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Author: Dr. Nafees Ahmad

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Internally Displaced Persons and International Refugee Law: Protection Gaps, Challenges and Implementation in Practice

Nafees Ahmad*

Abstract

The protection of Internally Displaced Persons - popularly called IDPs - has come to dominate the contemporary debate in International Law, International Refugee Law (IRL), International Humanitarian Law (IHL) and International Human Rights Law (IHRL). But these fields of law have offered disappointing levels of protection. There are no protection provisions in IRL, IHRL and IHL dealing with IDPs and protection is limited to only those persons who cross international borders. But there is another legal framework called the UNHCR Guiding Principles on Internal Displacement, 1998 which were prepared for the UN Commission on Human Rights that provides protection and assistance to the IDPs. Internal displacement rose to prominence as an issue through the late 1980s and became an important priority in global affairs during the 1990s. Today, human displacement trends in homeland boundaries have acquired global concerns and ramifications and need aid and assistance at par refugees. IDPs have also been living in refugee-like situations that make them eligible for international protection in their country of residence. Thus, it is evident from the IDPs definition discussed hereunder that it does imply to have an idea of international protection for them but it also endures insufficiencies. However, IDPs is an international problem now and creates with international obligations. Additionally, the IDPs framework is not a legally enforceable mechanism and its operation and implementation exclusively depends upon national governments. The IDPs definition is extremely restricted and lacks international application and flagrantly deprives them of international protection. Therefore, an attempt has been made in this paper to analyse the existing IDP laws, to identify the IDPs protection gaps, challenges and their implementation in practice worldwide including India.

* Ph. D., LL.M, Faculty of Legal Studies, South Asian University (SAARC)-New Delhi, Nafees Ahmad is an Indian national who holds a Doctorate (Ph.D.) in International Refugee Law and Human Rights. Author writes on International Forced Migrations, Climate Change Refugees & Human Displacement Refugee, Policy, Asylum, Durable Solutions and Extradition Issues. He conducted research on Internally Displaced Persons (IDPs) from Jammu & Kashmir and North-East Region in India and has worked with several research scholars from US, UK and India and consulted with several research institutions and NGO's in the area of human displacement and forced migration. He has introduced a new Program called Comparative Constitutional Law of SAARC Nations for LLM along with International Human Rights, International Humanitarian Law and International Refugee Law. He has been serving as Senior Visiting Faculty to World Learning (WL)-India under the India-Health and Human Rights Program organized by the World Learning, 1 Kipling Road, Brattleboro VT-05302, USA for Fall & Spring Semesters Batches of US Students by its School for International Training (SIT Study Abroad) in New Delhi-INDIA nafeestarana@gmail.com, drnafeesahmad@sau.ac.in

1. An Overview

The International humanitarian community is ceased with a task of internal displacement that has traumatic, tormenting and tedious terrain challenging to tread but has to be surmounted beyond transcendental trajectory of human existence. The monumental responsibility of protecting the internally displaced persons (IDPs) rests with the national governments, and the international community must contribute to ensuring the best possible protection to forcibly uprooted people in their country of habitual and ordinary residence. The global comity of nations must devise the architecture of humanitarian protection to IDPs that ensures, enhances and strengthens protection in their homelands.

There are more 60 million displaced people around the world and increasing on a daily basis, and humanitarian aid and assistance have come as the humongous challenge with the long-lasting condition for the civilized community of nations. The causes of international displacement have vertically and horizontally damaged the world and its structures that sustain the people to embrace socio-political roles, establish economic treasure and maintain physical integrity with an engagement in the consequential daily chorus which has been withered away. Thus, internal displacement creates a humanitarian crisis that poses a survival challenge that is beyond the contours of human biology but of human existentialism. The humanitarianism is the most prominent casualty in the internal displacement that puts displaced people in limbo neither in a state of predicament nor in a position to survive as regular citizens in the country of their residence. Internal displacement¹ is the new nemesis of the humanity that has been growing at an unprecedented pace. It has been warranted, necessitated, or manipulated under uncivilized reasons² since unrecorded history beyond the gullible human imagination. Internal displacement has been recognized in the latter quarter of the 20th century through the later part of the second decade of the 21st century. However, its dynamic range has moved the world over as the Internally Displaced Persons (IDPs) found themselves in the refugee-like situations in their countries of origin axiomatic from the IDPs definition. IDPs are:

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized border.³

¹ I perceive an internally displaced person (IDP) is someone who is forced to flee his or her home within the national boundaries and face refugee-like situations. However, IDPs are often perceived as refugees but they do not come within the purview of refugee definition and there is no universally binding and accepted treaty applicable to the IDPs.

² In my understanding I call “uncivilized reasons” those state practices which are discriminatory and based on the ground of caste, creed, communalism, regionalism, race, religion, nationality, membership of a particular social group or political opinion or sex and resorted to covertly or overtly by the state, state’s agencies, institutions, actors, non-state actors or state-tolerated actors against the person or persons, community, minority or social or religious group, individual or group of individuals within the country of his or her nationality and is unable to avail or owing to such practice or fear, is unwilling to avail himself or herself of the protection of the local state administration of his or her country.

³ UN Guiding Principles on Internal Displacement, 1998

These UN Guiding Principles are consistent with international human rights law and international humanitarian law which incorporate and make explicit guarantees protecting internally displaced persons that are inherent in these bodies of law. Primarily, refugees have been the priority of the international community under the 1951 UN Convention Relating to the Status of Refugees⁴ (UNCSR) with its Additional Protocol of 1967 collectively called the International Refugee Law (IRL). Therefore, humanitarian aid, assistance, and international support should not be confined to refugees; rather, the ambit of refugee rights⁵ is equally applicable to the protection of IDPs in the contemporary circumstances. Internal displacement is a manifestation of post-cold conflicts centered on altering tessellations of clashes and violence from intra-state to inter-state proportions.

The internal displacement during and after displacement causes huge violation of fundamental human rights like movement-related rights, family life, food, water and sanitation, basic shelter and adequate housing, health, recognition, issuance, and replacement of documentation, property and possessions, employment, economic activities, and social protection, electoral rights, education and other regulatory issues in every geopolitical entity. Since IDPs remain within the territorial jurisdictions of their homelands, the primary duty and responsibility to provide protection and humanitarian assistance to them without discrimination and by international human rights and humanitarian law lies with the state concerned. While a specific framework is available to offer protection for refugees, in the form of the 1951 Refugee Convention, and an international organization, the UNHCR, has been mandated to assist them, neither is available for IDPs per se as they remain inside their own countries and, therefore, do not have a similar right to have assistance and protection under any international legal instrument or from an international organization.

Therefore, internal displacement is not a different happening in the contemporary world of lopsided development that has made the IDPs and their problems an international concern. However, the awareness of the status of the worldwide problem of refugees as one of the burning questions of our times has now spread beyond academic circles, thanks to the efforts of groups and individuals campaigning for these floating populations into the general consciousness. Less exposure has been given to the situation of IDPs, that is, persons who have had to leave their homes involuntarily but unlike refugees, have not crossed the frontiers of the state where they live. The IDPs' population staggered at around 13.933 million in the Middle East and North Africa, 10.762 million in Africa, Europe has 2.804 million, 7.113 million IDPs in Americas and 2.879 million internally displaced persons in Asia and the Pacific constituting in totality around 37.491 million people affected worldwide as reported by the Internal Displacement Monitoring Centre⁶ (IDMC) on May 2017 due to conflict, violence, and disasters. The problem of IDPs far exceeds the dimensions of the world refugee problem.

⁴ 1951 UN Convention Relating to the Status of Refugees, July 28, 1951, Adopted by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UNGA Resolution 429 (V) of 14 December 1950, Entered into Force on April 22, 1954, in accordance with Article 43.

⁵ *ibid.*

⁶ Global Report on International Displacement, May 2017 <http://www.internal-displacement.org/global-report/grid2017/pdfs/2017-GRID.pdf> <<accessed on October 20, 2017>>

The precise figure for the internally displaced population stood at approximately 40.8 million in June 2017 in the top ten countries of the world. In Syria there are 7.6 million IDPs, Columbia has 6 million internally displaced persons, Iraq has a displaced population of 3.6 million, DRC [(Democratic Republic of Congo with 2.8 million IDPs)], Sudan is confronted with 2.2 million IDPs, South Sudan (1.6 million IDPs) Pakistan is pestered with 1.4 million IDPs, Nigeria (1.2 million), Somalia (1.1million) and this trend has since been increasing by millions of internally displaced persons in Rwanda, Burundi, Sierra Leone, Uganda and the former Yugoslavia, to mention only those states, which are most heavily affected.⁷ The UNHCR (United Nations High Commissioner for Refugees) is responsible for the protection of refugees and ICRC (International Committee of Red Cross) has to look after the victims of armed conflicts but their mandate do not adequately address the plight of IDPs. UNHCR and ICRC peripherally touch upon the problems of IDPs despite the fact, the conditions of IDPs are similar to refugees and require the same threshold of protections. There is now increasing activity in this area by the human rights mechanisms of the United Nations. According to the Reports by the Secretary-General to the Human Rights Commission (now UN Human Rights Council), the Commission appointed in 1992 a Special Rapporteur, Francis M. Deng, who in 1993, presented an exhaustive study on the subject of IDPs with the “observations from the field.”⁸ Further reports, with “Profiles in Displacement,” were submitted to the Commission on Human Rights in 1994 and 1995 respectively.⁹

In the course of his work, the Special Rapporteur for Internally Displaced Persons visited the countries of the former Yugoslavia, the Russian Federation, Somalia, Sudan, El Salvador as well as Colombia, Burundi, and Rwanda. His third report also cited the following countries with internally displaced persons: Afghanistan, Cambodia, Iraq, Myanmar, and Zaire with also Guatemala, Turkey, Colombia, Peru, and Djibouti. Meanwhile, Non-governmental Organizations (NGOs) Reported IDPs in Angola, Azerbaijan, Ethiopia, Georgia, Haiti, India, Liberia, Mozambique, the Philippines, the Russian Federation (Chechnya) and Sierra Leone.¹⁰ It is axiomatic from these circumstances that the issue of IDPs is a worldwide problematic phenomenon wherein historical, social, political, economic and cultural factors have been playing an influential part. Therefore, events common to IDPs include a variety of types of violence and insecurity as causes and effects of displacement: these are in an interdependent relationship with each other, and their significance is not easy to determine in any particular case. Thus, the causes which can be differentiated cover international and non-international armed conflicts (e.g. Burundi, Rwanda, the former Yugoslavia, Sri Lanka, Sierra Leone, Afghanistan, Somalia), the disintegration or collapse of the state below the level of an armed conflict (e.g. Russian Federation, Colombia and Sudan) and serious and continuing violations

⁷ *ibid.*

⁸ Francis M. Deng, *Comprehensive Study on Internally Displaced Persons*, Commission on Human Rights Resolution 1992/73, E/CN.4/1993/35. 1993. (Submitted to the UN Secretary-General on the Human Rights Issues).

⁹ Francis M. Deng, *Internally Displaced Persons*, Commission on Human Rights Resolution 1993/95. E/CN.4/1994/44. 1994. See: R. Cohen and F. Deng, *The Forsaken People: Case Studies of the Internally Displaced*, (Brookings Institution Press, Washington, D.C: 1998) 5. Cohen, R. Cohen and F. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, (Brookings Institution Press, Washington, D.C.: 1998) 1.

¹⁰ Francis M. Deng, *Internally Displaced Persons*, Commission on Human Rights Resolution 1993/95 and 1994/68. E/CN.4/1995/50. 1995.

of human rights; an additional cause of the growing numbers of the IDPs is the increasing prevalence of refusal to grant asylum.

Consequently, the displacement shows in varying forms of “insecurity” on the one hand a lack of state protection against violent attacks by the military, paramilitary groups or other groups of the population; and on the other hand hunger and economic hardship and threats to groups in particular need of protection such as women (e.g. rape) and children (e.g. lack of education). A range of human rights is violated by the displacement that includes the right to life including liberty and integrity of personhood, the right to food, shelter and health care, the right to work, the freedom of movement, the right to free speech, and the right to family, education and legal personality.¹¹ The issue of the IDPs brings in a variety of legal considerations as adumbrated hereunder with the particular attention that shall be examined and analysed on:

1. the question of arriving at a definition of the term “*internally displaced persons*” which will enable the group of individuals involved, the subjects of a “*right not to be displaced*,” to be determined; this will be a major factor when a declaration or convention is drawn up;
2. the question of what law applies to the IDPs (in particular, human rights law, international humanitarian law, and international refugee law) and whether this is adequate or needs to be augmented; and finally;
3. The question of how and by whom protection and humanitarian aid for the IDPs can be made available. In addition to this safety and assistance, there is also a need for long-term solutions to the causes behind the displacement; however, a discussion of this is beyond the scope of this study.

2. Internally Displaced Persons (IDPs): The Definition

The citizens and habitual residents of a country find themselves in situations of extreme vulnerability due to internal displacement who become internally displaced persons (IDPs) in their country of residence. They flee disasters, conflict, and violence while en route their safety and security are particularly at risk. Women are frequently subjected to abuse and sexual exploitation, particularly if traveling alone. Children may be kidnapped, trafficked, or forcibly enrolled as soldiers or, when unaccompanied, may not be able to find the necessities of life and thus survive. An understanding of the specialized terminology attributed to a particular situation of vital importance. Therefore, any attempt to define the term *internally displaced persons* raises two questions in particular: whether this definition should include natural and ecological disasters and whether the displacement must be a mass phenomenon to constitute a case of IDPs. First, however, the development of a working definition of the term “*internally displaced persons*” up to the present will be considered.

¹¹ Analytical Report of the Secretary-General on *Internally Displaced Persons* E/CN.4/192/23.1992

2.1 Efforts to Find a Working Definition for the Term Internally Displaced Persons

Within the framework of the United Nations' human rights mechanisms, the topic of IDPs was discussed in Cuenod's report.¹² The definition applied here includes economic refugees, but does not mention natural and ecological disasters or violations of human rights as causes of the creation of IDPs. The Analytical Report by the Secretary-General also took up the question of a definition of the term "internally displaced persons": while this extended the definition to stipulate that a mass phenomenon must be involved and to include human rights violations and natural and ecological disasters as causes, it excluded economic refugees from the definition. According to this definition, IDPs:

...persons who have been forced to flee their homes suddenly, or unexpectedly in large numbers; as a result of armed conflict, internal strife, systematic violations of human rights, or natural, or man-made disasters; and who are within the territory of their own country.¹³

It is evident from the IDPs definition *supra* that it does incorporate the idea of protection for climate refugees or climatically displaced persons (CDPs), but it also suffers from inadequacies. IDPs definition is extremely restricted and lacks international application and excludes those refugees who cross international boundaries. This definition protects only those IDPs who got displaced or deracinated, and their security has been entrusted to municipal jurisdictions and their agencies. On the other hand, duty-bearers are not discharging their obligations that are mired in external aid and assistance for capacity expansion, etc. However, climate change is an international problem now and burdened with international obligations. Additionally, the IDPs framework is not a legally enforceable mechanism, and its operation and implementation exclusively depend upon the national governments.

The Comprehensive Study presented by Special Rapporteur Deng adopts this working definition. The 1995 Report makes clear that the discussion on a definition of the term *internally displaced persons* has been a continuous development. One proposal is to arrive at a determination analogous to the extended definition of a refugee used in the 1969 OAU Convention on Refugees (which also recognized, in Article 1 Section 2, a flight from external aggression, alien rule and severe disturbance of public order as reasons for flight), or the Cartagena Declaration of 1984 (which draws in gross human rights violations in addition to the grounds listed in the OAU Convention). This extended understanding of the term "refugee" has won only regional acceptance as of now. Therefore, it is also proposed that the IDPs and refugees be given the same treatment, although this would bring into question the difference between the obligations under the national and international law of the state concerned. A more far-reaching proposal suggests that any definition should be avoided, so that as many victims and phenomena as possible can be included, although a description of the legal subject is a fundamental condition of any determination of rights and obligations. These proposals should, therefore, be rejected.

¹² Beiger, Y., 'The Role and Status of International Humanitarian Volunteers and Organizations', *The Right and Duty to Humanitarian Assistance*, (1991)

¹³ Analytical Report, *supra* note 11.

An international meeting of experts held in Vienna in 1994 dispensed with the requirement for a mass phenomenon but retained the inclusion of natural and ecological disasters in proposing as a working definition of *internally displaced persons* in the following articulation:

Persons or groups of persons who have been forced to flee their homes or places of habitual residence suddenly or unexpectedly as a result of armed conflict, internal strife, systematic violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.¹⁴

2.2 Should Natural and Ecological Disasters to be Included?

It is a matter of dispute whether natural causes such as natural catastrophes and environmental disasters caused by man should be considered alongside human rights violations, armed conflict, and civil disturbances when investigating the issue of *internally displaced persons*.¹⁵ For advocates of a definition of the term *internally displaced persons* by analogy with an extended definition of refugees, an additional argument against including natural or ecological disasters derives from the fact that in a case such as this, if international borders had been crossed, recognition as a refugee would not be granted. It is only when aid is withheld, or disasters are exploited for political ends that consideration may be given; however, as this amounts as a rule to the violation of human rights, the case is already included in the definition.

2.3 Internally Displaced Persons: Is it a Mass Phenomenon?

A coherent, comprehensive and systematic international legal framework that addresses all forms of internal and international human displacement is crucial and critical at this juncture to decimate disconnect between national and international protection of the IDPs, concept and practice, and protection norms and protection management. Every displaced person is not a refugee but he or she lives in a refugee-like condition and needs same treatment irrespective of his or her geopolitical settings. According to the Secretary-General's working definition, IDPs must be a mass phenomenon. Therefore, the working definition intended to protect the national sovereignty of states and prevent international protection from being involved except in severe cases whereas the state is no longer taking responsibility for its citizens. Against this, it must, however, be said that the *right not to be displaced* is both an individual and a collective right which can be asserted by individuals as well as by groups (human rights agreements, international humanitarian law, and the international refugee law protect the individual). It means that the sensitive problem of demarcation, deciding at what point a mass phenomenon is involved (when 100, 1000 or 10,000 persons are affected?) can be avoided.¹⁶ The term *internally displaced persons* should, therefore, be defined to comprise individuals who have left their homes involuntarily to escape violations of human rights and the use of violence but have not crossed the borders of their state.

¹⁴ Francis M. Deng, *supra* note 10.

¹⁵ Francis M. Deng, *supra* note 9.

¹⁶ Francis M. Deng, *supra* note 10.

3. Internally Displaced Persons: Legal Deficiencies and Gaps

Where on earth IDPs choose to settle; their necessities are often severely undermined and neglected. Areas of refuge may merely lack the shelter, water, and food they require. Even where such services do exist, the influx of IDPs into already populated areas may lead to discrimination and further abuse. An IDP's lack of personal documentation – whether lost or left behind – can efficiently bar his or her access to government services. Healthcare for the disabled, elderly and pregnant may be impossible to obtain. Education, if contingent upon local residents, can also be denied to IDP populations. Work, and therefore access to money, may be difficult to find – even for residents of their host communities, let alone the IDPs themselves. The physical and mental toll such conditions can take on affected individuals is immense. This section will begin by dealing with the law applicable to Internally Displaced Persons (IDPs), and its deficiencies and the gaps, followed by a discussion of whether a *right not to be displaced* can be based on the right to a home within the IRL and International Human Rights framework.

3.1 The Law Applicable to Internally Displaced Persons

Standards of protection for IDPs can be drawn primarily from human rights, international humanitarian law, and international refugee law. As regards the validity of these protective regimes, it is the area of applicability regarding their substantive, personal, territorial and temporal scope that is the determining factor. As well as this, attention needs to be given to restrictive elements such as derogation clauses in international human rights agreements.¹⁷

The most comprehensive protective regime for *internally displaced persons* is provided by the international human rights protection, which has unlimited substantive, personal, territorial, and temporal scope of application of core international human rights instruments¹⁸ and prominent regional human rights mechanisms.¹⁹ At the same time, this protection can be limited during a state of emergency by the application of derogation clauses included in international human rights agreements to the human rights minimum standard applying to states not bound by the agreement, as provided by international customary law or *jus cogens*.²⁰ The core of non-derogable rights prevailing even in cases of emergency and common to all international human rights agreements extends only as far as the right to life and the banning of torture, slavery, and retrospective criminal legislation. Further, there is no explicit ban on deportation or expulsion in the international human right agreements. The human rights guaranteed in the ICESCR frequently amount to clauses which are subject to

¹⁷ Aga Khan, Sadruddin, 'Legal Problems Relating to Refugees and Displaced Persons', Red Cross 1976-I

¹⁸ International Covenant on Civil and Political Rights (ICCPR), 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), 1966, European Convention for the Protection of Human Rights, and Fundamental Freedoms (ECHR), 1950, American Convention on Human Rights (ACHR), 1969 and African Charter on Human and People's Rights (AfrCHPR), 1981

¹⁹ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, (Kampala Convention), 2009, Adopted by the Special Summit of the Union held in Kampala on October 22, 2009.

²⁰ J. Fitzpatrick, *Human Rights in Crisis: The International System for Protecting Rights during States of Emergency* (Pennsylvania: UPP 1993). See: Von Glahn, W.: *Der Kompetenzwandel internationaler Flüchtlingshilfsorganisationen-vom Volkerbund bis zu den Vereinten Nationen*, 1992. Fronhoffer, D.: *Der internationale Menschenrechtsschutz bei inneren Konflikten* 1994.

considerable freedom of action on the part of the signatory state, and cannot be relied on precisely during a state of emergency.

In its substantive scope, international humanitarian law is restricted to armed conflicts. International armed conflicts are covered by the four Geneva Conventions of 1949 (GC I-IV) and Additional Protocol I of 1977 (AP I), internationalised armed conflicts by API, non-international armed conflicts by the common Article 3 of GC I-IV or in the presence of certain criteria by Additional Protocol II of 1977 (AP II). The common Article 3 of GC I-IV and AP II guarantee a minimum of humanity for those affected by the events in the conflict. Part II of AP II contains in Article 4-6 protective regulations to ensure humane treatment of victims and Part IV in Articles 13-18 protective provisions for the civilian population. Article 17 Sec. I of AP-II further includes a ban on the forced removal of the civilian population except where this is imperative for military considerations and protective regulations for cases where such removal cannot be avoided: The displacement of the civilian population shall not be ordered for reasons of the conflict provided the security and safety of the civilian populations caught up or imperative military reasons so warranted. Should these displacements have to be carried out while resorting to the all possible measures so that the civilian population has to be received under satisfactory conditions of safety, shelter, hygiene, health, and nutrition.²¹ This does not apply, however, to internal disturbances or tensions, which are typical of countries with perennial and severe violations of human rights, as in such cases non-international armed conflict exists, the threshold of applicability of Article 3 of the GC or AP II is not reached and accordingly international humanitarian law is not applicable. Article 1 sec. 2 of AP II states:

This Protocol shall not apply to situations of internal disturbances or tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

The application of international humanitarian law to non-international armed conflicts is additionally hindered by the circumstances that the applicability of common Article 3 of the Geneva Conventions depends on the judgement of the state concerned, which may refuse it for political reasons, that Article 3 includes no definition of non-international armed conflict and that no body to objectively qualify such a conflict is provided. On the other hand, international humanitarian law has the advantage that, as a law of conflict, it does not include any derogation clauses²² and at least GC I-IV is of universal application.

The international refugee law is based on the principle of *non-refoulement* – i.e. refugees may not be returned to areas where their life and safety are under threat. The Convention relating to the Status of Refugees (Refugees Convention) of 1951 in the wording of the 1967 Additional Protocol on the Status of Refugees states in Article 1. A paragraph 2:

²¹ On Jan. 01, 2000, 185 States were signatories to Geneva Convention I – IV and 120 were signatories to Additional Protocol II.

²² Buergenthal, T. and R. Norris (eds.), ‘*Human Rights: The Inter-American System*,’ Loose-Leaf Collection in 6 Volumes (1991) See: Calogeropoulos-Stratis, A, ‘*Droit Humanitaire et Droits de L’Homme. La Protection de la Personne en Periode de Conflit Arme*,’ (1980) Corten, O. and P. Klein: *Droit D’Ingerence ou Obligation de Reaction non Armee?* In RBDI (1991)

For the present Convention, the term ‘refugee’ shall apply to any person who.... (2) ... owing to a well-founded fear of being persecuted for reasons of political opinion is outside the country of his nationality...

While Article 33 Section 1 of the Refugees Convention states:

No Contracting States shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

Moves to develop the international refugee law to expand the definition of “refugee” or include *internally displaced persons* are as yet limited to efforts on a regional scale – in particular the OAU Convention on Refugees of 1969 mentioned earlier, which additionally recognises in Article 1 sec. 2 flight from external aggression, alien rule and serious disturbances of public order as reasons for flight and the final agreement from an international colloquium of experts and representatives of ten governments to discuss the protection of refugees in Central America, known as the Cartagena Declaration of 22.11.1984, which calls in sec.3 for the consideration of Article 1 sec. 2 of the OAU Convention on Refugees, with the inclusion of serious human rights violations, and in sec.9 for protection and aid for the IDPs.²³

The current legal position of internally displaced persons is aptly summarized by the Secretary-General’s report in words, “The applicable law is a patchwork of customary and conventional standards...”²⁴

International and regional standards, first and foremost in the areas of human rights law, humanitarian law and criminal law, lay the groundwork for accomplishing IDPs’ rights and addressing the particular problems they encounter. The contextualization of these standards in national legislation on internal displacement is crucial to producing positive change for IDPs. Most of these measures, as enunciated in international and regional treaties, are binding upon States and require domestication.

3.2 The Existing Law Need to be Implemented and Extended

The Special Rapporteur for the IDPs refers to the existence of two different approaches to the question of extending the law applying to this group. One of these considers the existing standards to be adequate and calls merely for better enforcement, while the other demands that a separate protective regime supplements the current standards for the IDPs.²⁵ The three protective systems relevant to IDPs each show deficiencies inherent to the framework. The international human rights agreements contain derogation clauses, which can be invoked to set aside the right to freedom of movement. Article 12 of the ICCPR guarantees the right to freedom of movement, includes numerous constraints in Section 3. It can also be set aside entirely, as it is not included in the list of non-derogable rights provided in Article 4, sec. 2 of

²³ Francis M. Deng, *supra* note 11.

²⁴ Francis M. Deng, *supra* note 9.

²⁵ Francis M. Deng, *supra* note 9.

the ICCPR and prevailing even in cases of emergency mentioned earlier. There is, in addition, no ban in deportation or expulsion. On the other hand, IHL (International Humanitarian Law) is applicable to international armed conflict situations of human displacement. IHL²⁶ seeks to limit the effects of armed conflict and to protect persons who are not or are no longer participating in the hostilities. IHL violations – such as attacks against civilians and ill-treatment of them, destruction of property, sexual violence and restricted access to health care and other essential services – are some of the main causes triggering displacement. While displaced, these communities struggle to meet essential needs amid exacerbated hardship and they may face particular threats, such as tension between them and host communities, settlement in unsafe or unfit locations, and forced return to unsafe areas. IHL contains important provisions to prevent the displacement of people and the suffering that follows and for the protection of persons forced to flee,²⁷ and the international refugee law fails to apply precisely for IDPs.

To achieve adequate protection for IDPs, these gaps in the international agreements must be closed. A lowering of the threshold of applicability of the international humanitarian law to include internal disturbances and tensions in its substantive scope is not in prospect, given the resistance shown by those states at the Diplomatic Conference on the Reaffirmation and Development of Internal Humanitarian Law held in Geneva 1974-7. Analogous application of the International refugee law to the IDPs would likewise meet resistance from states which reject any attempt to encroach on their sovereignty, as well as reservations by the UNHCR, which prefers to extend its brief only in a limited and ad-hoc manner. The 1994 UNHCR report, for its part, refers to the danger, “... that humanitarian aid in the refugees’ own country may cause neighboring countries to refuse entry even when people are fleeing not only through hunger but also for fear of persecution.” The only likely course would, therefore, seem to be an extension of human rights protection to cover internally displaced persons, including the setting up of a special protective regime. This is also the view taken by the Special *Rapporteur*, who stated, “just as certain categories of vulnerable groups, such as refugees, the disabled, women, and children, require special regimes for protection, so do the internally displaced.”²⁸

Given the dimensions of the problem of internally displaced persons, with some 25 million affected, there is a need for a stable protective regime for the IDPs, independent of the reasons for their displacement, the countries concerned and the unique legal, social, political and military situations in these countries.²⁹ A suitable way of proceeding, as with areas dealt with earlier (torture, “disappearing”), would be to draw up, on the basis of a summary of existing standards (for which a first draft has already been produced and is under discussion, a body of principles which can then be incorporated into a solemn declaration of the General Assembly

²⁶ Henckaerts, Jean-Marie and Louise Doswald-Beck, ‘*ICRC: Customary International Humanitarian Law*,’ 3rd Edition, ICRC-Cambridge University Press (UK: 2009).

²⁷ IHL contains many provisions concerning the prevention of displacement and the protection of IDPs - mainly in Geneva Convention IV (GC IV) and Additional Protocols I and II (AP I and APII), as well as in customary international law. States have the responsibility to implement these protections in their internal legal framework.

²⁸ Analytical Report, *supra* note 11.

²⁹ Analytical Report, *supra* note 11.

and finally into a binding Convention.³⁰ This should, in particular, clarify such questions as who is to be the beneficiary of a *right not to be displaced* and how the obligations of the states are to be constituted. The basis for this must be the particular needs of the IDPs before, during and after their displacement. Finally, the matter of how and by who this constitutional protection is to be enforced will need to be clarified.

4. The Right to a Home as the Basis of an International Protection Regime for Internally Displaced Persons

In respect of the right not to be displaced, the question arises whether existing mechanisms can be used to provide such a right. The right to a home formulated after the Second World War in response to the expulsions of the civilian population from central and Eastern Europe would also be suitable as protection for the IDPs, as internal and external displacements amount to the same facts. However, in considering the question of whether the right to a home exists, a distinction must be made between the right in an objective sense and the right in a subjective sense, the former being the sum of the obligations constituting this right, and the latter the entitlements due to the subject to the right.

The subject of the right to a home may be an individual or a group. It should be noted that this leaves open the question of whether the IDPs must constitute a mass phenomenon and whether the right to a home may be asserted only by groups or equally by an individual. Kimminich³¹ rightly stresses that “group rights do not exclude the simultaneous existence of individual rights, and conversely, group interests may be protected by individual rights.”

As to the question of what legal rules are to be encompassed by the right to a home in an objective sense, this should be determined by the needs of the IDPs before, during and after their displacement. Work has only just begun in drawing up an appropriate schedule of rights and is at present directed at compiling a list of applicable standards. Accordingly, the considerations below can do no more than indicate the direction of further development of the applicable law. A distinction must be made between the first right not to be displaced and secondary claims for redress during and after the displacement. Whilst the primary right is directed at halting actions by the state (i.e. deportation and forced resettlement, along with human rights violations and military actions resulting in the flight of the persons affected) so that civil and political rights are not violated, the secondary claims call for extensive additional action on the part of the state: a guarantee of elementary living conditions (basic provisions of food, water, shelter etc.), the assurance of social and cultural needs (education, religious teaching) and comprehensive measures to return and reintegrate the IDPs with at the same time a guarantee of special procedural rights to enable these claims to be implemented.

³⁰ Kimminich, O.L., *The Right to Home*, 3rd Edition 1989, See: Lavoyer, J.P. *Refugees and Internally Displaced Persons. International Humanitarian Law and the Role of the ICRC*, International Review of the Red Cross, (1995)

³¹ Article 17, Additional Protocol-II, 1977

However, it is still unclear whether the right to a home prevails in the case of a state of emergency. By analogy with international humanitarian law³² (Article 17 AP II), such a right could be considered to prevail during states of emergency, but subject to certain limitations. If the right to a home were to be interpreted as lapsing where a state of emergency is involved, at least, a restrictive interpretation of the derogation clauses should be guaranteed. It might require a restrictive application of the features: the existence of a state of emergency, the proportionality of the measures and adherence to the formal guarantees of protection (proclamation and notification).

Meron, in his thoughts on closing the gaps in international human rights protection during a state of emergency by analogy with international humanitarian law and drawing up a list of humanitarian rules for internal disturbances and tensions, which would prevail in these situations, takes a similar line.³³ In 1988, Meron presented the draft for an altruistic declaration, which includes the provision of improved protection for IDPs.³⁴ In 1990 an amplified version of this resolution was presented, in which Article 7 sec. One concerns the protection of IDPs:

The displacement of the population or parts thereof shall not be ordered unless their safety or compelling security reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken so that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health, safety, and nutrition. Persons or groups thus displaced shall be allowed to return to their homes as soon as the conditions, which have made their displacement imperative, have ceased. Every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members want to stay together must be allowed to do so. The persons thus displaced shall be free to move around in the country, subject only to the safety of the individuals involved or reasons of important security.³⁵

Meron, however, treats the right not to be displaced as a right, which does not yet exist, whereas in the sphere of human rights³⁶ the view could be taken that the right to a home is not merely a pious hope but is already enshrined in various separate standards of international law. This is also clear from Kimminich's exhaustive study, which leads him to the conclusion:

If it has been clearly established that expulsions are contrary to international law and even resettlement agreements may only be concluded where these represent the will of those affected; if the right to self-determination has been proven to be an established legal rule and no longer simply an empty principle; if the currently applicable international law further promotes the instrument of protection for minorities and population groups; if deportations

³² Meron, Theodor, 'Towards a Humanitarian Declaration on Internal Strife', *American Journal of International Law*, Vol. 78 (1984) 859–868, *See*: Meron, Theodor, *Humanitarian Declaration on Internal Strife*, (1987)

³³ Meron, Theodor, 'Draft Model Declaration on Internal Strife,' *International Review of the Red Cross*, No. 262 (1988) 59–76.

³⁴ Meron, Theodor and Allan Rosas, 'A Declaration of Minimum Humanitarian Standards', *American Journal of International Law*, Vol. 85 (1991) 375–381. *See*: ORAA, J, *Human Rights in the States of Emergency in International Law*, (1992)

³⁵ GC-IV & AP-I & II, *supra* note 27.

³⁶ United Nations High Commission for Refugees (UNHCR), UNHCR Report (Bonn: 1994), *See*: United Nations World Conference on Human Rights: Vienna Declaration and Programme of Action, 12 July 1993, A/CONF. 157/23

are banned even in time of war, why should we not then be able to say that, on the basis of international law, everyone has the right to remain in his home area?.... The right to a home is an element of existing international law.³⁷

Long-lasting internal displacement has become the pattern in far too many countries and continents, often in spaces with some of the lowest development indicators and the highest levels of violence. In many areas, it is fuelled and prolonged by unsettled inter-ethnic, religious or political tensions. Internal displacement also offers fertile ground for human rights abuses inter-alia killings, torture, rape, the forced recruitment of child soldiers along with forced evictions and property destruction. Confronting such abuses and defending citizens is a responsibility not often entirely shouldered by countries battling with internal displacement? They are themselves often politically fragile, with limited presence and capacity of State bodies. They tackle issues that are central to resolving human displacement like transitional justice, reform of the security sector, livelihood restoration, housing, environmental sustainability, gender equality, land and property ownership premised on the rule of law and democracy of human rights. The recognizing internal displacement is not just a humanitarian problem, but an issue that hits at the heart of human rights, peace-building measures, and national stability epitomizes a significant step forward. Making that connection is especially critical for countries in post-conflict or in transition looking to build a democratic and peaceful future.

5. International Protection for IDPs and its Implementation

Just as important as recognizing the right to a home is the question of how and by who this right can be enforced. It is above all the UN, the ICRC and the UNHCR that come to mind here. The following, after outlining their responsibilities for *internally displaced persons*, will consider the different forms of protection and aid. Finally, an examination is needed of whether individual states and humanitarian NGOs could also become active by a right to humanitarian assistance for internally displaced persons.

5.1 The Role of UN, ICRC, and UNHCR in providing International Protection to IDPs

Regarding the protection of IDPs, the UNHCR report of 1994 rightly states:

No international organization shall have a universal mandate or authority to care for displaced persons; even where their needs in respect of protection and aid do not differ from those of refugees...Displaced persons should not be compelled to cross a border to obtain assistance.³⁸

The aim, therefore, is to set up complementary mechanisms of protection and aid. Possible vehicles for the international protection of internally displaced persons are the United Nations (Secretary-General and Secretariat, the General Assembly, Security Council, Economic and Social Council along with the Human Rights Commission and its Sub-Commissioner for

³⁷ Article 17, AP-II, *supra* note 31.

³⁸ International Committee of the Red Cross (ICRC): ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law, *International Review of the Red Cross* (1988)

Refugees. The 1995 report mentions the following bodies and organisations, which are active on behalf of internally displaced persons: the UN Department of Humanitarian Affairs (DHA), the UN Development Programme (UNDP), UNICEF, the World Food Programme, the World Health Organisation (WHO), the International Organisation for Migration (IOM) and the High Commissioner for Human Rights. The Report does, however, emphasize the importance of international protection for the IDPs and the growing importance of human rights. In the following, it shall, therefore, be examined that the function of protection for the IDPs in the sphere of the UN, as guaranteed by International human rights protection is available or not.

After an extended period of which the problems of the IDPs were given little or no attention, it is noticeable that there is now a considerably greater awareness of the dimension and significance of this issue. The Vienna Declaration and its Programme of Action adopted in 1993 at the second international Human Rights Conference:

... emphasizes the importance of paying particular attention, including through intergovernmental and humanitarian organizations and, finding lasting solutions to questions relating to the IDPs including their voluntary and safe return and rehabilitation³⁹.

As long ago as 1981, the International Committee of the Red Cross looked into the problems of the IDPs at the XXIVth International Conference of the Red Cross in Manila and declared in a statement on its refugee policy: “The ICRC should at all times be ready to aid and to protect refugees, displaced persons and returned when such victims are regarded as protected persons under the IV Geneva Convention of 1949, or when they are recognized as refugees under Article 73 of the Additional Protocol-I of 1977 to the Geneva Conventions, 1949, or in conformity with the ICRC statutes⁴⁰ especially when they cannot, in fact, benefit from any other protection or assistance, as in some cases of the IDPs.

Finally, the UNHCR took up the question of the IDPs in Resolution No.71 of the Executive Committee, requesting the High Commissioner:

... to examine methods and means better to do justice within the regime of the United Nations to the need of persons displaced within their own state for protection under the law and for support, to promote further discussions on this high-priority issue with the Department of Humanitarian Affairs (DHA) and the Special Rapporteur of the Secretary-General for persons displaced within their own state and with other appropriate international organisations and bodies, including the International Committee of the Red Cross...⁴¹

³⁹ UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, available at: <http://www.refworld.org/docid/3ae6b39ec.html> [accessed 13 December 2017].

⁴⁰ United Nations High Commission for Refugees (UNHCR) (eds.): International Protection under the Law for Internally Displaced Persons, Resolutions of the Executive Committee for the Programme of the High Commission for Refugees of the United Nations, Loose-leaf Collection (1988)

⁴¹ Sandoz, Y, *Le droit d'initiative du Comité international de la Croix-Rouge*, GYIL, Vol. 22 (1979) 353–372.

To enable a valid position to be taken in discussions with the governments of the states involved in the problem of the IDPs, the activities of the UN, ICRC, and UNHCR also require a recognized basis of competence.

Within the United Nations, there is nobody specifically concerned with the IDPs. The General Assembly, the Economic and Social Council, the Human Rights Commission and the Subcommission for the Prevention of Discrimination and the Protection of Minorities have all been active in the area of internal refugee problems by the human rights protection embedded in the UN Charter. However, out of respect for the sovereignty of nation states, this protection extends only as far as severe and systematic violations of human rights; and the financial and organizational situation of the United Nations means that it can offer no more than protection. Material assistance, it would seem, can be provided only by other organizations, such as the ICRC and the UNHCR. At the same time, their competence in this area would need to be given an exclusive basis, as states often react very negatively to offers of assistance because they feel that their sovereignty is being reduced more so than by international human rights protection, which remains *external*.

In the case of non-international armed conflicts, the ICRC has a power of initiative guaranteed by Article 3 sec. 2 of the Geneva Convention. For internal disturbances and tensions, the ICRC has a power of action recognized in international customary law, with its roots in the tradition of the Red Cross, resolutions of the international conferences of the Red Cross and the statutes of the Red Cross movement and the ICRC.⁴² This is also the basis for the declaration of the refugee policy mentioned above, in which the ICRC invoked its statutes alongside GC IV and AP I. However, any action by the ICRC still requires the approval of the affected states, which at the same time stresses the subsidiarity of aid by the ICRC and the core principle of collaboration with the UNHCR and other organisations supplying aid to refugees.

The Statute of the Office of the UNHCR in itself provides only for the Commissioner's responsibility for refugees under the convention on refugees.⁴³ As early as the 1970s, however, the UNHCR supplied material aid to the IDPs in the Sudan after being requested to do so by the General Assembly on 12.12.1972 in Resolution 2958 (XXVII). Von Glahn rightly stresses, "[a]s the UNHCR statute only allows it to help international refugees and a not indigenous displaced person, the resolution in the General Assembly was a condition of its involvement."⁴⁴

Although the UNHCR has reservations on a general extension of its mandate to include IDPs for financial and organizational reasons, quoted above, which adds the following grounds?

1. To address the impairment of work with refugees,
2. To identify the gaps and absence of a legal framework,
3. To appreciate the difficulties with protection in armed conflicts,

⁴² UNHCR Statute, Chapter-II, 6 (a)

⁴³ Von Glahn, (1992) 151

⁴⁴ Agha Khan, *supra* note 17.

4. To attend the safety risks for aid workers, and problems with assisting the IDPs and refugees at the same time in conformity with subsequent UN resolutions have confirmed the general validity of such extensions of the mandate as regards humanitarian aid.

A former High Commissioner, Sadruddin Aga Khan, has also made reference to the analogous situation shared by refugees and *internally displaced persons* and gives a list of criteria for action by the UNHCR on behalf of IDPs:

1. The assistance must consist of humanitarian aid, non-political nature,
2. There must be a request by the government concerned, and the sovereignty of the relevant state must be respected (this would apply only to material aid, however, and not to the protection of the internally displaced persons), and;
3. The internally displaced persons must be in a situation analogous to that of refugees.⁴⁵

Discussions on an organizational reform, as part of which an organization responsible solely for the IDPs would be set up, are as yet only beginning.⁴⁶ In the meantime, there will continue to be a need for collaboration and coordination of humanitarian aid between the UN and its specialist organizations, the ICRC and numerous NGOs.

6. International Instruments for Protection and Aid to IDPs in the Area of Human Rights, International Humanitarian Law and International Refugee Law

International human rights protection rests on two bases: the UN Charter on the one hand and international human rights agreements on the other. Within the UN, the protection of human rights is principally a matter for the General Assembly (resolutions and declarations), the Economic and Social Council, the Human Rights Commission and the Subcommission for the Prevention of Discrimination and the Protection of Minorities. The Human Rights Commission and its Subcommission also employ Special Rapporteurs and working groups to study particular topics or countries, from which they receive regular reports. The appointment of the Special Rapporteur for *internally displaced persons* also fell within this framework. It ensures at least that the general public is kept informed of grave human rights abuses, although at the same time these procedures do not provide adequate protection to individuals.

Human Rights protection by treaties is provided mainly by the organs of such conventions as the ICCPR the ACHR and the ECHR. It is furthest advanced in the areas of the ACHR and the ECHR, while human rights protection in Africa, based on the AfrCHR, is still at the formative stage. The only case of expulsion so far dealt with is the *Misquito Case* examined by the Inter-American Commission on Human Rights (IACHR) and involving the forced relocation of 8500 Misquito Indians from the Coco River to Tasba Pri in Nicaragua in 1981. In this, report, the IACHR found that there was no breach of the ACHR since the Misquito

⁴⁵ Francis M. Deng, *supra* note 10.

⁴⁶ Analytical Report, *supra* note 11.

Indians were allowed to return home at the end of the state of emergency.⁴⁷ The report begins by establishing that the right to freedom of movement⁴⁸ does not subsist in an emergency situation, then confirms the existence of a state of emergency and considers the proportionality of the measures taken, adherence to the ban on discrimination and compatibility with other international obligations all of which it confirms on the basis that the persons displaced were allowed to return home at the end of the state of emergency. A serious problem, however, was the application of the derogation clause of Article 27 of the ACHR, given the fact that the Nicaraguan government had not followed the formal guarantees of protection, proclamation, and notification of the state of emergency. The ACHR considered this breach to be insignificant, even though conformity with the formal guarantees of protection is of decisive importance to the restrictive application of emergency clauses in furtherance of human rights.

As regards the ability of ICRC and the UNHCR to act to assist IDPs, it has proved impossible to maintain the original division of labour between these organizations (the ICRC to be responsible for internally displaced persons as victims of armed conflicts, the UNHCR for refugees who have left their own state) in view of the interdependence of the causes of expulsion and flight and the consequences for internally displaced persons. Because of the many interrelationships between the problems of refugees and *internally displaced persons*, the distinction between protection and assistance has also broken down.

The activities of the ICRC to benefit IDPs consist in the main of working for the protection of the civilian people and respect for international humanitarian law, visiting political prisoners, providing medical care and rehabilitation in cases of need, supporting public health programmes and supplying food, plus assistance in satisfying other essential needs (such as shelter and clothing).⁴⁹ In addition to this, its efforts are also directed at reuniting families and the necessarily related inquiries and evacuating affected persons from danger zones. On the whole, however, the ICRC provides only subsidiary aid until the UNHCR, and other aid organizations intervene. In some cases, the distinction between non-international armed conflicts and internal disturbances and tensions is not made; despite its of decisive importance in determining the applicability of the international humanitarian law.⁵⁰

In 1993 the UNHCR provided aid to as many as 3.5 million IDPs. In the same year guidelines for assistance to internally displaced persons were adopted which provides that the UNHCR should intervene if there is a direct connection with its activities for refugees, and in particular if returning refugees are mixed with internally displaced persons and where there is a risk that

⁴⁷ Article 22, American Convention of Human Rights, 1969

⁴⁸ *International Committee of the Red Cross (ICRC): ICRC Protection and Assistance Activities in Situations Not Covered by International Humanitarian Law*, International Review of the Red Cross (1988)

⁴⁹ Maurice, F. and J. De Copurten, 'ICRC Activities for Refugees and Displaced Persons,' International Review of the Red Cross, No. 280 (1991) 9-22. See: Jean-Philippe Lavoyer, 'Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC,' International Review of the Red Cross, No. 305 (1995) 30-04. Françoise Krill, 'The ICRC's Policy on Refugees and Internally Displaced Civilians', International Review of the Red Cross, Vol. 83 No 843 (2001) 610-624. Daniel Fink, *New Directions in Research on Forced Migration: The ICRC Approach*, ICRC (Oxford: 1994)

⁵⁰ Macalister-Smith, P, *International Humanitarian Assistance: Disaster Relief Actions in International Law and Organization*, (Netherlands: Springer 1985)

internally displaced persons may become refugees. This is also the outcome of the growing efforts on prevention and early warning. The UNHCR's 1997 report notes on this point, "For this reason, long-term strategies for aid and protection must be developed in particular for internally displaced persons who are directly threatened with a refugee's fate."⁵¹

However, a precondition for this, in the view of the UNHCR, is that the following core elements of adequate protection in the land of their origin are assured:

1. Maintenance of human rights;
2. No restriction on the right to seek asylum in another country; and
3. No compulsion to stay in areas where people are under serious threat.

6.1 Humanitarian Intervention, Right to Interfere or Right to Provide Humanitarian Aid to IDPs: Scope and Extent

In addition to the United Nations, the ICRC and the UNHCR, individual states and NGOs may become active on behalf of the IDPs. Thus, it invariably raises the question of the degree to which the sovereignty of the various states concerned, which is protected by international law, is infringed.⁵² Three different situations can be differentiated here:

1. The government of the concerned state requests foreign aid or at least agrees to such aid;
2. The government in question expressly refuses help (e.g. for the protection of the Kurds in northern Iraq in 1991); and
3. A responsible government no longer exists (e.g. in Somalia since 1992).

The latter two cases, in particular, raise problems⁵³ where humanitarian aid is provided with the approval of the government of the state concerned (and for the protection of the aid workers, and coordination of the support among the states involved, international relief organizations and humanitarian NGOs). Sandoz notes that in more than 95% of cases support is only possible with the agreement of the governments concerned.⁵⁴ Torrelli also stresses that any right to humanitarian aid must also take account of national sovereignty and that the concurrence of the Governments involved is a fundamental principle for the exercise of this right.⁵⁵

⁵¹ UN High Commissioner for Refugees (UNHCR), *Report of the United Nations High Commissioner for Refugees*, 1997, A/52/12, available at: <http://www.refworld.org/docid/3b00f216c.html> [accessed 12 December 2017].

⁵² Plattner, D, 'Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law,' *International Review of the Red Cross*, No. 288, 1992 (1992a). See: Plattner, D, 'The Protection of Displaced Persons in Non-International Armed Conflicts,' *International Review of the Red Cross*, No. 288 (1992 2b). Marguerite Contat Hickel, 'Protection of Internally Displaced Persons Affected by Armed Conflict: Concept and Challenges,' *International Review of the Red Cross*, Vol. 83 No 843 (2001) 700-710.

⁵³ Sandoz, Y, "Droit" or "Devoir D'Ingerence" and the Right to Assistance: the Issues Involved,' *International Review of the Red Cross*, (1992). See: Stavropoulou, M, 'The Right Not to be Displaced,' *American University Journal of International Law Intervention: An Inquiry into Law and Morality*. (1988)

⁵⁴ Torrelli, M, 'From Humanitarian Assistance to Intervention on Humanitarian Grounds?' *International Review of the Red Cross*, No. 288, (1992) 228-248.

⁵⁵ UNGA Resolution A/Res/46/182, 1991

It is also the line adopted by the General Assembly in its efforts to draw up rules for humanitarian aid supplied with the agreement of the states involved. A Resolution⁵⁶ passed by the General Assembly in 1991, which contains the principles of humanitarian aid, lays down that humanitarian aid must conform to the principles of *humanity, neutrality and impartially*. At the same time, the *sovereignty, territorial integrity and national unity* of the states must be preserved, by the UN Charter. Humanitarian aid should be provided with the agreement of the states affected and in principle after a request from the country itself. The first responsibility for the victims of humanitarian crises⁵⁷ is to be borne by the victims' state. Finally, reference is made to the growing importance of prevention and early warning humanitarian crises.⁵⁸ Whether this discussion will eventually lead to a convention on humanitarian aid remains to be seen in the context of the IDPs.

Therefore, the IDPs are different from refugees as they are moved from one area to another within the borders of their homelands and countries. Legally, they fall under the sovereignty of their governments even though that government may not be able or willing to protect them. IDPs have been defined as persons who have been forced to flee their homes *suddenly and unexpectedly* to significant numbers as a result of armed conflict, internal strife, systematic violations of human rights or natural or human-made disaster.

According to the report by the Secretary-General Kofi Annan's Representative in charge of monitoring the problem of *internally displaced persons* since 1993, some 20-25 million people worldwide in at least 40 countries have been uprooted from their homes exposing them to physical and psychological dangers and depriving them of basic needs. The number of IDPs has been rising since then. It has been estimated that by the end of 2017, 50 million people around the World will have lost their homes due to war and natural disasters. In India, thousands of Hindu population of the Kashmir valley, namely, the Kashmiri Pandits were compelled to flee from Jammu and Kashmir, and Muslims of State of Gujarat was also forced to migrate due to the communal conflagration in the wake of Godhra incident and have settled and sheltered in other parts of India respectively. Such persons are not refugees since Refugee Convention of 1951 defines refugees as anyone who ...is outside the country of his nationality. They are therefore not granted the status of refugees though they have been forced to flee to another part of the country on the same grounds as refugees. Although some human rights violations take place when forced displacement occurs, they are denied international protection as given to refugees. The primary reason for this apathy is that their movement falls within the domestic jurisdiction of a State and United Nations may not intervene in matters, which are essentially within the competence of any State as per the provisions of Article 2 Para 7 of the U.N. Charter. However, if human rights violations are so grave as to create conditions, which threaten international peace and security, the Security Council may take action under Chapter VII of the U.N. Charter.

⁵⁶ See, A/Res/43/131 and A/Res./45/100.

⁵⁷ Jane McAdam, '*Climate Change, Forced Migration, and International Law*', (Oxford: OUP 2014)

⁵⁸ Teson, F. R, '*Humanitarian Intervention: An Inquiry into Law and Morality*' (1988). See: Teson, F. R, '*Humanitarian Intervention: an Inquiry into Law and Morality*,' (Transnational Publishers, 3rd Edition, fully updated and revised, 2005)

However, it was realized that IDPs require international protection because of their miserable conditions. They are not only denied fundamental human rights, but camps for displaced persons have been the target of attacks by the warring parties. International protection is also required as their number has substantially increased and they are spread in at least 40 countries.

Although UNHCR was involved in supplying material aid to IDPs since 1970 in a few countries under the resolutions of the UN General Assembly, in 1993 UNHCR established a set of Guidelines to clarify the conditions under which the Organisation shall undertake activities on behalf of the IDPs. For instance, it shall take primary responsibility when IDPs are prepared to go back to the same area from where they have fled and if IDPs are living alongside a refugee population and have a similar need for protection and assistance. Later, Guiding Principles on Internal Displacement were prepared by the Representative of the Secretary-General on Internally Displaced Persons, Mr Francis Deng who was submitted by him to the Commission on Human Rights in 1996. The Commission requested the Representative to develop a normative framework to enhance the protection of IDPs in 1998 to the Commission on Human Rights.

The Guiding Principles in its introductory section defined the IDPs as persons or group of individuals who have been forced to migrate or to leave their homelands or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situation of generalised violence, and who have not crossed an internationally recognised State border. It is to be noted that the definition of IDPs given in Guiding Principles is broader in scope than that provided earlier by the Representative of the Secretary-General. For instance, the words *large number* as mentioned in the definition of the Representative has been omitted; the words *sudden and unexpectedly* have been omitted in the definition to include those persons as IDPs who move for a considerable period, and IDPs are those who are *forced to flee* or those who are *forced to leave* their homes. Guiding Principles are divided into five main sections: general principles, laws relating to the protection of forced displacement, core principles relating to protection during displacement, principles relating to humanitarian assistance, and policies relating to return or resettlement and integration.

It is unfortunate to note that the Guiding Principles are neither a treaty nor a declaration and they are therefore not binding on State. However, they provide practical guidance to the States who are involved with the problems of IDPs since these Principles reflect and are consistent with International Humanitarian Rights in its Resolution 1998/50 noted the intention of the Representative of the Secretary-General to make use of the Guiding Principles non-governmental organisations and requested him to report to the Commission *on the views expressed to him*. These principles are likely to prove of immense value in the development of the law relating to IDPs in future.

7. Conclusion

It is axiomatic from the on-going deliberations that there are several challenges required to be confronted with to provide protection to the IDPs like mitigation and management of disasters, inclusive decision-making in which IDPs must be considered as an inalienable stakeholders, role of the host communities, rights of IDPs in mobility, preventive measures at the origin of displacement, politicization of protection, rehabilitation, livelihood restorations, accurate data documentation, setting a sense of disempowerment, and additional vulnerabilities in case of displacement of women, children, minorities and indigenous people. Regardless of the causes and phases of displacement, one of the constant characteristics of the decision-making practice across the world has been the near absence of input from IDPs regarding key decisions and policies affecting them. The destiny of the IDPs is devastatingly determined by high level policy decisions. As of now, the magnitude and incidence of involuntary displacement in the recent past has far exceeded worst-case projections, and the trend is likely to continue. However, the response of the national governments have been largely reactive and characterized by a failure to formulate a comprehensive approach that focuses on preventing internal displacement, including through avoiding conditions that may lead to displacement, and where displacement is inevitable mitigating its effects on the affected population, and finding durable solutions once the cause of displacement subsides.

The cumulative effect of displacement by natural and human-induced disasters in the world is that humanitarian needs are higher than ever. However, immediate humanitarian assistance is crucial in internal displacement situations, but the focus needs to move beyond emergency response. The affected populations have specific requirements throughout the different stages of displacement, and these conditions often continue long after the initial movement has come to an end. To close, we deal with those cases where the governments of the states affected explicitly reject aid or where a responsible government no longer exists. The justifications given for action by individual states or NGOs are a humanitarian intervention, a right to interfere (*Droit d'ingerence*) and recently a right to humanitarian aid. Therefore, humanitarian intervention as a mechanism to secure a minimum standard of human rights through the use of force cannot be reconciled with the peace rule in current international law. Although humanitarian intervention is now the vast majority of authors, reject once again finding support⁵⁹ but this mechanism, as it cannot be reconciled with the UN Charter's general ban on violence and there is a risk of abuse. Thus, a right to interfere, as lately, demanded by French writers⁶⁰ is also generally rejected. In the current discussion, a right to humanitarian aid which guarantees access to the victims of humanitarian crises is not seen as a restriction on national sovereignty but, on the contrary, as reconcilable with this. This view that in cases of doubt a right to humanitarian aid could prevail over the principle of national sovereignty is still confined to a minority⁶¹ and is not reflected in the resolutions of the General Assembly.

⁵⁹ M. Bettati, 'Souverainete et Assistance Humanitaire, in *Humanite et Droit International, Melanges Rene-Jean Depuy*', 1991 (1991a). See: M. Bettati, 'Un Droit D'Ingerence?' in *RGDIP* 1991 (1991 b).

⁶⁰ R. Depuy in F. Kalshoven, 'Assisting the Victims of Armed Conflict and Other Disasters', (1989). See: M. Kouhene, 'Les Garanties Fondamentales de la Pesonne en Droit Humanitaire et Droits de L'Homme' (1986).

⁶¹ M. Harroff-Tavel, 'Action Taken by the International Committee of the Red Cross in Situations of Internal Violence, *International Review Red Cross* (1993)

Only in the UN Security Council is it possible, in the context of situations examined here, for resolutions binding on the member states to be taken on the basis of Chapter VII of the UN Charter to enable aid to be supplied to internally displaced persons, as was done in the case of the Kurdish civilian population in Iraq and in Somalia.⁴⁸ Proceeding in this way assumes that a risk to peace has already been established, and this option is also the subject of political considerations within the Security Council. Also, the results of the actions taken in Iraq and Somalia leave room for doubt as regards the suitability of this form of protection for IDPs.

The United Nations in response to the severe crisis of internally displaced persons has set up a new unit in the year 2002 i.e. Unit on Internal Displacement (UID) to provide expertise and to advise and support the U.N. Under-Secretary-General for Humanitarian Affairs and Emergency Relief Coordination and to provide the guidance in responding to the Inter-Agency Standing Committee (IASC). The Unit will also maintain close links with the former U.N. Secretary-General Kofi Annan's Representative on *internationally displaced persons*, Francis Deng. Therefore, Kofi Asomani as Director and Special Coordinator on Internal Displacement had headed the Unit consisting of staff seconded from various U.N. agencies dealing with refugees (UNHCR), Children (UNICEF), development (UNDP) and food security (WFP) as well as the International Organisation for Migration (IOM) and the Non-governmental Organisation (NGO) community. The Unit was located in the Office for the Coordination of Humanitarian Affairs (OCHA) in Geneva.

There is no state protection available to the IDPs nor International NGOs as enumerated *supra* are allowed to visit and attend the *internally displaced persons* in the different parts of the country or national jurisdiction who owe their displacement to generalised violence, organised crimes, communal violence, man-made disasters, ecological imbalances, noxious emissions, insurgency and militancy *inter-alia* reasons adumbrated in the definition of *internally displaced persons* discussed in the preceding paragraphs and grounds stipulated in Article 1 of 1951 Convention Relating to the Status of Refugees. Though the IDPs are living in the refugee-like situations, and *Guiding Principles on Treatment of Internally Displaced Persons* recognized by the UNO are not followed by the national governments. The dynamics that have caused internal displacement are a complicated bunch and cannot be addressed by a one-size-fits-all approach. However, consistent focus on some minimum essentials is imperative. The foremost among them is the urgent need to see IDPs as holders of rights and to understand and publicise that their rights do not disappear when they are displaced and that those rights include the right to receive protection and humanitarian assistance from the authorities. Displacement gives rise to particular vulnerabilities those affected, necessitating special measures for assistance and protection that correspond to those weaknesses. The impact of involuntary displacement is often most severe on the most vulnerable and marginalized people. Two of the most neglected and most crucial areas are the need to ensure that women do not face assistance and protection gaps on account of their gender, and that IDPs are consulted, and their problems addressed regarding all aspects of decision-making that affect their lives and that they have adequate and timely information to make informed and voluntary decisions. Many of these elements are already covered by international human rights instruments that Pakistan has ratified. However, failure to implement those commitments through domestic legislation has deprived the displaced people of the expected

benefit. Factors of additional vulnerability often create further hurdles in meeting essential assistance and protection needs, further exacerbating weaknesses and a sense of disempowerment. Ensuring enforcement of human rights instruments specific to women and children can support measures for their protection, empowerment, and rights in situations of displacement. Incorporating Guiding Principles on Internal Displacement in domestic legislation will also enhance the ability of the displaced persons to invoke their rights. Therefore, it is the most opportune time to treat IDPs populations eligible for the international protection by adopting an Additional Protocol to UNCSR or Article 1 of the 1951 Convention may also be re-drafted, reformulated and restructured while taking into consideration the on-going debates and deliberations initiated and posted hereinabove for the posterity.