

**WHO SHALL SAVE US? INTERNATIONAL LAW AND THE QUEST FOR
A FRAMEWORK FOR PROTECTING THE INTERNALLY DISPLACED
PERSONS IN KENYA**

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MASTERS DEGREE IN PUBLIC INTERNATIONAL LAW, UNIVERSITY
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STELLA MUNAI MUKETI

SUPERVISOR: DR. KITHURE KINDIKI

DECLARATION

I, **STELLA MUNAI MUKETI** do hereby declare that this thesis is my original work and has not been submitted and is not currently being submitted for a degree in any other University.

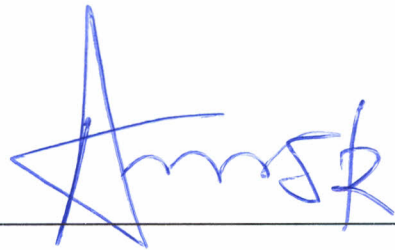
SIGNED



STELLA MUNAI MUKETI

This thesis has been submitted with my approval as University Supervisor

SIGNED



DR. KITHURE KINDIKI

Lecturer, Faculty of Law, University of Nairobi

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DISCLAIMER

The responsibility for opinions, accuracy of facts and views expressed herein are mine.

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DEDICATED TO IDA, THE PEARL OF MY LIFE.

INTRODUCTION

1.1 BACKGROUND

Internally displaced persons herein after referred to as (IDPs) have been defined as;

“Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed any internationally recognized State border.”¹

An estimated 25 million people today live in situations of internally displacement as a result of conflicts and human rights violations.² They are forced to flee their homes because their lives are in danger but unlike refugees they do not cross international borders though exposed to violence and other human rights violations they have no or have only limited access to food, employment, education and health care.

Large numbers of IDPs are caught in desperate situations amidst fighting or in remote or inaccessible areas cut off from international assistance. Others have been forced to live away from their homes for many years or decades because the conflicts that caused their displacement remain unsolved.

While refugees are eligible to receive international protection and help under the 1951 Refugee Convention³ and the 1967 Additional

¹ Principle 2 of The Guiding Principles on internal Displacement, 1998.

² Denis mc Namara (Accessed In IRIN news .org 14th June 20005

³ The Refugee convention, 1951.

Protocol⁴, the international community is not under the same legal obligation to protect and assist internally displaced persons.

National governments have the primary responsibility for the security and the well being of all displaced persons in their territory. Often, they are unable or unwilling to live up to this obligation.

At the core of the IDPs problem therefore lie the fundamental and unresolved questions regarding the scope of the humanitarian action and the limitations of sovereignty. There is no clear legal framework for dealing with IDPs. Their Principal recourse for seeking legal protection and assistance remain with their governments. This is so despite the fact that the best protection can only come from international law given the fact that most of the times the government that is given the primary responsibility to protect IDPs is the actual perpetrator of the atrocities leading to displacement. Today there are no specific provisions that assist in ameliorating the plight of the internally displaced persons It is in this context that this study looks at the plight of IDPs particularly in Kenya with a view to examine the extent to which the existing international legal and institutional framework protects IDPs

1.2 **STATEMENT OF THE PROBLEM**

There is no specific legal regime or institutional framework tackling the plight of the internally displaced persons and gaps exist in the international law instruments that may be inferred to protect them.

1.3 **OBJECTIVE OF THE RESEARCH**

The objective of the study is:

⁴ The 1967 Additional Protocol to the Refugee Convention

- a) To analyze the problem of internal displacement with special reference to Kenya
- b) To explore the extent to which existing international legal instruments may protect IDPs
- c) To identify the gaps in international Human Rights Law, Humanitarian law and Refugee law.
- d) Make recommendation on an appropriate international Legal and Institutional framework for the protection of IDPs

1.4 **HYPOTHESIS**

The existing Regime of international Human rights law, humanitarian law and refugee law is inadequate to protect the unique interests of IDPs

1.5 **RESEARCH QUESTIONS**

The study is premised on the following research questions;

- 1) What are the causes and effects of internal displacement and how has Kenya handled its IDP situation?
- 2) Is the international legal regime be it human rights law, humanitarian law or refugee law adequate to ensure adequate protection of IDPs?
- 3) Do IDPs require a separate legal and institutional framework?
- 4) What is the place of the Deng's 1998 Principles on displacement?

1.6 **LITERATURE REVIEW**

The literature to be considered will be that that sets out the issues that deal with the plight of the IDPs. In that regard what will the

points of focus will be their tribulations, whether there is adequate protection accorded to them under the existing international law instruments, whether there is a case of a specific regime or whether they can be brought aboard and can be protected by the existing refugee law and other international law provisions. There is also the need to identify the gaps that this study aims to fill.

Today the internally displaced cannot be ignored as their numbers continue to increase. Mc Namara⁵ then the director of the U.N Inter Agency internally displacement division said;

“Globally we estimate approximately 25 million IDPS have been created from conflict and violence and probably another 25 to 30 million though natural disasters.... the IDPS are three times the size of the global refugee problem” Kalja Luopajarvi⁶ is concerned with the providing of humanitarian assistance to internally displaced persons Luopajarvi⁷ writing about humanitarian assistance to the internally displaced persons states in his executive abstract that -

“...The capacity and/or willingness of the government concerned to provide assistance and protection to IDPS is doubtful”.

This stems from the lack of a specific regime to govern the issues of internal displacement. Such a regime will address the questions that the writer is raising. He states that -

“Questions therefore arise as to whether and when the international community can provide either surrogate or complimentary

⁵ Denis mc Namara In IRIN news .org 14th June 2005

⁶ Article Is there an obligation on states to accept International Humanitarian assistance to internally displaced persons under International Law

⁷ ibid

assistance to the internally displaced without the consent of the government involved”.

As it is today the primary responsibility for the protection and assistance of the internally displaced persons is vested in individual states. This is in line with the Principles of Sovereignty and non- intervention.

Some writers for example Bennet⁸ has argued that the term IDP reinforces sovereignty as it recognizes borders and upholds the responsibility of Governments to protect all those within its jurisdiction. This can only be true and morally right if the state takes its responsibility to protect those within their territory seriously. In that sense Sovereignty can be equated to state responsibility.

Deng⁹ characterizes the corresponding obligations of states to accept offers of assistance and protection for internally displaced as one of the areas where international law offers insufficient protection of IDPS concerned. Lack of humanitarian assistance to IDPS is an aspect that requires attention by the international community. As Deng has rightly argued, the legal provisions at international level are inadequate and must therefore be resolved by setting up a specific regime.

Hathway¹⁰ has articulated the reasons why the international community does not include the IDPS within the Refugee Convention of 1951, that these are, limited resources, prevention of states from shifting the responsibility of looking after their citizens and the fact that it will

⁸ Jon Bennet, Forced migration within National borders: the IDP Agenda.

⁹ Internally displaced Persons. Report of the representative of the secretary general, Francis M. Deng
Compilation and analysis of Legal Norms E/C

¹⁰ James .C Hathway, The Law of Refugee Status Butterworths,1991 page 30 and 31

constitute an infringement of the National Sovereignty of a given state. This however need not be so. Principles like sovereignty are never absolute. The international community has been known to intervene in certain situations where it is of the opinion that there are breaches of international norms. Take the Darfur issue it was decided that those involved in the atrocities will be subjected to the International Criminal Court notwithstanding the fact that Sudan was yet to submit itself to the jurisdiction of the court. The intervention and similar measures though desirable come after the fact. In setting up a specific regime though, there will be a set of standards, a guiding unit where one can always refer to for quick and accurate reference. In such a case, there will be no need for one to stretch the law to find answers. The answers will be in one definite legal regime.

Some writers for instance L.T. Lee have argued that refugees and IDPS should be protected together and that either an additional protocol be adopted to encompass the same or that alternatively the requirement for alien age be deleted. This may work as a stop- gap measure, that is, for a short time, but will not offer long-term solutions. This is so given the fact that as Phuong, the refugees and IDPS have rightly argued it cannot be given the same status, as they require protection of a different nature. That the refugee's protection is of a *surrogate* nature and the IDPS protection is of a *complimentary* nature.¹¹ Restating the refugee convention of 1951 or bringing the IDPS aboard will not therefore, solve the problem of the internally displaced persons as they face different problems.

¹¹ Catherine Phuong Internally displaced persons and refugees Conceptual differences and similarities 18 Netherlands International journal of Refugee Law vol 15 No 1

As Deng rightly observes¹², “no Government can legitimately invoke sovereignty for the deliberate purpose of starving its population or otherwise denying them protection and resources vital to their survival and well-being”. A state therefore, should not be allowed to hide behind the veil of sovereignty to perpetrate atrocities against her people and to deny them basic needs without the international community having the responsibility and the right to move in. Deng ¹³advocates that in such instances, “...if a government is incapable of providing protection and assistance, the international community, either on the invitation of the host country or with international consensus should act in consonance with the principle of sovereignty ”By so arguing, Deng equates sovereignty with responsibility. Deng¹⁴ further argues that the existing patterns favor International action and that this has transmitted a message of global concern to the masses that comprise the internally displaced.

Deng¹⁵ is of the opinion that active intervention should be the last resort. He rightly observes that the root cause of the problem should be addressed. That there should be “...monitoring developments to draw early attention to impending crises, interceding through diplomatic initiatives in time to avert crises and mobilizing active international intervention when necessary”

¹² Deng, Francis Mading 1993 Protecting the disposed ; A challenge to the International community THE BROKING INSTITUTION 1775 Massachusetts Avenue, N.W, Washington, D.C 20036 page 119

¹³ Ibid page 119

¹⁴ Ibid 120

¹⁵ Ibid page 121

1.7 METHODOLOGY

This will be basically a desk research that will mostly rely on secondary Data. The researcher will conduct Library research and internet research to ascertain the existing provisions in several international law instruments that govern the handling of the plight of the internally displaced persons.

Records; Will go into records of accounts of secondary Data already collected to get the voices of the internally displaced persons.

1.8 CHAPTER OVERVIEW

Chapter One will set out the background of the research its objective, the problem of the research, the assumptions of the research and the literature review.

Chapter Two The IDP situation in Kenya is analyzed. The chapter then explores both the legal point of view and the institutional framework and will be raising issues as to whether there is the need to extend the institutional mandate or whether the answer lies in the setting up of a separate institution to handle IDPS issues. This will be looked at with specific reference to the Kenyan situation

Chapter Three will look at the provisions that exist today that may be said do offer protection to IDPS under current international law. This includes Human Rights law, Humanitarian law, and Refugee law. The Chapter will address the existing Gaps in these laws and its efficacy.

Chapter Four will address issues that will show the need towards a specific legal and institutional regimes. To be considered will be issues of Sovereignty **vis-avis** responsibility and whether there is a need for a specific regime or whether it is merely a case for re-statement.

Chapter Five will contain the conclusion and recommendations.

2.0 CHAPTER TWO

THE KENYAN CASE

INTRODUCTION

The IDPs situation in Kenya was compounded by the fact that there were political undertones. The Kenyan situation is what may be termed as displacement due to 'ethnic cleansing'. This means if a place of origin comes to be identified by the parties to a conflict with a particularly political, ethnic, religious or other communal affiliation, the residents may be targeted for removal. In this situation, they may be obliged to flee to regions controlled by the government, where they will be considered adversaries by their government and denied access to humanitarian assistance. In recent times internal conflicts, ethnic cleansing - removing entire communities from their home locations as happened in the Kenyan situation, has become an increasingly common way to deal with land pressures, economic scarcities, religious differences or perceived historical injustices This is well captured by the extract below.

“Links with Thirty-something Beatrice Atieno [not her real name] speaks with conviction when she remembers her family’s eviction from their land in 1992, around the time of Kenya's first multi-party elections for nearly thirty years.

She recalls that at noon one day a local official delivered a letter ordering her family and the rest of the ethnic Luo community in the area to evacuate the land within 30 hours. "People were tongue-tied. We sat there not knowing what to do until four in the afternoon," she told IRIN.

According to Atieno, at 6.30pm the same day, the official returned with a second directive, again ordering the families to leave. "We were frightened and confused, so we went to spend the night at the [nearby] Thessalia Catholic mission". Atieno claims that the following morning some men came with a bulldozer and destroyed their homes. "Those who tried to protect their property were beaten. One man died," she says¹⁶

This reflects the causes, the mood generated by internal displacement and its aftermath ripple effect.

2.1 INTERNAL DISPLACEMENT IN KENYA AND THE INSTITUTIONAL RESPONSES

Clashes broke out in Kenya in the periods proceeding elections both in 1991 and 1997. The Government then it has been argued, did play a part in the clashes and for sometime refused to quell the same. Had there been a specific regime governing the plight of the internally displaced,

¹⁶ IRIN Web Special on Internal Displacement MONDAY 15TH AUGUST 2005

perhaps the international community would have moved in to ameliorate the plight of the IDPS.

Ethnicity is deeply entrenched in Kenya and has its roots in colonial times. Today politicians too have discovered the “value” of divide and rule and have used ethnicity to fan clashes. Odote Oloo Collins in his dissertation¹⁷ places the origins of the tribal clashes to the inflammatory statements of politicians. For instance at the height of the agitation for “Multi- Partism” it was stated by some politicians that it would lead to ethnic animosity and eventually to ethnic violence. Soon after, clashes broke out.

Those who took shelter in camps that had been set up were victims of further violence. Those at Maela camp were forcefully loaded into Government lorries and those who resisted were beaten up. They were transported to three destinations in Central Province, the homeland of the Kikuyu. The roadside at Ndaragwa in Nyandarua District dumped one group, another was dropped at Kirigiti Stadium in Kiambu and a third was left between the railway line and the main road in Ol-Kalau, Nyandarua District. The Government moved at a snail’s pace to quell the clashes. The law was applied discriminatively. The security personnel and Provincial Administrators were partisan.

The Government, more precisely the head of state declared in both 1991 and 1997 that the affected areas were security zones. This was under Chapter 57 of the laws of Kenya – which empowers the President to exercise the powers under the preservation of public security He banned all election candidates except the indigenous. The net effect was that this denied opposition politicians campaign rights in these areas.

¹⁷ Collins Odote Oloo the challenges of internal displacement for international law ; The Kenyan Experience Unpublished LLM Dissertation, University of Nairobi 2003.

Those affected could not move freely as curfews had been declared. Victims ended up at Maela Camp. Then the Government moved in and demolished the place. The interference with the IDPs camps can be explained on the basis of partially political machination and partially on the fact that the government was embarrassed by their presence. This is well captured in the observation that “The visibility of more than 10,000 displaced people encamped in Maela clearly caused the local and national administration a public relations problem”¹⁸.

On January 5th 1994, the District Officer, Mohammed Hassan, accompanied by over twenty police officers demolished the camp. They closed a medical clinic and school. They pressurized church officials to discontinue providing relief to displaced families.

The District Officer evicted them again for the second time on the 24th December 1994. People lacked basic amenities like food, shelter and clothing. Their security was compromised. Their basic human rights trampled upon.

2.2 Causes, actors and effects

The last few decades have witnessed a sharp rise in the numbers of internally displaced persons (IDPs) throughout the world. In the past, most conflicts were between states. The displacement of civilians was an incidental effect of hostilities, and those displaced could normally count on support from their government and fellow citizens. This spirit of solidarity occurs less frequently in the context of internal conflicts, in

¹³ibid

which particular groups within the population are characteristically identified with the enemy and deliberately targeted.

Large-scale displacement may result from strategies to remove the support base of the enemy, or even worse, the displacement or destruction of the population may be the goal of the conflict itself. Furthermore closely connected with the causes of displacement are the conditions under which people are forced to abandon their homes. A common factor is the element of coercion, although its form and intensity may vary. Whatever the conceptual differences concerning who to include within the category of internally displaced people, there is often little no doubt about who they are in practice: they often arrive totally empty-handed, exhausted, sick or wounded, traumatized, and separated from the rest of their community or family.

2.3 INSTITUTIONAL FRAMEWORK

Many organizations, intergovernmental and non-governmental, have broadened their mandates or scope of activities to cover IDPs. Nevertheless, there remains a considerable lack of capacity to address a number of emergency situations in a truly comprehensive manner, notably as regards protection. At present, only few organizations have the necessary expertise and capacity to undertake protection activities, and those who possess such skills, are limited by their mandates from assuming general responsibility for internally displaced people. ICRC covers the needs of all the affected population, displaced or not, but will normally be involved only when an armed conflict is taking place. UNHCR's¹⁹ involvement is normally contingent upon an invitation from the government concerned, a request from the Secretary-General or the General Assembly, and sufficiently strong links with actual or potential refugee problems. UNICEF²⁰ has a mandate to protect children, including those who are internally displaced, but is not supposed to assume responsibility for the whole population that may be at risk. Where these organizations do not get involved, there is a need to find other actors who can assume the protection role. The Office of the High Commissioner for

¹⁹ UNHCR was established by the United Nations General Assembly on 1 January 1951, for a three-year period and has been renewed since for successive five-year periods. An integral part of the United Nations, the High Commissioner follows policy directives from the General Assembly and the Economic and Social Council. Although UNHCR's mandate is to protect and assist refugees, the agency has been called on increasingly to assist a broader range of people living in refugee-like situations. In 1995 they included 5.4 million "internally displaced persons" (those who have been displaced within the borders of their own countries, usually because of civil or ethnic conflicts).

²⁰ UNICEF was founded in 1946 to help children in the aftermath of World War II. UNICEF, or the United Nations International Children's Emergency Fund, as it was then known, was established on the 11th of December 1946. UNICEF was established by the UN to meet the emergency needs of children in Europe and China in the aftermath of World War II. In the year 1950, the mandate was broadened to address the long-term needs of children and their mothers in all developing countries. In the year 1953, UNICEF became a permanent part of the United Nations system. It was then that the name was shortened to the United Nations Children's Fund, although the acronym UNICEF was retained.

Human Rights (OHCHR) has over the last several years increasingly built up its operational capacity, but in comparative terms this capacity still needs to be strengthened if the OHCHR is to assume effectively its role of prevention and protection in the field. As a result, despite improvements in the system, operations aimed at providing protection and assistance remains *ad hoc*, selective and inadequate. Large numbers of internally displaced people remain outside international systems of protection and assistance, or are inadequately covered.

The fact that there is no agency specifically mandated to assist internally displaced people does not in it mean that they have received little attention. The issue is whether they are best assisted through general programmes addressing broader sectors of the population, or whether there is a need to put in place specific programmes to address their needs. For instance, it makes sense to create an independent body for those who are internally displaced. It is reasonable to have special mechanisms of coordination to address their needs, in parallel to mechanisms addressing the needs of other vulnerable people.

Internally displaced people often have specific needs, which are also often neglected in the broader framework. Thus, it would be useful in each situation of internal displacement to designate an institution or task force to monitor people's needs on an ongoing basis. This will reveal their main problems as well as priorities and plans for the future. In this way, operational planning and preparedness may be improved.

Defined in the broad sense, protection of internally displaced people can be said to include any measure or activity aimed at securing their physical safety and legal rights.

This could therefore range from the provision of technical assistance and advisory services to relevant authorities, training and education for law enforcement officials and civil society, through monitoring of the situation of the affected population, advocacy and lobbying on their behalf, right up to the deployment of peace-keeping troops or the creation of so-called safe havens (which, as recent history has demonstrated, may not be so safe after all). It may be that the lack of a common understanding or clarity about what is meant by protection contributes to the reluctance of several governments to accept offers of assistance in addressing problems of insecurity, especially since they often perceive such activities as interfering with their sovereignty.

Since IDPs remain within their own country, it is the primary responsibility of their government to provide them with the necessary assistance and protection. Although the international community may in exceptional cases carry out operations on its own initiative (under Chapter VII of the UN Charter-when the Security Council considers that international peace is threatened), the general rule is that consent by the state is necessary. As a result, the governments concerned usually determine the extent to which the international community is allowed to operate in their country. Where the international community steps in to support the vulnerable population, there is a conceptual difference between protection and assistance activities. Assistance can be seen as a form of substitution, whereby the international community steps in on behalf of the government. In this light, the humanitarian community can supply bread to the hungry, or health personnel to tend the sick. Protection activities thus have to be carried out through different means, in a more indirect manner, and necessitate close cooperation with the government at the central and local level.

It should be emphasized however, that both activities are possible, and can be viewed as assisting the authorities in discharging their duties towards their citizens. Protection activities have therefore been described as 'international support for national governments.

Over the years prominent voices have called for the enlargement of UNHCR's mandate to include internal refugees, but the very idea triggers strenuous objections from other UN agencies unwilling to yield turf to the refugee agency. UNHCR's staff is also divided. Some fear the agency would be overwhelmed if it took on the internally displaced. Others fear that protecting people in their own countries would undermine UNHCR's primary responsibility-defending the right of people to leave their countries and seek asylum abroad²¹.

While formal responsibility for the welfare and security of IDPs rests with their own governments, international accountability is also essential to protecting the internally displaced. But under today's arrangements, no one knows for sure which agency or combination thereof will become involved in new humanitarian and human rights emergencies.

In Kenya both in 1992 and 1997, Churches assisted the internally displaced persons out of moral obligation. The Catholic Church and NCKK. International NGOs gave medical supplies, food beddings – e.g. Medicine sans Frontiers (MSF), World vision and Oxfam.

²¹ Roberta Cohen making a key address "Internal Refugees" Need Attention on World Refugee Day *The Brookings Institution*, June 20, 2005

UNDP ran programmes, which ran from 1993 to 1995. Its mandate was extended to include IDPs. The program was aimed mostly at resettling and re-integrating people. The general assessment was that the program were not effective Odote rightly argues that it brought to the fore, the plight of the internally displaced persons. Besides performing this important task that cannot be underestimated, the program did not achieve much of the initial objective that it had set to achieve. The program concentrated on short-term measures, aimed at merely providing relief.

In 1992 the Catholic Church helped to evacuate those caught in the middle of the tribal clashes. Generally it was religious groups and non- governmental organizations which were involved in assisting the internally displaced both the Christians and Moslems helped to settle the victims.²² When these offer assistance then it raises cardinal issues. The state has the primary responsibility with regard to the rights its citizens. When the civil society steps in to assist, this should not be taken as usurping the role of the state. What the civil society does should be taken as a complimentary role to the states. Given the reality on the ground more often than not, the state is involved in the issue of displacement the civil sector therefore has a moral duty to step in and assist the internally displaced persons

In her unpublished thesis Magiti²³ alluded to the fact that though the civil society were willing to assist, they lacked capacity to so. The Kenyan Phenomenon was a situation of unrest characterized by

²² Human Rights Watch, Failing the internally Displaced: The UNDP Displaced Persons Program in Kenya(New York: HRW 1997)

²³ Magiti Esther Mbuya ;The civil society and Humanitarian assistance to internally displaced persons in Africa; case Study in the Catholic Church in Kenya (1992-2000)An Unpublished Dissertation

insecurity. The church had neither an army nor a police force of its own and was therefore poorly equipped to protect those who were assisting in aiding the displaced let alone those displaced.

3.0 CHAPTER THREE

In the absence of a specific regime governing the plight of the internally displaced persons, the aspect of protection can be inferred from several international law instruments. These are to be found in Human rights instruments, Refugee law and humanitarian law as discussed in details below.

3.1 HUMAN RIGHTS INSTRUMENTS

The Human rights instruments that may be said to cover the rights of the internally displaced are the universal declaration of Human rights and International Covenant on Civil and Political Rights, The International Covenant and Economic, Social and Cultural Rights Human rights law, which is applicable both in times of peace and in situations of armed conflict, also provides important protection to IDPS. It aims both to prevent displacement and to ensure basic rights should it occur. The prohibition on torture, cruel, inhuman or degrading treatment or punishment, and the right to peaceful enjoyment of property and to home and family life are of particular importance for the *prevention* of displacement. The right to personal safety and to a home, as well as the rights to food, shelter, education and access to work offers vital protection *during* displacement. Many of these rights are also of relevance to the issue of return. People displaced within their own country can be particularly vulnerable to violations of their human rights and may need a specific form of human rights protection.

Human rights needs of IDP can be addressed at several levels: during the period of displacement itself; in preparation for a return

home; during a return process; and after a return and during a period of re-integration. IDPs have been defined as;

“Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed any internationally recognized State border.”²⁴

This definition is a broad one, largely because, the term “internally displaced person”, is a descriptive term and not a legal designation. The definition includes the major causes of displacement — armed conflict, generalized violence, violations of human rights, natural or human-made disasters — but uses the qualifying term “in particular” to emphasize that it does not exclude other causes. The definition focuses on persons who, if they were to cross an international border, would qualify as refugees, both under the OAU Convention and the Cartagena Declaration²⁵ and, arguably in many cases, under the narrower definition of the Convention relating to the Status of Refugees. The definition does not encompass persons who migrate because of economic reasons.

IDPS are distinguishable from other persons in movement, and are of concern to the international community, essentially because of the coercion that impels their movement, their subjection to human rights abuse emanating from and as a result of their displacement, and the lack of protection available within their own countries.

²⁴Principle 2 of the 1998 Principles ,Ibid.

²⁵ The two documents give a broader definition of what a refugee is.

IDPS often have very limited access to adequate food, water and shelter, to health or education facilities, and to employment. They often suffer from violations of their human rights, which initially caused them to flee their homes; they may experience further threats to other rights during the period of displacement and others during the process of return and re-integration to their home communities. IDP is vulnerable to violations of both civil and political and economic, social and cultural rights there may be many different causes behind each violation or pattern of violations. Three key areas can however be identified:

3.1.1 Discrimination Based Upon Membership of a Group

Depending upon the background reasons, which had originally forced people to flee their homes, IDPS from particular countries or regions are often the members of an identifiable group — they may all be the members of a religious, linguistic or ethnic minority group, for example. As such they may be the object of discriminatory practices on the part of the other groups of the population or authorities. They may, for example, find that their freedom of movement is restricted, or that their children are not offered places in local schools. They may also be the victims of attacks, killings and arbitrary arrests.

3.1.2 Displacement from Community of Origin

The simple fact of being displaced from one's community — leaving behind property, status, employment, family members, places IDPS in a vulnerable situation. For example, because of their displacement IDPS may have difficulty in proving their identities and so claiming the normal rights which accompany a national in his or her own country — such as

the freedom of movement of a population. There are strict conditions governing the regimes for derogations from human rights responsibilities.

3.1.4 Discrimination

A very significant problem faced by the IDP populations following their return to a home country or region is that of discrimination from the national or local authorities. Many international human rights instruments require States parties to respect and ensure the rights recognized by those conventions without discrimination.

Article 26 of the Covenant on Civil and Political Rights, for example, provides for equality of treatment and governs the exercise of all rights, whether protected under the Covenant

3.1.5 Life and Personal Security

IDPS may be at risk from acts of violence. The violence may, for example, involve killings, rapes, torture, beatings or forced disappearances. These acts might be committed by the local authorities or by other members of the local population. In situations of armed conflict they may be committed by one or more of the forces involved in the conflict.

3.1.6 Threats to life

In situations of tensions and disturbances or disasters, as in all other situations, the right to life is a fundamental right of IDPS. This right is affirmed in Article 6(1) ²⁶.

“Every human being has the inherent right to life. Law shall protect this right. No one shall be arbitrarily deprived of his life”.

Because of the non-derogable right to life, the use of force by law enforcement officials are restricted to that which is both proportional and necessary. Law enforcement officials are only allowed to take a person’s life when their own lives, or the life of a third person is threatened, and there is no other way to remove that imminent threat.

The Convention on the Prevention and Punishment of the Crime of Genocide also provides a certain protection for the right to life of IDPS insofar as they, as members of a group (national, ethnic, racial or religious), are subjected to killings; serious bodily or mental harm; the intentional imposition of conditions of life calculated to bring about the physical destruction of the group, in whole or in part; measures which are intended to prevent births within the group; or the forced transfer of children from the group to another group.

3.2 HUMANITARIAN LAW

International humanitarian law is applicable in situations of armed conflict, whether international or non-international. If IDPS are in a State that is involved in an armed conflict then, provided they are not taking an active part in the hostilities, they are considered civilians and, as

²⁶ Covenant on Civil and Political Rights:

such, are entitled to the protection afforded to civilians. International humanitarian law expressly prohibits compelling civilians to leave their place of residence unless either their security or imperative military necessity render this essential.

If respected, the general rules of international humanitarian law that protect civilians can prevent displacement or, should it occur, offer protection during displacement. The following rules are of particular relevance:

Those prohibiting parties to a conflict from targeting civilians and civilian objects or conducting hostilities in an indiscriminate manner;
The prohibitions on starvation of the civilian population and on the destruction of objects indispensable to its survival;

The prohibitions on collective punishments – which often take the form of destruction of dwellings; the rules requiring parties to a conflict to allow relief consignments to reach civilian populations in need.

If respected, these rules play an important role in *preventing* displacement, as it is often their violation, which is at the root of displacement.

The only context in which international humanitarian law expressly addresses the question of return is that of “lawful displacements”, i.e. evacuations for reasons of security or imperative military necessity. In such cases, displaced persons must be returned to their homes as soon as hostilities in the area have ceased. A right of return can be inferred a fortiori following arbitrary displacement.

In situations of armed conflict Common Article 3 protects the life and personal security of IDPS²⁷ in so far as the IDPS are not participating in the conflict. Common Article 3 provides that:

“Persons taking no active part in the hostilities, including those members of the armed forces that have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any distinction...

It goes on to specify a number of acts that are prohibited: violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and summary executions”.

The Geneva Conventions and Additional Protocols, insofar as they are civilians, protect IDPS. Civilians, including IDPs, may not be the targets of attack. Note, however, that IDPs might not benefit from this protection if they are present in or near significant military targets. In situations of international armed conflict IDPs who are in regions controlled by an opposing armed force will often fall into the category of protected persons to whom Article 32²⁸ is applicable and which prohibits the parties to the conflict:

²⁷ The 1949 Geneva Conventions In the aftermath of the Second World War, a Diplomatic Conference deliberated for four months before adopting the four Geneva Conventions of 1949, which for the first time included provisions for the protection of civilians in wartime. In 1977, the Conventions were supplemented by two Additional Protocols The basic principles of Geneva conventions are reposing on the respect of the human being and are respecting its dignity

²⁸ The Fourth Geneva Convention

From taking any measure of such a character as to cause the physical suffering or extermination of protected persons in their hands. This prohibition applies not only to murder, torture, corporal punishment, mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person, but also to any other measures of brutality applied by civilian or military agents.

In situations where IDPS are not defined as protected persons, they should nonetheless benefit from the minimum protection under Article 75²⁹, which prohibits violence to the life, health, or physical or mental well-being of persons, including in particular murder.

Article 51³⁰ addresses this risk -

“The civilian population . . . shall not be the object of attack. Acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited.”

This prohibition would include, for example, acts or threats by armed groups intended to prevent IDPS from leaving their camps to return home. Article 51 goes on to state that indiscriminate attacks are prohibited, and describes indiscriminate attacks as “those which are not directed at specific military objectives” and “those which employ a method or means of combat which cannot be directed at a specific military objective or... which employ a method or means of combat which cannot be limited...and are of a nature to strike military objectives and civilians... without discrimination”.

²⁹ Additional Protocol I to the Geneva conventions. Additional protocols are extending action field, concerning it to any individual, involved in a military conflict. Moreover, these protocols oblige warring sides and combatants not to attack civilians and civil objects as well oblige to guarantee the providing of military operations in compliance with the generally accepted humanitarian law

³⁰ Ibid

With regard to internal conflict, the relevant provisions are contained in Articles 3, 4, 5 and 6³¹. For inter-State armed conflicts the relevant provisions are contained in Articles 27 and 32³² of the Fourth Geneva Convention, and in Article 75 of Protocol I. In situations of internal armed conflict, Article 8 of Protocol II requires that there be an end to internal troubles.

Regardless of the situation in which IDPs may find themselves, they should always benefit from the minimum protection afforded by Article 5 of the Universal Declaration of Human Rights: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

This prohibition is generally accepted as forming a part of international customary law and is reproduced in Article 7 of the Covenant on Civil and Political Rights. The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment indicates that an act of torture is a universal crime and establishes rules that define the competence and obligations of States parties in dealing with incidents of torture. Cruel, inhuman or degrading treatment and punishment are also prohibited as acts or omissions which cause suffering not reaching the level of severity necessary for torture or which lack the element of purposely being done. In situations where IDPs are arrested and placed in detention, Article 10 of the Covenant.³³ Recognizes the right of people that have been deprived of their liberty to “be treated with humanity and respect for the inherent dignity of the human person”.

³¹Additional Protocol II to the Geneva conventions

³²The Fourth Geneva Convention 1948

³³Covenant on Civil and Political Rights

Prohibitions of torture and cruel or inhuman treatment or punishment are non-derogable and apply therefore in situations of armed conflict. Humanitarian law provides additional protection through Common Article 3 of the four Geneva Conventions which prohibits: “Violence to life and person, in particular... mutilation, cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment”.

Article 4 of Protocol I, Article 75 of Protocol II, and Articles 27 and 32 of the Fourth Geneva Convention provide similar protection. Personal liberty IDPS who return to their country or region of abode may be at Risk from arbitrary detention by authorities on the basis of discrimination or some other factors.

Article 9(1) of the Covenant on Civil and Political Rights provides that:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”. “Arbitrary arrest or detention” has been interpreted to prohibit arrest and detention, which is

not in accordance with domestic law or not in accordance with international standards of liberty and security of person. These standards concern, in particular, judicial guarantees defined in Article 9(2) to 9(5) of the Covenant on Civil and Political Rights. They include the right to be informed of the reason for an arrest Adopted by UN General Assembly in resolution 3946 of 10 December 1984. and of the charges; the right to be brought promptly before a judge;

the right to a trial within a reasonable period; and the right to a review of the lawfulness of one's detention.

With regard to humanitarian law, Article 5 of Protocol II provides guidelines for the treatment of persons deprived of their liberty for reasons related to internal armed conflict. With regard to situations of inter-State armed conflict the Fourth Geneva Convention allows for the internment of protected civilians if necessary for the security of the detaining authority. Such internment is subject to particular standards of treatment and to a regular review.

3.3 ECONOMIC RGHTS

Article 11(1) of the Covenant on Economic, Social and Cultural Rights recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing...". The Committee on Economic, Social and Cultural Rights, interpreting States' obligations under the Covenant, has declared that States parties have a "minimum core obligation to ensure the satisfaction of each of, at the very least, minimum essential levels of each of the rights". A State party that is unable to fulfill this obligation must "demonstrate that every effort has been made to use all resources at its disposition in an effort to satisfy as a matter of priority those minimum obligations".

A further interpretation by the Committee, and one that is of particular importance with regard to IDPS, is the requirement that a State demonstrate that it has made a maximum effort to use all the resources at its disposal to satisfy the IDP'S needs.

This effort includes not only resources within the country but also resources made available by the international community. This provision can be interpreted, as an obligation upon States to allow the international community to provide assistance in the form of subsistence needs to IDPS.

The Committee on Economic, Social and Cultural Rights has interpreted the right to housing as a “right to live somewhere in security, peace and dignity.” In assessing the adequate nature of housing one can consider the availability of services (water, electricity), materials and infrastructure (roads, hospitals, etc.), affordability, habitability, accessibility (particularly to the disabled, to children, or to the elderly), location and cultural adequacy.

In situations of armed conflict, Common Article 3 does not explicitly refer to food, water or adequate housing but provides for humane treatment of all persons who are not taking an active part in the conflict. Humanitarian law prohibits starvation of civilian populations as a means of combat. It also prohibits the destruction, removal, or rendering useless of objects which are “indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of food stuffs, crops, livestock, drinking water installations and supplies and irrigation works”. For internal armed conflicts, the essential provisions are contained in Article 14 of Protocol II.

In internal conflicts, Article 5(1) of Protocol II provides for the minimum standards of treatment of people detained during armed conflict, including notably the provision of drinking water, food and protection from the weather and conflict.

These rights are not, however, repeated in Article 5(3), which provides for the treatment of people whose liberty is restricted in any manner other than by detention. Hence, unless IDPS are detained, Article 5 may not assure the provision of water and food among other essentials.

In inter-State conflicts, Article 55 of the Fourth Geneva Convention requires that the occupying power ensure that food supplies reach the population. The article also prohibits the occupier from requisitioning food without taking into account the needs of the civilian population Health services.

IDPs are often at risk from sickness and/or injury. Certain groups of IDPs women, children, the elderly and the disabled are particularly vulnerable.

3.4 SOCIO -ECONOMIC RIGHTS

Article 12 of the Covenant on Economic, Social and Cultural Rights sets as an objective “the right of everyone to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.”

The second paragraph of this article requires States to take measures to attain this objective and requires notably “the creation of conditions which assure to all medical service and medical attention in case of sickness.” Under both human rights and humanitarian law, IDPS should not suffer discrimination regarding their access to medical supplies and facilities.

In situations of internal armed conflict. Common Article 3 requires the humane treatment of all persons not actively participating in the conflict. The same article also requires the parties to a conflict to collect and care for the wounded without conditions. This protection should be made available to returnees and IDPS. Article 7 of Protocol II states that in the provision of medical care no distinction is allowed on any grounds other than medical considerations. No distinction should therefore be made against IDPS. In situations where it becomes necessary to move members of the civilian population, Article 17(1) of Protocol II requires the taking of “all possible measures... in order that the civilian population may be received under satisfactory conditions of hygiene, health, safety and nutrition”.

In situations of inter-State armed conflict, Article 55 of the Fourth Geneva Convention requires that the occupying power ensure medical supplies to the population. Article 6 imposes a duty on the occupying power to ensure and maintain medical and hospital facilities and services. In Articles 16, 17, 18, 19, 21 and 22 of the Fourth Geneva Convention, provision is made for the sick and injured, for expectant mothers, for the protection of medical facilities, and for the evacuation of the sick and wounded.

3.5. ACCESS TO PROPERTY

IDPS often lose possession of their property during displacement. It is important for the successful reintegration of returnees and IDPS that they are able to reclaim ownership and possession of belongings,

cars, offices and land. The restitution of houses occupied by other individuals is often a problem faced by displaced people who return home. It is also important that returnees and IDPS be allowed to maintain possession, or to reclaim, any money that they own.

In situations of internal armed conflict, Article 4 of Protocol II prohibits “pillage”, and thus provides a certain protection for the personal property of IDPS in displaced persons’ camps or in homes. Article 14 of Protocol II prohibits the “attack, destruction, removal, or rendering useless of those objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.

In situations of inter-State armed conflict, the Hague Regulations Respecting the Laws and Customs of War on Land of 1907 provide a certain protection to property. Article 25 prohibits the “attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”. Articles 28 and 47 prohibit the pillage of a town or place during hostilities or occupation.

Article 53 of the Fourth Geneva Convention prohibits any destruction of real or personal property by an occupying power. Article 97 provides that sums of money and other items of value can only be taken away from civilian internees in exchange for a receipt. Objects with a personal or sentimental value cannot be taken away.

3.6 RIGHT TO EMPLOYMENT

Article 23 of the Universal Declaration of Human Rights provides that:

- (1) Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.
- (2) Everyone, without any distinction, has the right to equal pay for equal work.

3.7 RIGHT TO EDUCATION

IDPS may find themselves excluded from education opportunities when they return home. There may be insufficient places available, the fees may be too expensive, or there may be discrimination against the IDPS in the attribution of places in educational institutions. Education is extremely important to returnees and IDPS and fulfils a principal role in the process of reintegrating into a community. Education is particularly important for IDPS children who will often have missed several years of formal and structured schooling.

Article 13 of the Covenant on Economic, Social and Cultural Rights recognizes the right to education for everyone — particularly compulsory and free primary education. The UNESCO Convention against Discrimination in Education also prohibits discrimination at all levels of education.

3.8 RESTRICTIONS ON MOVEMENT

Freedom of movement is an extremely important right for IDPs. It is also a right that is frequently denied them. For example, IDPS leaving a country or region in which they have been seeking refuge will often need to travel long distances in order to reach their home region. National or local authorities may try to force the IDP to use a particular route of return. Displaced Persons are longer or more dangerous than other alternatives, and the restriction of movement has the effect of preventing or discouraging displaced persons from making the return journey. IDPs are sometimes forced to settle in one particular area, for example, in a region where the soil is not suitable for farming, where there are few water sources, or where mines have made the area very dangerous. IDPs have already suffered a violation of their right to freedom of movement when they were forced to flee as refugees or as IDPS. It is therefore all the more important that as displaced people return, this right should be respected.

Accordingly, it is essential that IDPs be guaranteed the right to freedom of movement. Any restrictions imposed on movement by local authorities under Article 12 of the Covenant on Civil and Political Rights should be critically examined and, where possible, avoided. Moving within one's own country. The principal contexts in which a returnee's right to freedom of movement might be violated are: when moving within his/her own country; when choosing a residence; and as a result of decisions to displace, relocate or transfer groups of returnees and Dips. The Universal Declaration of Human Rights recognizes, in Article 13(1), the freedom of residence and movement as a basic human right. Article 12(1) of the Covenant on Civil and Political Rights provides that:

“Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.”

In situations of tensions and disturbances the right to freedom of movement is derogable and subject to various possible limitations. Article 12(3) of the Covenant on Civil and Political Rights provides that the only restrictions permitted are those “which are provided by law, are necessary to protect national security, public order), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present covenant.” In all cases any restrictions should be proportional to the necessity.

A situation of internal armed conflict may provide justification for a restriction of freedom of movement. Article 17 of Protocol II, however, prohibits the forced movement of civilians, except under special circumstances:

- (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.

In situations of inter-State armed conflict Article 49 of the Fourth Geneva Convention provides for the freedom of movement of displaced persons: “Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the

Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of the motive Article 49 continues.

Nevertheless, the occupying power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons does demand. Such evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement.

Article 85(4)(a) of Protocol I characterizes the intentional “transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory in violation of Article 49 of the Fourth Convention” as a grave breach of the protocol.

As referred to above, the term “protected persons” can be interpreted to cover returnees and IDPS. In some situations returnees and IDPS, as members of a civilian population, may be forced to leave their residences so as to shield military objectives from attack. Article 51(7) of Protocol I prohibits this form of forced displacement.

3.9 **REFUGEE LAW**

Parts of refugee law may be said to be applicable to the internally displaced persons. For instance the first part of the Preamble refer to rights that are inherent and applicable to all human beings. It states that;

The High Contracting Parties,

Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination, ...

This entitlement to fundamental rights can be extended to the internally displaced. *Article 2. General obligations*

Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for the maintenance of public order.

Article 3. Non-discrimination

The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.

Article 4. Religion

The Contracting States shall accord to refugees within their territories treatment at least as favorable as that accorded to their nationals with respect to freedom to practice their religion and freedom as regards the religious education of their children

The existing laws that may be said to be protecting the rights of the internally displaced are the Humanitarian law, Human rights law and refuge law. Deng has captured this when he says,

“Although these bodies of law are conceptually distinct, they have influenced and informed each other and have also contributed to the corpus of laws that could be applied to the problems experienced by the internally displaced persons”.

From an international point of law one can comfortably say that internally displaced persons fall in the gap where international refugee law does not apply. During instances of strife and disturbance IDPS are also denied the basic protection that is provided for civilians. These provisions though do have inherent shortcomings. For anyone to fall under the Refugee law the refugee conventions, that is the 1951 refugee convention the 1967 additional protocol and the 1969 convention of the organization of African Unity on refugee problems in Africa and the 1984 Cartagena Declaration on refugees insist on those affected crossing an international border. Humanitarian Law is only applicable in times of armed conflict.

In human rights law the problem is that most treaties allow for retractions and derogations to be made from the provisions.

3.10 **GUIDING PRINCIPLES**

In 1998, the Representative of the UN Secretary-General on Internally Displaced Persons, Dr. Francis Deng, presented the “Guiding Principles on Internal Displacement”¹ to the UN Commission on Human Rights. in response to a request to prepare an “appropriate framework” for addressing the plight of internally displaced persons (IDPS). The language of the resolution did not ask him to come up with a “legal” framework or to propose the text of a declaration on the rights of

internally displaced persons but gave him a great deal of latitude to decide for himself what kind of framework would be “appropriate” under the circumstances. The Representative, thus, was confronted with the question of what form he should favor for the requested framework. Had they been asked at the time, many international lawyers and NGOs would probably have advised him to opt for a convention or, at least, a UN General Assembly declaration. The Representative did not choose this option. His Guiding Principles are neither a binding treaty nor a declaration adopted by the General Assembly after negotiations of the text by the Member States, but a set of non-binding guidelines submitted by the Representative after a prolonged period of preparation and discussion. They are thirty of them and divided into four categories. They set out the minimum procedure to be followed. They are as a matter of fact “a bill of rights” of some sort for the IDPS. The first category – that is Principles 5 to 9 deals with the protection against displacement.

The second category relates to protection during displacement. Principle 10 related the right to life. He shall be secure Principle 12, and has to have the right to choose his place of residence.

Under Article 14 an IDP shall not be arbitrarily deprived of his property. The next set of principle relates to issues of resettlement. Deng’s legal team tried to deduce specific norms from more general principles that are part of existing international law. One example of this technique is Principle 6 on “the right to be protected against being arbitrarily displaced”. No existing instrument mentions such a right explicitly. However, humanitarian law prohibits displacement in some specific and limited situations and human rights law, in a more general sense, guarantees not only freedom of movement but also the right to choose

one's own residence, and thus, a right to remain 13. A right not to be displaced can also be found in instruments on the rights of indigenous peoples¹⁴. From this it can be inferred that a right not to be arbitrarily displaced is already implicit in international law. Another example is the prohibition of return to situations of imminent danger¹⁵. Such a prohibition can be deduced from the prohibition of inhuman treatment, as it has been recognized by international monitoring bodies that it is inhuman to send a person to a country where he or she will face torture, death or another very serious human rights violation. However, as all the case law refers to return across international frontiers, a prohibition of inhuman return of internally displaced persons to dangerous areas within their own country needs to be articulated. Therefore, Principle 15 states the right of internally displaced persons "to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk". Such a principle, though not stated yet in an authoritative document, is in line with the spirit of existing international law and re-

3.11 **MAPPING THE GAPS**

International human rights law does not contain specific norms on IDPs but most of its guarantees can be invoked by the displaced persons.

Humanitarian law is applicable only in times of armed conflict contains a few scattered provisions on the treatment of the displaced which, however, do not constitute a comprehensive legal regime for this group of persons.

International refugee law has a lot to say about persons in flight but only applies to those who, unlike internally displaced persons, have left their country of origin and crossed an international frontier. The challenge is therefore to identify and analyze those norms, which are of special significance to IDPs, and also to detect relevant gaps and gray areas in international law. International law contains sufficient protection for the specific needs of internally displaced persons in many areas, but that there are a number of limited gaps as well as certain gray areas where clarification is needed. In this regard, Deng³⁴ distinguished two categories

“... one area of insufficient coverage results from gaps in legal protection which occur where no explicit norms exist to address identifiable needs of the displaced. In some cases, there may be a norm in human rights law but not in humanitarian law and *vice versa*. In such cases, it is only possible to articulate rights by analogizing from existing provisions of law that apply only in limited situations or only to certain

³⁴ Compilation and Analysis of Legal Norms pertaining to internally displaced persons, U.N. Doc.E/CN.4/1996/52/Add. 2. 11 Id., Para. 411.

categories of persons such as children, refugees or minorities. The second area of insufficient coverage results where a general norm exists but a corollary, more specific right has not been articulated that would ensure implementation of the general norm in areas of particular need to internally displaced persons. In such cases, it is possible to infer specific legal rights from existing general norms; however, the protection of internally displaced persons would be strengthened by spelling out these specific guarantees in an international instrument examine how binding norms of existing law can be made fruitful for IDPs by analogous application and which specific norms can be deduced from more general provisions. The Guiding Principles are not a binding document. Unlike declarations, resolutions or recommendations by international organizations, they have not been negotiated by States. Thus, they do not even constitute typical soft law, i.e. recommendations that rest on the consensus of States and thereby assume some authority that may be taken into account in legal proceedings, but whose breach does not constitute a violation of international law in the strict sense, and thus does not entail State responsibility. One may argue that the Guiding Principles are very well grounded in international law. As a matter of fact it is possible to cite a multitude of existing legal provisions for almost every principal. An element which did provide the drafters with strong normative guidance. Even where language was used that was not to be found in existing treaty law, no new law in the strict sense of the word was created in most cases. Instead

What are the disadvantages and advantages of the non-binding nature of the Guiding Principles? An obvious disadvantage of the non-binding nature of the Guiding Principles is the fact that States cannot be

held accountable if they disregard them and that, as such, they cannot be invoked in legal proceedings at the domestic level.

However, the Compilation also identifies a number of legal weaknesses, including some situations where the law is silent, and numerous 'gray areas' where there is a general norm, but where its implication or specific bearing for internally displaced people is unclear. It does therefore expose some of the inherent weaknesses as regards the application of the existing international law to the IDP situation.

Among normative gaps, one could cite the lack of a right to restitution of property lost during armed conflict. There are also 'application gaps' where existing legal norms do not apply in all situations, are binding only on a limited number of actors, or protect only limited categories of civilians. Among these, one could mention that human rights law is binding only upon governments and not on non-state actors, and that in some situations, the intensity of conflict is below the threshold of humanitarian law, while at the same time allowing governments to derogate from human rights provisions, often key to the survival of internally displaced people. Similar weaknesses exist where only segments of the population are entitled to the protection provided by the law, such as indigenous peoples (ILO Convention 169) or 'protected persons' (Geneva Conventions). There are also 'ratification gaps', where a person is without the protection afforded by international law because the government has not ratified the relevant instrument.

Among the 'gray areas', which are found where there is a general norm, but where a corollary norm specific to the needs of IDPs does not exist, could be cited the prohibition of forcible return to situations of imminent danger. (Governments may be tempted to return people to

such areas, in order to demonstrate a situation of normalcy or reduce the pressure on urban). A closer look at the above reveals a more serious situation. States affected by internal displacement are often among those that have failed to ratify the relevant treaties, or to accept the competence of supervisory bodies to consider individual complaints; consequently, how existing rights relate to internally displaced people has often not been clarified by case law, at least not in the relevant context. There is therefore insufficient guidance from supervisory bodies regarding these provisions and their general nature remains unclear. Furthermore, while it may generally be acceptable that human rights obligations apply to states, national legislation is expected to regulate the conduct of non-state actors and, in situations of internal displacement, the state often lacks the capacity to enforce domestic law. In addition, since internal displacement often occurs in situations of public emergencies, during which various rights may be suspended, IDPs may be able to rely on only a limited number of non-derogable rights, sometimes supplemented by limited parts of humanitarian law. Thus, while international law may in general demonstrate weaknesses, it is particularly inadequate in many situations of internal displacement

By restating and analyzing the relevant standards in one document, the Compilation both highlights applicable law and provides guidance—to those able to read the document—on how internally displaced people should be treated. However, it is questionable whether the Compilation, with some 105 pages of main text and 70 pages of endnotes, can be described as a user-friendly document. Its primary usefulness is probably for researchers, legal advisers at headquarters and governments seeking to develop or revise their domestic legislation.

Another problem relates to the authority of the Guiding Principles within the hierarchy of international norms. The wording of the Human Rights Commission's request to the Representative provides guidance on the type of document to be produced: he was asked to develop and appropriate' framework. for the protection and assistance of IDPs. While not being a 'legal' or a 'normative' framework, it was to be based on the legal Compilation. The Guiding Principles should, therefore, probably be characterized as a legal document, as the document relating to and based on law. It may be argued that a non-binding document can hardly be said to fill legal gaps. However, both a binding and a non-binding instrument/document aim at leading to a change in practice. This in itself justifies the elaboration of the Guiding Principles. Whether the Guiding Principles will over time contribute to the creation of legal norms of a more binding nature, either through formal adoption or by gaining authority through practice, remains to be seen. Although an instrument of a more committing character (politically or legally, such as a declaration or convention), might be more likely to be followed by practical action, it is uncertain whether the length of time required for its elaboration would result in any substantive improvements.

CHAPTER FOUR DISCUSSION

4.0 The Quest For A Specific Regime, Looking Ahead.

4.1 Discussion

This chapter looks at the crucial issues that have emerged. To be analyzed are issues such as the place of the 1998 Guiding Principles on internal Displacement and the concept of Sovereignty vis- avis- the issue of international humanitarian intervention. Despite the strides that have been made in recent years toward addressing the issue of internal displacement, much work remains to be done. Protecting and assisting the internally displaced remains one of the most complex issues facing humanitarian organizations today, raising a whole host of legal, ethical, and practical difficulties

At the core of these difficulties lie fundamental and unresolved questions regarding the scope of humanitarian action and the limitations of sovereignty. In its publication, the UNHCR³⁵ has encapsulated the problem by asking: "To what extent can humanitarian organizations substitute for an absence of national protection, even if the government and other actors consent to their presence?" And, crucially, if such consent is not forthcoming, do the United Nations and other multilateral actors have the right or the capacity to intervene in an assertive or coercive manner?" Such questions pose a major challenge to the international community in the 21st century, and how they are answered could have significant consequences for millions of people.

³⁵ UNHCR publication *The State of the World's Refugees 1997-98 -- A Humanitarian Agenda*

4.1.1 The 1998 Guiding “Principles” What is the implication?

The guiding Principles on internal displacement were drawn up by a team of international experts under the direction of the UN Secretary – General. They are thirty in number and they create a clear legal framework for the protection of IDPS. They are as a matter of fact the first international instruments that set down standards and define the rights of IDPS and creates obligation for their protection by either the government or rebel groups.

Their major weaknesses however are that the principles are non-binding. The Guiding Principles make it clear that IDPS need to be protected. It is not clear though as to who should undertake the said protective activities. The principles do not also create new rights but merely do re-state the existing legal provisions. There is a danger in this in that they do not take in account the peculiar needs of the IDPS. As it has been argued before, the Principles are only a tool which can be used by the politically weak to challenge the politically powerful.

Deng developed a concept of sovereignty as responsibility. What this concept does is it stipulates that when governments are unable to fulfill their responsibilities they are expected to request and accept outside offer of aid. If they refuse or obstruct efforts to do the same the international community has the responsibility to step in.

To date no government has challenged the concept of sovereignty as responsibility. This besides other reasons may stem from the fear that the same is tantamount to denial of life sustaining support to its citizens

4.1.2. The crossroad; is it a case for Re-statement? Or is there a need for a specific regime?

The guiding principles are a re-statement of the existing law. There may be not so much of an issue here given that rights are rights. All human beings by the mere virtue of them being human beings are entitled to rights. Merely re-stating rights though does not take in account the special needs of the internally displaced. A specific regime creating rights and obligations will take care of the special needs of the IDPS. These will be rights grounded in the actual needs of IDPS. It will be a reflection of their aspirations as opposed to merely derivative rights that are inferred from general provisions. As a stop gap measure the restatement may be helpful that is to handle the situation as something is being done. IDPS have peculiar needs. For instance unlike refugees they are yet to cross any National borders and yet their rights are being infringed upon. Pigeon- whole the existing international law to suit at any given time the situation of IDPS is like a Standard form contract taken to be suitable for every given situation. This not being homemade and not specifically tailored to fit the situation of IDPS is not suitable as a long-term measure. At the time of the Representative's appointment, there was some debate about whether the main problem was to ensure that existing law was being implemented, or whether there was also a need to elaborate new provisions. In response to a request from the Commission on Human Rights, the Representative has undertaken an assessment and evaluation of existing international law to determine the degree to which it provides an adequate basis for the protection of internally displaced people. To this end, the Ludwig Boltzmann Institute in Vienna and the American Society of International Law/International Human Rights Law Group, based in Washington, prepared two studies.

After several rounds of consultations with experts, including those from UNHCR and the ICRC, the two studies were merged and edited by Professor Walter Kälin (Switzerland).

The *Compilation and Analysis of Norms pertaining to Internally Displaced Persons* was presented at the 51st session of the Commission on Human Rights. The study lists a range of needs experienced by those who are internally displaced, as identified in the context of field studies. Among these are equality and non-discrimination (both between internally displaced people and the rest of the population as well as among the IDPs themselves), life and personal security, personal liberty, subsistence needs, movement-related needs (including the ability to seek safety in other parts of the country and abroad, to return to one's home area and to be protected from forcible return to conditions of danger), need for personal identification, documentation and registration (which is often necessary as a means to obtain public services, but which may expose internally displaced people to persecution), property-related needs, needs to maintain family and community values, and the need to build self-reliance. In all these areas, the *Compilation* highlights the corresponding provisions under international human rights law and humanitarian law, and examines the extent to which they provide adequate coverage. A separate section analyses different aspect of access to vulnerable persons, their access to relief agencies, the protection of relief workers and organizations, including their transport and relief supplies. Because the applicable sources of law depend on the situations which internal displacement occurs, the study examines separately situations of tensions and disturbances or disasters, non-international armed conflict, and international armed conflicts. Both regional and

global instruments are examined, including so-called soft law and hard law. Refugee law is also included for purposes of analogy.

The Compilation concludes that while existing law seems adequately to cover many vital needs of internally displaced people, there remain areas where there is insufficient coverage. The law seems to cover many aspects relating to the right to life, prohibitions on torture, and hostage-taking, contemporary forms of slavery, subsistence rights and many aspects of religious rights. In these areas, the hardships experienced by internally displaced people indicate a lack of willingness on the part of the authorities to observe and implement existing obligations rather than lack of clarity about or absence of relevant norms. It would thus be wrong to assume that because there is no specific regime for internally displaced people, there is no legal basis for their protection.

4.2 Sovereignty Vies a Vis international Humanitarian assistance

Sovereignty does not have its roots in the classical tradition but does emerge from the struggle of middle ages³⁶Who ever is sovereign should not take commands emanating from another body. Rousseau argument was that the sovereign will can neither be alienated nor be dependant upon any human will and Kindiki³⁷ has stated that Humanitarian intervention as a particular type of intervention and for the purpose of his study meant any coercive or forceful interference by an external authority in the sphere of jurisdiction of a sovereign state

³⁶ Sovereignty as Dominium; Is There A Right of Humanitarian intervention?

³⁷ DR KITHURE KINDIKI, HUMANITARIAN INTERVENTION AND STATE SOVEREIGNTY IN AFRICA The changing paradigms in international lawpage3

This he distinguishes from humanitarian operations which he defines as reflecting a whole spectrum of humanitarian responses to conflict and crises. This is distinguishable from the former as no force is used. That the general concept however, is to step between to disrupt or to interfere.

Article 2(1) of The Charter of the United Nations articulates the Principle of Sovereign Equality and Article 2(7) prohibit intervention in matters that are essentially within the domestic jurisdiction of any state. Article 2(7) however further states that this Principle shall not prejudice the application of enforcement measures under chapter 7.

At the core of the IDP problem lies the fundamental and unresolved problem of sovereignty vis- a Vis the scope of humanitarian assistance. There is no clear legal framework for dealing with IDPS. their principle recourse for seeking assistance remains their own governments, which may be unable or unwilling to assist. Efforts to define more clearly the legal status of IDPS gained momentum in January 2000. when the USA Ambassador to the U.N Richard Holbrook³⁸ argued that there was no meaningful difference between Refugees and IDPS. His plea had a ripple effect. It helped put in the spotlight the plight of IDPs. It fueled debate and some states resisted the idea of equating IDPS to refugees and in so saying, they relied on the principle of National Sovereignty. His plea signals the end of the era where states have been hiding behind the veil of sovereignty as they perpetrate human rights abuses.

In a related sign the of changing times the special representative of the U.N secretary General on IDPS Francis Deng has proposed tying the idea of sovereign authority to government's responsibly for treating all their citizens decently. Sovereignty therefore is never absolute.

³⁸ Ibid.

CHAPTER FIVE

WHERE IS THE WAY FORWARD?

This chapter addresses the issues of the way forward in addressing the plight of the internally displaced persons. It captures what this write up has demonstrated, that there is the a need for a specific regime to govern the plight of the internally displaced persons.

5:1 CONCLUSION AND RECOMMENDATION

Addressing protection concerns is relevant and necessary at all stages of internal displacement. The widespread and grave violations of basic human rights that internally displaced people are exposed to reveal that adequate and consistent protection remain a major gap in the national and international response. If tailored to the particular needs of internally displaced people, this response is likely to be improved. In this light, a specific legal framework is a useful means of stimulating relevant actors to protect IDPs from being exposed to violence and other types of abuses. It must also be emphasized that there is no inherent contradiction between more legal prescription and better implementation of existing law; providing clarity of existing obligations is a means to ensure better implementation. To this end, a major challenge will be to ensure that the Guiding Principles are widely disseminated to the field, so that internally displaced people, organizations working on their behalf and government officials in affected countries can in a simple manner seek guidance on how to address the relevant problems As it is today, there is no specific regime that governs the rights and responsibilities of IDPS. One is left to go on a fishing expedition whenever there is a feeling

that the rights of IDPS are involved and have been breached. This is a tedious exercise for both legal experts and academicians. This also is susceptible to lack of a common stand and can be a subject of several interpretations depending on the lens or perspective that one is making the observations from.

A specific regime would ensure that rights and obligations of IDPS are well set up. For instance there would be provisions that though the state has responsibility to protect them and to ensure that they are safe, they are also duty bound not to engage in activities that may cause insecurity for instance sporadic attacks.

Leaving this as a gray area creates a host of problems. Often the perpetrators of situations that lead to displacement are the governments. The absence of a specific regime makes it impossible to compel the government to act appropriately.

The international community in so failing to come up with a specific regime to govern the plight of the IDPS has been forced to almost always to act "*ipso facto*" after the fact. This is evidenced for instance in the Darfur situation the international community watched as massive displacement took place. Then it became fashionable to try and get in medical and food supplies. Similarly the world watched as Rwandees killed each other. Then moved in to set up a tribunal international, Criminal Tribunal for Rwanda. If the Security Council can put up measures in position that can take care of criminals who are the people who trigger the displacement under Chapter 7, they ought to set up a specific regime that can justify their intervention in the infant stages of displacement.

Under Chapter VII they may always intervene if there is a threat to peace. A specific regime would however enable state parties to know the perimeter of what will be termed as atrocities and where the world nations are justified to intervene.

The guiding principles are a stage ahead. The principles however, as observed elsewhere, may be termed to be 'soft law'.

Deng's mandate when he was assigned to study the IDPS situation and came up with a document was wide. Perhaps he had reasons as to why he opted for soft law rather than a treaty. He may have been avoiding the complex treaty making procedure that may take years.

Was this a justified option though? The principles are merely guiding. They don't have that binding effect that may justify any sort of intervention or even compel a state to accept humanitarian and the world literally takes a back seat, and watches as the drama unfolds. In the Kenyan situation for instance the world merely sat and watched the atrocity go on for several months. The government was unwilling to quell the tribal clashes that led to the displacement. The UNHCR – extended its mandate to extend humanitarian aid to IDPs. This was not very successful. They did not go very far in resettling those displaced. What appeared to have emerged were comments by the international community and the press. In as much as this may help to highlight the plight of the IDPS it does not ameliorate their situation.

A specific regime will set the rights and obligations of the IDPS. It will be a quick – read easy to refer to and easy to observe and enforce. One appreciates the fact that enforcing international law is based on

good faith and state parties fear to be ostracized. Obligation which are not specific and which have not acquired customary law status are even harder to enforce. A need for a specific regime therefore cannot be overemphasized enough.

There is no specific institution that takes care of the plight of IDPS. In the Kenyan situation the refugee body when there was displacement extended its mandate and attempted to take care of IDPS. Yet as argued by Phuong³⁹ IDPS problems and Refugee problems are not the same. A specific institution rather than one with an extended mandate will be more suitable. Perhaps as a stop-gap measure the Refugee body would take control if its officers were closer to the victims.

A long-term answer will be to get a specific institution mandated to look after IDPS. The Refugee regime unusually bargains with 3rd or 2nd states of occupation. These negotiating skills are therefore limited to dealing with countries that are not specifically involved in perpetrating the reasons for displacement. These countries are therefore in a way neutral. It will only be involved in resettlement in event of ended hostilities.

A new institution with its own framework out to be established. Its mandate will involve negotiating with the often-hostile government for the resettling and assisting its own citizens and also allowing the international community to assist and offer humanitarian aid.

This body, this being its only mandate, that is to handle the situations of displacement, will sharpen and develop its own skills in

³⁹ IBID

handling the plight of the IDPS. A specific mandate will enable it to specialize in handling the situation of IDPS. Handling the IDPS situation will be more detailed and in-depth as this will be its own mandate. It will be *‘lex specialis’*.

5:2 RECOMMENDATIONS

The way forward to avoid and ameliorate the plight of IDPS is either to strengthen the guiding principles to a treaty. Besides rights the instrument should create obligations for IDPS. This though is an application or restatement of the already existing international law instruments.

The better option will be coming up with a specific regime to govern the issue of displacement. It will be grounded to aid very specific to the IDP. The IDP with his needs aspirations and desires will be central to the setting off of this regime. He will not be a person deriving rights from elsewhere. He will not be entitled to merely **‘trickling’** rights from another stream, dependant on who is on the other end and is interpreting the same. He will have rights emanating from him that will reflect and encompass his special needs, and aspirations. Giving him rights similar to the refugee may not solve his problem in every instance. For instance some refugees desire is not to return home, this is not often the case with those internally displaced.

There is also a need for an institutional framework to cater for the need of the IDPS. They can't be merely boarding buses going into

different destinations. An extended mandate of the refugee body cannot be effective. Their needs are different.

Kenya did handle its IDP situation inhumanly. Had there been a specific international legal regime and a body specialized in the IDP – situation – the plight of the international displaced would have been ameliorated. Even the extended mandate of the refugee body did not help the Kenyan displace much.

The answer therefore, lies in the need for a specific regime, and a specific institution to govern the plight of the displaced. This will be of great help – as it will place the plight of the internal displaced at the center. It will be a more grounded approach that tends to yield more results.

The veil of sovereignty should be lifted and sovereignty should be equated to responsibility.

Perhaps the state parties should be more alert to the issues that cause displacement that should be arrested at inception acting after the fact leads to untold suffering to those displaced.

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