel, inhuman or degrading treatment.<sup>307</sup> Article 7 of the ICCPR is, as the right to life, an underogable right.<sup>308</sup> In interpreting Article 7, the Human Rights Committee has emphasized that it 'relates not only to acts that cause physical pain but also to acts that cause mental suffering.'<sup>309</sup> The reference to both, physical and mental pain accommodates a wide range of practices, including sexual violence and the threat thereof.

In conclusion, the Sudan is bound by several norms of international law that protect the personal safety of IDPs. According to the account given, the Sudanese government has not guaranteed but instead violated these provisions.

The last section affirms the findings made in chapter two. On the one hand, it proves that humanitarian and human rights law obliges states to protect and assist IDPs. on the other hand, it exemplifies one of the shortcomings of the international protection system which were discussed in chapter two. The fact that the Sudan has not ratified the Additional Protocols to the Geneva Conventions renders the detailed provisions of Additional Protocol II inapplicable. As a result, the Protocol's safeguards can, at best, be inferred from applicable provisions.

Most importantly, the section demonstrates that the rights of IDPs are consistently violated. This finding is in accordance with the conclusion of chapter two which asserts that the unwillingness to comply with rules constitutes the main obstacle to the protection of IDPs. The Sudan, in fact, provides a text book example of how much IDPs suffer at the hands of their own government. Lacking the support and protection from their own government, Sudanese IDPs are left with nothing but the international community to turn to.

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<sup>307</sup> The prohibition is also enshrined in Article 5 of the African Charter.

<sup>308</sup> See Article 4(2) of the ICCPR.

<sup>309</sup> CCPR General Comment No. 20 para. 5.

### 3. International Response to the Crisis of Internal Displacement in the Sudan

Because of the size and length of the conflict in the Sudan it is impossible to conduct a full examination of the international community's response in this paper. This section will, therefore, focus on the most recent events, namely the conflict in Darfur. Shortly after the beginning of the conflict many observers indicated that the situation could develop into one of the worst humanitarian crises in the world.<sup>310</sup> However, despite early warnings the situation in Darfur only made it onto the agenda of the Security Council in April 2004. Following a briefing on the humanitarian situation in Darfur, the Council issued a presidential statement expressing deep concern about the massive humanitarian crisis.<sup>311</sup> The Security Council called upon the parties to ensure the protection of civilians and to reach a ceasefire, which at the time was being negotiated under the auspices of the African Union (AU).<sup>312</sup>

A few days later the Humanitarian Ceasefire Agreement between the Sudanese government and the rebels was signed.<sup>313</sup> In accordance with the agreement, the AU established a Ceasefire Commission to monitor the implementation of the ceasefire.<sup>314</sup> However, the violence did not halt.<sup>315</sup>

In June 2004, the Security Council unanimously adopted Resolution 1547 which called upon the parties to use their influence to bring the fighting in Darfur to an end. It also welcomed the efforts of the African Union.<sup>316</sup> More decisive action was eventually taken in July 2004. In Resolution 1556 the Security Council condemned:

'all acts of violence and violations of human rights and international humanitarian law by all parties to the crisis ... including indiscriminate attacks on civilians, rapes, forced displacements and acts of violence especially those with an ethnic dimension and [expressed] its utmost concern at the consequences of the conflict in Darfur on the civilian population, including women, children and internally displaced persons.'<sup>317</sup>

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<sup>310</sup> A documentation of Human Rights Watch is available at [www.hrw.org/doc/?t=africa&c=sudan](http://www.hrw.org/doc/?t=africa&c=sudan).

<sup>311</sup> SC/8050, 2 April 2004.

<sup>312</sup> SC/8050, 2 April 2004.

<sup>313</sup> The agreement is available at [www.usip.org/library/pa/sudan\\_ceasefire\\_04082004.html](http://www.usip.org/library/pa/sudan_ceasefire_04082004.html).

<sup>314</sup> See Article 3 of the Ceasefire Agreement.

<sup>315</sup> International Crisis Group (236).

<sup>316</sup> S/Res/1547 (2004) para. 6.

<sup>317</sup> S/Res/1556 (2004).

In the end, it deemed the situation a threat to international peace and security.<sup>318</sup> Accordingly, the Security Council could have authorized a humanitarian intervention to end the crisis in Darfur. Its actions, however, stopped far from it. The Council confined itself to consider further actions, including measures provided under Article 41 of the U.N. Charter if the Sudanese government failed to disarm the pro-government militia.<sup>319</sup> Article 41 of the U.N. Charter provides for measures falling short of the use of force such as economic sanctions.<sup>320</sup> The reason why the Security Council did not take a stronger stand is the reluctance of some of its members to endorse such a stand. Many have blamed the Chinese interest in preserving its lucrative oil contracts in Sudan as the underlying reason.<sup>321</sup> Moreover, Russia was accused to impede stronger action fearing that this may terminate its valuable arms sales.<sup>322</sup>

The Sudanese government failed to disarm the militia but instead transferred parts of them into the police and armed forces.<sup>323</sup> However, the Security Council did not follow up on the threat of further measures under Chapter VII of the U.N. Charter, most likely because its members, for the above mentioned reasons, could not agree on doing so. It has done something novel instead. In March 2005 it adopted Resolution 1593 which again declared the situation in Darfur to be a threat to international peace and security.<sup>324</sup> Acting under Chapter VII of the U.N. Charter the Council referred the situation in Darfur to the Prosecutor of the International Criminal Court, thereby underlining the gravity of the situation.<sup>325</sup> As explored in chapter two, the Security Council can refer situations even if the country involved is not a party to the ICC Statute. Therefore, it is of no relevance that the Sudan has, as pointed out earlier, not ratified the ICC Statute.

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<sup>318</sup> S/Res/1556 (2004).

<sup>319</sup> S/Res/1556 (2004) para. 6.

<sup>320</sup> See Article 41 of the U.N. Charter.

<sup>321</sup> See, for example, [www.globalpolicy.org/security/issues/sudanindex.htm](http://www.globalpolicy.org/security/issues/sudanindex.htm) and [www.hrw.org/wr2k5/darfurandabughraib/2.htm](http://www.hrw.org/wr2k5/darfurandabughraib/2.htm).

<sup>322</sup> As regards other Security Council members, Human Rights Watch observed that: 'Algeria and Pakistan have been models of Islamic solidarity, so long as that is defined as fealty to an Islamic government rather than commitment to the lives of Muslim victims. Other African members of the Council, Angola and Benin, placed premium on loyalty to a fellow African government.' (no. 321).

<sup>323</sup> IDMC Internal Displacement Profile: Sudan (no. 238) 168.

<sup>324</sup> S/Res/1593 (2005).

<sup>325</sup> S/Res/1593 (2005) para. 1.

International criminal law provides for accountability for serious violations of humanitarian and human rights law. The prospect of accountability may help to prevent future violations of these laws. In the words of the Prosecutor of the ICC:

‘The referral of the situation in Darfur to the Office of the Prosecutor has brought an international, independent and impartial justice component to the efforts to end the violence in Darfur. This component forms part of a collective international and regional effort to improve the security situation, ensure the provision of humanitarian assistance and the creation of conditions for the return of refugees and internally displaced persons.’<sup>326</sup>

On what scale the ICC’s involvement will, in practice, benefit the internally displaced remains to be seen. The Prosecutor’s statement, however, implies that it will only be a contribution to effectively putting an end to the violence in Darfur. A humanitarian intervention involving military presence in insecure regions of Darfur would have greater potential to improve the situation of IDPs on the ground. In light of this it is regrettable that the Security Council has not authorized such intervention. Its ability to provide the most effective form of protection to the internally displaced is after all, as asserted in chapter three, tied to the will of states. In the case of Darfur some states have put their self-interest above the common interest to uphold the guarantees which protect individuals, including the internally displaced.

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<sup>326</sup> Report of the Prosecutor of the International Criminal Court, Mr. Luis Moreno Ocampo, to the Security Council pursuant to UNSCR 1593 (2005) at 10, available at [www.icc-cpi.int/library/cases/ICC\\_Darfur\\_UNSC\\_Report\\_29-06-05\\_EN.pdf](http://www.icc-cpi.int/library/cases/ICC_Darfur_UNSC_Report_29-06-05_EN.pdf).

## Conclusion

The question set forth at the outset of this paper was whether the internally displaced require enhanced protection. A closer look at the existing international standards has revealed that IDPs are, in theory, widely protected. However, theory does not reflect practice. The main reason for this divergence is that the states who bear the primary responsibility for ensuring these standards are unwilling to live up to their responsibility. In fact, more often than not, they constitute the cause behind the need for protection in the first place. As such, it can be concluded that IDPs are in need of enhanced protection and it is apparent that such protection can only be effectively provided by the international community.

In recent years, there has been a growing trend on the part of the international community to respond to situations when individuals are suffering at the hands of their own government. To this end it has employed interventions which can be legally undertaken with the authorization of the Security Council. Since the end of the Cold War, obtaining such authorization has become a real possibility. However, while the international community has the means to react to humanitarian catastrophes these means are, to date and to the detriment of the internally displaced, not employed consistently. This can be attributed to the fact that the protection of humanitarian and human rights standards often plays second fiddle to domestic self-interest.

As long as the effective implementation of humanitarian and human rights standards cannot be assured, the crisis of internal displacement will continue to haunt the international community. It is safe to say that the aspiration of David Scheffer, quoted at the outset of the paper, has not materialized. On the contrary, and in the words of the Secretary-General:

*“the desperate plight of tens of millions of persons displaced within the borders of their own countries poses one of the greatest challenges of our time.”<sup>327</sup>*

*Kofi Annan*

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<sup>327</sup> Kofi Annan, Secretary-General of the United Nations. In an appraisal of *Exodus Within Borders*. See at the back of the book (no. 14).