

CHAPTER 3: INTERNATIONAL RESPONSES TO INTERNAL DISPLACEMENT

*Even though the primary responsibility for the security and well being of internally displaced persons lies with their governments, when governments are unwilling or unable to provide protection and assistance to their citizens, or when there is no government at all, the international community is challenged to become involved.*³⁵²

3.1 Introduction

This study is aimed at realizing the level of comprehensiveness in existing protection mechanisms for internally displaced persons within the Great Lakes region. To achieve this it is imperative in this chapter to ascertain whether existing international law mechanisms provide adequate provision, coordination and subsequently, adequate protection, legally and institutionally for the internally displaced. Governments are first and foremost responsible for protecting their own, but sometimes it is these very governments that are responsible for displacing or tolerating the displacement of their citizens or are unwilling or unable to guarantee their basic rights.³⁵³ Such conditions have created a vacuum within internal displacement protection initiatives hence the need for international cooperation. Yet the UN and the international community's approach to the protection of internally displaced persons is still mainly *ad hoc* and initiated by personalities and individual convictions as opposed to institutional, system wide agenda. There is also inadequate, often un-collaborated political and financial support from UN headquarters and member states.³⁵⁴

Internally displaced persons are entitled to enjoy equally, and without discrimination, the same rights and freedoms under international and national law, as any other members of a

³⁵² UN Secretary Kofi Annan in Cohen R 'Some reflections on national and international responsibility in situations of internal displacement in Mishra O *Forced Migration in the Southern Asian Region: Displacement, Human Rights and Conflict Resolution*, Spring 2004 at 34; This is also the basis of the emerging international norm of Responsibility to Protect (R2P) which was first articulated by the International Commission on Intervention and State Sovereignty (ICISS) appointed by the government of Canada to further calls by the then United Nations General Secretary Kofi Annan.

³⁵³ Deng and Cohen 1998 as above at 74.

³⁵⁴ Bagshaw and Paul 2004 as above at 3.

particular country. Internally displaced persons do not relinquish their rights by virtue of being displaced. They can invoke these rights through existing human rights, humanitarian law as well as refugee law by analogy.³⁵⁵ These systems of international law in combination reflect local and international responsibility for the protection and assistance of internally displaced persons. Such responsibility has always existed within rules of international law, even though in a somewhat un-coordinated manner.³⁵⁶ This lack of coordination was problematic because international law for a long time did not contain explicit provisions for the exclusive protection of the rights of the internally displaced.³⁵⁷

3.2 emergence of international responsibility

After World War II the nature of conflicts ceased to be external and amongst states, and became internal, as various ethnic and religious sectors within countries struggled to seize power and self determine. At the same time, this was the era when most African states were gaining independence from their colonial masters. This newly found independence coupled with the fact that large superpowers such as the Former Soviet Union and the United States used developing countries as pawns during the cold war, led to an unprecedented internal turmoil.³⁵⁸ It has been stated that since the superpowers could no longer control the developing countries directly, the process had to be indirect though inciting internal wars and rivalry. This necessitated the economic independence of these states to remain held ransom by their former masters, or unknown third parties, who in turn benefited from the lack of peace, security and stability.³⁵⁹

As a result of these internal disturbances, the number of internal refugees began to rise. Between the late eighties and early nineties, the number of internally displaced persons worldwide exceeded that of refugees who happened to be well provided for by the international community. In the 1990s the gap in addressing the plight of internally displaced

³⁵⁵ Deng and Cohen 1998 as above at 74.

³⁵⁶ As citizens or habitual residents of a particular country, IDPs are entitled to full and equal protection under the State's national law, which should be compatible with the rules of international law. The challenge faced by the international community before the existence of a legal framework for IDPs was to identify the rights and guarantees scattered in the international law system that corresponded with the particular needs and protection risks that arose during internal displacement; IASC Handbook for the protection of IDPs 2010 as above at 30.

³⁵⁷ Deng and Cohen 1998 as above at 74.

³⁵⁸ Alao A 'The role of regional and sub-regional organizations in conflict prevention and resolution' *New Issues in Refugee Research* Working Paper No. 23 July 2000 at 5.

³⁵⁹ Alao as above.

persons began receiving attention.³⁶⁰ There are many reasons advanced concerning the surge in the attention provided by the international community towards internally displaced persons. The first reason was the one advanced above that the number of internally displaced persons had swelled dramatically. There is also the fact that the process of accessing internally displaced populations became much easier after the end of the cold war, when countries and the atrocities they committed were no longer shelved under the umbrella of one superpower or the other. Internationally, there was eventually less tolerance over events taking place within state borders and excuses such as strict sovereignty were slowly being discarded.³⁶¹

International human rights movements that had all along condemned the issue of ignoring states' internal affairs at the expense of obvious violations of human rights began to grow stronger. This was followed by the signing of vast human rights documents and declarations by states holding relevant states accountable for the violations of people's rights. This went to prove that indeed rights transcended borders.³⁶² Humanitarian organizations providing relief to populations, especially those stuck behind borders became stronger as well, especially after being backed by the international community. Humanitarian relief in times of conflict or disasters became internationally recognized, and seized being subjected to frontiers. Governments that denied their citizens this right were deliberately subjecting them to abuse,³⁶³ which could in turn be as a basis for international reaction.³⁶⁴

Under this auspice, the responsibility to protect (R2P) and policies such as sovereignty as responsibility were born.³⁶⁵ The intention was to reconcile the concept of sovereignty and international intervention by re-conceptualizing the notion of sovereignty from control to responsibility.³⁶⁶ The concept stipulates that states, on the basis of their sovereignty have a

³⁶⁰ Cohen 2004 as above at 2.

³⁶¹ Cohen 2004 as above.

³⁶² Cohen 2004 as above.

³⁶³ The reaction could be in the form of forceful military intervention, or soft intervention

³⁶⁴ See Security Council Resolutions for Somalia, Rwanda, Bosnia-Herzegovina and Azerbaijan.

³⁶⁵ When the first Human Rights RSG (Representative of the Secretary General) for the internally displaced was appointed, the framework he established was based on this philosophy, this was the guidance followed in adopting a framework for assisting and protecting internally displaced persons.

³⁶⁶ International Refugee Rights Initiative (IRRI) 'Some reflections on the legal and political mechanisms bolstering the responsibility to protect: the African Union and the Great lakes, Eastern, Southern and Horn of Africa sub-regional arrangements', 21st October 2008, at 21, at <http://www.refugee-rights.org/Focus%20on%20Africa/Great%20Lakes/PDFs/R2P%20RECs%20Discussion%20paper.1021008.pdf> accessed on 13-05-2012.

fundamental responsibility to provide life supporting protection as well as assistance to their citizens from avoidable catastrophes. Where they are unable or unwilling to do so, they are expected to request or accept external aid. Refusal or deliberate obstruction of such endeavors and any consequent mass risk of lives, provides the international community with a right and correlating responsibility to assert its concern in whatever form it deems fit.³⁶⁷

Responsibility to protect (R2P) expresses a commitment to protect starting with prevention, which entails among other things, addressing any underlying and direct causes of internal conflict and human made disasters. R2P is a continuous responsibility which runs through reaction and response to conflict and addressing crisis with the requisite measures.

Depending on the circumstances, reaction and response may include, sanctions, international prosecution, and in extreme cases military intervention whether by consent from the concerned state or otherwise.³⁶⁸ The last responsibility lies in re-building and assisting with post conflict or post crisis reconstruction and reconciliation by the wider community of states where the concerned state is unable, unwilling or has made such request.

Through this, a framework that has synthesized international refugee law by analogy, international humanitarian law, international human rights law and international criminal law has been adopted to provide for the internally displaced. In as much as a ‘melting pot’ of provisions could be found in these instruments, too often it was difficult to determine which guarantees applied in specific situations. A set of rules that were authoritative, whilst addressing gaps in the already existing international system became imperative. The Guiding Principles on Internal Displacement purport to bring together in one document all the relevant international law rules which are necessary for protection in situations of internal displacement. They do not only put them together, but also expand and make them more explicitly applicable.³⁶⁹ They set out the rights of IDPs and correlative responsibilities of states and other authorities towards them. The Guiding Principles cover protection from displacement, protection during displacement and also highlight on principles of

³⁶⁷ Cohen 2004 as above at 2.

³⁶⁸ International Refugee Rights Initiative (IRRI) 2008 as above at 1.

³⁶⁹ Training on the protection of IDPs ‘Guiding principles: legal origins and international obligations’ at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/D98A13C023DC877DC12571150046DEC3/\\$file/GP%20module%20handout%20legal%20origins.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/D98A13C023DC877DC12571150046DEC3/$file/GP%20module%20handout%20legal%20origins.pdf) accessed on 30 March 2012.

humanitarian assistance, as well as matters relating to return, resettlement and reintegration.³⁷⁰

3.3 International Legal framework

3.3.1 *Guiding Principles on Internal Displacement*³⁷¹

After the events that were outlined above, it became apparent that more serious steps had to be taken towards the protection of internally displaced persons. There were a couple of approaches suggested. The first one was creation of an independent regime to provide for internally displaced persons. The only problem with this approach was that it was very likely to offend the internationally recognized principle of state sovereignty. It was feared such approach would attract a lot of disagreement from some of the states, especially those with un-transparent human rights records. The second approach suggested an extension of the already existing refugee framework to cover internally displaced persons.

This approach also was problematic because factual circumstances within which the refugee regime worked did not always cover internally displaced persons, at least not without rendering the whole exercise redundant. This is because the Refugee Convention and other instruments that provided for the protection of refugees were meant to protect people who were forcibly removed or had to forcibly leave their states and seek refuge in other states. These are people who had in actual effect lost ties, or who had temporary or permanently severed ties with their states. The international community provided an independent regime to provide for them whilst in refuge in another state where they could not enjoy the benefits of citizenship. This is not the case with internally displaced persons, they are usually still within their own states.

The third approach is what was later endorsed by the international community. It suggested the creation of a set of Guiding Principles that synthesized relevant international human rights law, international humanitarian law and refugee law for specific IDP protection whilst addressing protection gaps within these existing laws.³⁷² These principles are soft law, thus in

³⁷⁰ Guiding Principles on Internal Displacement 1998 as above.

³⁷¹ Guiding Principles on Internal Displacement 1998 as above.

³⁷² See Principle 2(2) of the Guiding Principles on Internal Displacement 1998 as above.

as much as they outline the guidelines for protection against, assistance during and after displacement, they do not as a matter of principle make any imposition upon states. Exception to this arises only where states have included the Guiding Principles into their own domestic laws. This approach was also supplemented by the introduction of the collaborative and cluster arrangement of institutions that would provide for the protection and assistance to internally displaced persons, thus facilitating implementation of the principles.

The Guiding Principles, thirty in number cover a wide array of issues that IDPs face. They apply to three different circumstances, including tensions and general disturbances which are covered by human rights law; non-international armed conflict, covered by international humanitarian and human rights law, as well as interstate wars where humanitarian law applies exclusively.³⁷³ The principles provide guidance to all actors involved with the internally displaced including governments, NGOs and international organizations and non-state actors.³⁷⁴ The guidance provided covers all phases of displacement starting with prevention from arbitrary displacement, by specifically providing for the right not to be arbitrarily displaced.³⁷⁵

If respected and implemented by states, this provision is key to future successful and comprehensive protection for IDPs, for it covers a gap that international human rights law had failed to specifically provide for.³⁷⁶ The principles further provide for protection and assistance during displacement including the coverage of a full range of civil, political, economic, social and cultural rights such as protection from human rights abuses, freedom of movement, access to documentation, education, food and basic supplies, freedom to choose residence, freedom against forcible return, freedom for women to access health facilities including reproductive health, and rights for women, children, the disabled, the elderly, and persons with special attachment to land or any other vulnerable groups.³⁷⁷

³⁷³ Cohen R 'The development of international standards to protect internally displaced persons' *Human rights and forced displacement (ed.) Bayefsky A and Fitzpatrick J* Refugees and human rights series Vol. 4 2000 at 79.

³⁷⁴ Cohen R 'The Guiding Principles on internal displacement: an innovation in international standard setting' *Global Governance* Vol.10 2004 at 465.

³⁷⁵ Principle 6(1) (2) of the Guiding Principles on Internal Displacement 1998 as above.

³⁷⁶ Ngugi L 'Internally displaced persons: towards an effective international legal protection regime' *Unpublished LLM thesis* 2008 University of Cape Town at 58.

³⁷⁷ Cohen 2000 as above at 80; See Principle 10, 11, 12, 13, 14, 18 and 22, 23 of the Guiding Principles on Internal Displacement 1998 as above.

Lastly the principles provide for protection during return, resettlement and reintegration.³⁷⁸ They clarify IDP rights to return to their homes or places of habitual residences voluntarily in safety, dignity or if uncomfortable then an alternative to seek safety in another country is provided.³⁷⁹ This provision is very important because the IDP regime does not have a specific principle of *non-refoulement*. This has at times resulted in IDPs being forced to return to places they are not very comfortable.³⁸⁰ The principles also cater for the process of return by providing for the property rights of returning persons.³⁸¹ The provisions include the recovery of property and possessions lost as a result of displacement as well as compensation and reparations in circumstances where recovery has become impossible.³⁸²

The principles have been a source of guidance for various international, intergovernmental organizations and United Nations Agencies. Although the principles were disseminated as soft law, and hence are not binding in nature, they have been relied on by various aid organizations and NGOs such as the Norwegian Refugee Council, the International Commission of Jurists and the Refugee Policy Group. A growing number of national governments are also incorporating the principles into their national policies and legislation and other programs for dealing with internally displaced persons.³⁸³ They have also been endorsed by the General Assembly of the United Nations³⁸⁴ and the UN Commission on Human rights³⁸⁵ as generally acceptable guidance as far as the protection of the internally displaced is concerned.³⁸⁶ They have further been endorsed by UNHCR, ICRC, UNICEF WFP and a lot of other UN umbrella organizations.

³⁷⁸ See principle 28, 29 and 30 of the Guiding Principles on Internal Displacement 1998 as above.

³⁷⁹ Cohen 2000 as above at 81; Principle 28 of the Guiding Principles on Internal Displacement 1998 as above.

³⁸⁰ Principle 15(d) of the Guiding Principles on Internal Displacement 1998 as above; In Kenya and a few other countries it is questionable whether this principle was ever followed. 'Operation Rudi nyumbani' (operation return home) which was set up to facilitate the return of IDPs in Kenya left a lot of doubt about the application of this principle.

³⁸¹ Cohen 2000 as above at 81.

³⁸² Principle 29 (2) of the Guiding Principles on Internal Displacement 1998 as above.

³⁸³ Cohen 2004 as above at 467.

³⁸⁴ GA Res 60/1, 2005 World Summit Outcome Resolution adopted by Heads of State, 15 September 2005 Para 132 at

<http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/NO548760.pdf?openElement> accessed on 19 December 2011.

³⁸⁵ UN Office of the High Commissioner for Human Rights (UNOHCHR), Commission on Human Rights Res 1996/52, 19 April 1996, Para. 9; See also United Nations Commission on Human Rights Resolution 2003/1 of 23 April 2003; and United Nations General Assembly Resolution 58/177 of 22 December 2003.

³⁸⁶ Cohen 2004 as above at 469; Former UN Secretary General Kofi Annan, supported the principles and went on to call them one of the 'notable achievements' in the humanitarian area, he later encouraged states in his report to the Security Council, to observe the principles in situations of mass

The reason for this widespread acceptance of the principles includes the fact that they were developed in an all inclusive process of wide consultation with all relevant stakeholders. Therefore at some point or the other the above mentioned organizations were part of the consultative process that bore the principles. The other reason is based on a previous urgent need for a document to direct various organs of state and the international community on how to deal with internally displaced persons. The Guiding Principles happened to be the right answer to this urgent need. They represent minimum standards not only for assistance, but for the protection of internally displaced persons.³⁸⁷ Finally the careful diplomatic coining and terming of the principles reflected an effort to balance issues of humanitarian imperatives and sovereignty.³⁸⁸ In doing so the drafters of the principles managed to avoid sparking controversy around the issue of any purported interference with state sovereignty.³⁸⁹ The Guiding Principles reflect an effort throughout to balance state sovereignty with humanitarian obligations.

Whilst acknowledging that the primary responsibility for the displaced rests with their national governments,³⁹⁰ they also provide that aid from the international community and humanitarian organizations shall not be regarded as an ‘unfriendly act or an interference in a State’s internal affairs.’ Consent for international aid cannot, according to the principles, be ‘arbitrarily withheld’ especially in circumstances where the relevant authorities seem ‘unable or unwilling’ to provide the necessary assistance.³⁹¹

The same principles further provide that in the process of assisting IDPs, international and humanitarian organizations should pay attention to their protection needs as well as their human rights and if possible they should take an extra step to provide such.³⁹² This means that the idea of international organizations and other actors, just coming in to provide only ‘assistance’ is being discouraged. Assistance is expected to be comprehensive and integrate

displacements, and further recommended to the General Assembly and the Economic and Social Council to encourage member states to develop national laws and policies consistent with the Guiding principles; see Cohen 2004 as above at 478.

³⁸⁷ Principle 27 of the Guiding Principles on Internal Displacement 1998 as above.

³⁸⁸ See principle 3 and 25 of the Guiding Principles on Internal Displacement as above.

³⁸⁹ Cohen 2004 as above at 468.

³⁹⁰ Principle 3 and 25 of the Guiding Principles on Internal Displacement 1998 as above.

³⁹¹ Cohen 2004 as above at 467; Principle 25(2) of the Guiding Principles on Internal Displacement 1998 as above.

³⁹² Principle 27(1) of the Guiding Principles on Internal Displacement 1998 as above.

matters of protection as well. This is a good way of addressing the ‘well-fed dead’ expression that seemed to be an outcome of some humanitarian responses. The expression rendered the process of feeding people without addressing their protection needs very redundant.³⁹³

3.3.1.1 Reservations

The main reservation the principles faced was in the form of an initial outright disapproval from their official recognition by intergovernmental organizations, such as the United Nations.³⁹⁴ The main reason for this disapproval resulted from some criticisms raised by states that deemed the process of endorsement of the principles to have failed to include intergovernmental processes or negotiations. The principles were enacted independently by a panel of experts. This was initially okay for most governments considering the fact that the principles were not binding. When intergovernmental organizations became involved, most governments, especially those harboring large numbers of refugees and internally displaced persons became concerned. The basis of this concern was that, if the principles were officially endorsed, this would lead to their eventual enforcement and probably result in the dilution of the principle of sovereignty that some states were still holding onto dearly.³⁹⁵

In addition to the above reservations, the principles have faced numerous challenges including consequences of their non binding nature. However useful the principles seem to be, the need to reconcile them with state sovereignty left them toothless and hence states, international organizations or other actors cannot be held liable for violating them. Closely related to this is the lack of mechanism set up in place to ensure their proper implementation.³⁹⁶ In fact this concern was first raised by the then RSG of the human rights of IDPs. He stated that ‘while the Guiding Principles had a relatively good reception, this was done rhetorically. He pointed out that their implementation remained problematic and often rudimentary.’³⁹⁷ This means that for their provisions to be very effective or enforceable,

³⁹³ Cohen 2000 as above at 81.

³⁹⁴ The Commission for Human Rights and the United Nations General Assembly were initially cautious in receiving the principles, but later they embraced them and went as far as calling them ‘standards’ and ‘important tools’.

³⁹⁵ Cohen 2004 as above at 472; India, Egypt and Sudan seemed a lot worried initially about the recognition of the Principles in UN bodies and their growing usage internationally.

³⁹⁶ Phoung 2004 as above at 66.

³⁹⁷ UN Commission on Human Rights, Report of the Representative of the Secretary General on the Human Rights of Internally Displaced Persons, Francis M Deng, UN Doc E/CN.4/2002/95, 16 January 2002 para. 98.

at some point parties will have to rely on the general norms from which such specific IDP rights were derived.

It has already been established that forced displacement did not initially invoke protection under international human rights instruments, or humanitarian law. But these instruments have proven to be useful since they contain general norms relevant to the protection of internally displaced persons.³⁹⁸ These instruments are the principal sources of existing standards for protection, and are basic foundations for future protections as well. To fully understand and most effectively use the Guiding Principles, it is imperative to discuss them within the broader framework of the international legal norms that constitute them and whose gaps they are designed to fill.

3.3.2 *International Humanitarian Law (civilian protection)*³⁹⁹

Humanitarian law is constituted of internationally accepted norms that are responsible for determining parameters within which warfare can be conducted by parties involved.⁴⁰⁰ This set of international law strives to offer protection to non-combatants, ex combatants and civilians from the effects of war, and to control or limit certain methods of warfare.⁴⁰¹ The notion that civilians should be distinguished from combatants, and the fact that the latter should be protected before and during armed conflict, predates even the establishment of the ICRC or the Geneva Conventions.⁴⁰² Hugo Grotius in the seventeenth century pioneered international law conceptions on laws of war, especially the issue of non-combatant immunity. As Grotius stated ‘rulers and commanders may respect the non-combatant because there are no practical military reasons why they should not do so, and because there are good religious and ethical reasons why they should.’⁴⁰³ This formulation by Grotius, led to a

³⁹⁸ Phoung 2004 as above at 13.

³⁹⁹ Section III of Guiding Principles on Internal Displacement 1998 as above.

⁴⁰⁰ Training on the protection of IDPs ‘Guiding principles: legal origins and international obligations’ as above.

⁴⁰¹ Aeschlimann A ‘Protection of IDPs: an ICRC view’ *Forced Migration Review* -1-10-2005 International Committee of the Red Cross at 1-4 at <http://www.icrc.org/eng/resources/documents/articles/other/protection-article-011005> visited on 26-08-2011.

⁴⁰² Keen D and Lee V ‘Civilian status and the new security agenda’ in Collinson S, Darcy J, Waddell N and Schmidt A (eds.) *Realizing protection: the uncertain benefits of civilian, refugee and IDP status* Humanitarian Policy Group (HPG) Report 28 September 2009 Overseas Development Institute (ODI) at 12.

⁴⁰³ Keen and Lee 2009 as above at 12; See Grotius H *The law of war and peace (De Iure Belli ac Pacis* 1625) reprinted 2004 at 30.

significant international humanitarian law principle that wars should be fought by just means and deliberate civilian casualties or displacements should be avoided.⁴⁰⁴

Failure to observe humanitarian principles, total disregard for applicable norms of engagement during wars and situations of generalized violence or conflict has resulted in the rise of a new crisis in international law. This notable crisis which has required humanitarian attention is the forcible freight of entire populations from their homes within their own states. Humanitarian law provides for the protection and assistance of vulnerable populations, including internally displaced persons in times of conflict and civil strife. The two Geneva Conventions of 1949 and their Additional Protocols of 1977 provide for the protection and assistance to the lives and dignity of victims of war and internal violence. They also provide for the prevention of human suffering by promoting and strengthening humanitarian law and universal humanitarian principles. International humanitarian law is relevant to the situation of internally displaced persons because armed conflict and situations of violence constitute the main causes of internal displacement of civilian population.⁴⁰⁵ The Geneva Conventions and their Additional Protocols spell out the principle that, in times of armed conflict, those not directly participating in the aggression are entitled to protection.⁴⁰⁶

Under international humanitarian law, everyone who is not a combatant is categorized as a civilian. In the case of international armed conflict, combatants are defined in international humanitarian law as ‘members of the armed forces of a party to a conflict (other than medical personnel and chaplains...). They have a right to participate directly in hostilities.’⁴⁰⁷ This means that other parts of the population, including people who are displaced should be distinguished from the combatants by both parties to the conflict, including government forces. They should not in any way be used as human targets to settle scores between two

⁴⁰⁴ International humanitarian law is more interested in the fact that war should entail just conduct, as opposed to concerning itself with issues such as the justifiability of war itself; See Article 51 of the Additional Protocol to the Geneva Conventions of 1977.

⁴⁰⁵ Ahlbrandt S *The protection gap in the international protection of internally displaced persons: The case of Rwanda* 2004 Working Paper 04/01 at 12.

⁴⁰⁶ Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field of August 12 1949; Geneva convention relative to the treatment of prisoners of war of August 12 1949; Geneva convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea of August 12 1949; The Geneva convention relative to the protection of civilian persons in time of war of August 12 1949 (these are hereafter referred to as the Geneva Conventions); Protocol additional to the Geneva Conventions of August 12, 1949, and relating to the protection of victims of international armed conflicts (hereafter referred to as Protocol I); and Protocol Additional to the Geneva Conventions of August 12, 1949, relating to the protection of victims on non-international armed conflicts of 8 June 1977 (hereafter referred to as Protocol II).

⁴⁰⁷ Geneva Conventions Additional Protocol I of 1977 Art 43.

warring factions to a conflict,⁴⁰⁸ neither should they have to suffer un-proportionally from the consequences of the conflict.⁴⁰⁹ In this case internal displacement is regarded as an un-proportional, excessive and unfair combination of consequences of conflicts (in the case of conflict inflicted displacements) in relation to the ‘concrete and direct military advantage anticipated’ by all the parties involved in conflicts or generalized situations of violence that result in population displacement.⁴¹⁰ International humanitarian law requires the exercise of ‘precaution’ to minimize civilian casualties, and prohibits the use of ‘acts or threats of violence the primary purpose of which is to spread terror among the civilian population’⁴¹¹ Part of this prohibition may serve to curb the displacement of populations as a result of terror and threats of attack and abductions, not to mention rape and general acts of sexual violence which are prevalent in most areas facing the crisis of internal displacement.⁴¹²

The law governing internal conflicts is less developed than the body of law set up to deal with international conflicts. This is because the establishment of international humanitarian law reflected the prevailing political conditions of its time. States and their representatives who played a part in setting up international humanitarian law had a more vested interest in limiting conflicts between each other than curbing insurgencies or internal disturbances.⁴¹³ This can be seen in prevailing international humanitarian law protection reflected in the case of non-international conflict by Common Article 3 of the Geneva Conventions.⁴¹⁴ The article uses the less precise articulation of ‘persons taking no active part in hostilities’ as a determination of which part of the population qualifies to get protection under international humanitarian law during internal conflicts.⁴¹⁵ The section does not define such persons, or describe what constitutes taking part in hostilities either. It seems that the main interest was not vested in protecting persons internally affected by such conflicts because in most cases such persons were nationals of the other party to the conflict as opposed to being internal citizens.

⁴⁰⁸ The international humanitarian law principle of ‘distinction’ between combatants and civilians and between military and non-military targets.

⁴⁰⁹ Geneva Conventions Additional Protocol I Art 51 precludes any ‘attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated’.

⁴¹⁰ Keen and Lee 2009 as above at 13.

⁴¹¹ Geneva Conventions Additional Protocol I 1977 as above Art 51.

⁴¹² Keen and Lee 2009 as above at 13.

⁴¹³ Keen and Lee 2009 as above.

⁴¹⁴ It is called common article 3 because each of the four Geneva Conventions reads exactly the same.

⁴¹⁵ Keen and Lee 2009 as above at 13.

Article 3, which is common to all the four Geneva Conventions, is applicable to armed conflicts of a non-international nature, the circumstances leading to internal displacement fall squarely within such provisions. The article prohibits violence to life and person, it further prohibits the taking of hostages, and specifically provides for the personal dignity of persons who find themselves in situations of armed conflict which is not of an international nature but happens to occur in the territory of one of the contracting parties.⁴¹⁶ The article does not specifically define what ‘armed conflict not of an international character’ means, but it excludes international armed conflicts from its application, and it also singles out conflicts that take place in the territory of one contracting party only; Common article 3 provides that,

In case of armed conflict not of an international character occurring in the territory of one of the high contracting parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, bounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion, or faith, sex, birth, wealth, or any other similar circumstances.

To this end the following acts are, and shall remain prohibited at any time in any place whatsoever with respect to the above mentioned persons:

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; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.⁴¹⁷

Common article 3 does not at any point make specific reference to the protection of civilian populations that do not take part in hostilities but are affected by them.⁴¹⁸ When it generally states ‘persons not taking part in hostilities’ it does not specify who such persons might be.

⁴¹⁶ Ahlbrandt 2004 as above at 12.

⁴¹⁷ Article 3 Common to the Geneva Conventions of August 12 1949 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

⁴¹⁸ Junod S ‘Additional Protocol II: history and scope’ *The American University Law Review* 1983 Vol. 33 No. 29 at 31.

Most of the provision provides for people who are former combatants, the sick or wounded, but what about civilian displaced populations? How are these provided for? There are no specific judicial guarantees and implementation clauses for protection. Other protection and assistance provisions are also not provided for by the article.⁴¹⁹ It is understandable that at the time of introducing common article 3 into the Geneva Convention, sovereignty had been a highly respected notion that could not be breached. The introduction of article 3 was an initial recognition by the international community of a need not only to protect victims of inter-state conflicts, but also those affected by non-international conflict taking place within the borders of their states. As progressive as this was, the intrusion in the form of common article 3 was very limited and succinct.⁴²⁰ This and other civilian protection gaps within the provisions of common article 3 of the Geneva Conventions have necessitated the re-visiting and supplementation of the provisions of this article. But the provisions of the article have nevertheless been considerable sources of protection norms to be included in the Guiding Principles.

Additional Protocol I to the Geneva conventions provides extra emphasis to the Geneva Conventions by further articulating protection of civilian populations from the effects of hostilities. The protocol requires combatants to distinguish themselves from the civilian population during their engagement in attacks or military operations or preparations for such.⁴²¹ This is meant to provide additional protection to innocent civilians who in the case of Africa are always caught between armed combatants or insurgencies and government forces or other warring parties. In cases of displaced populations caught behind enemy lines, or living within the frontlines of insurgent forces⁴²² distinction is hardly ever made. They are usually simply targeted as enemy combatants or sympathizers even when they do not actively participate or engage in combat.

This provision has proved to be hard to practically implement where the nature of the internal conflict involves abduction of civilians and forceful induction into militia. How does one distinguish between a civilian, a combatant and a forcefully inducted combatant? Do the forcefully abducted owing to the nature of the hostilities regard themselves as distinguishable

⁴¹⁹ Junod 1983 as above at 31.

⁴²⁰ Junod 1983 as above at 30.

⁴²¹ Additional Protocol I 1977 as above Art 44.

⁴²² Insurgents have been described as parties opposing government authorities in non-international armed conflict.

combatants? International humanitarian law has attempted to clarify such complex situations by recognizing the occasional complex nature of armed conflict where armed combatants cannot distinguish themselves. In such instances it provides that the person(s) will retain their status as combatants as long as they carry their arms openly.⁴²³

The provisions of article 3 common to the Geneva Conventions of August 12 1949 were further supplemented and substantiated in Additional Protocol II. The article specifically provides for the protection of victims of non international armed conflict.⁴²⁴ Article 17 is of particular importance because it explicitly prohibits the displacement of civilian populations, unless ‘security of the civilians is involved or imperative military reasons so demand.’ The article provides that:

The displacement of civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians is 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.

Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Movements of civilian populations that might eventually end up as forms of displacement are restricted by Protocol II. Guarantee for satisfactory conditions of living is provided to the civilian populations if movement becomes imperative, but any form of forceful expulsion for conflict related reasons is prohibited.⁴²⁵ Protocol II does not cover a scope similar to that one of common article 3. It is additionally only applicable in situations involving hostilities that have reached a certain level of intensity. It should be pointed out that any imperative military reasons provided as an excuse for the displacement of civilian population in article 17 cannot be justified by political motives. Displacement or forced movement should and can only be carried out in the interest of the general public and security of the civilians being moved. The nature of the article is wide and subject to multiple interpretations. If this open-ended nature of article 17 is not taken into account the gaps within the article can, and have been used

⁴²³ Additional Protocol I of 1977 additional Art. 44.

⁴²⁴ Protocol Additional to the Geneva Conventions of 1949 (Protocol II), *opened for signature* Dec. 12, 1977, *reprinted in* 16 int'l legal materials 1442 (1977) (hereinafter cited as Protocol II).

⁴²⁵ Article 17 of Additional Protocol II 1977 as above.

occasionally to displace populations in order to exercise more effective control over dissident ethnic groups.⁴²⁶

Provisions of article 17 of Protocol II apply only to states that are party to the Additional Protocol, and they apply only in circumstances of armed conflict involving official armed forces and armed dissident forces or any other form of paramilitary groups.⁴²⁷ But what is described as ‘dissidents’ should only include groups that have responsible command to exercise adequate control over part of a state’s territory to enable them to carry out sustained and concerted military operations that would call for the implementation of Protocol II.⁴²⁸ Because there are so many restrictions imposed upon the application of Protocol II with regard to internal conflicts, its application has a narrower threshold and is less likely than that of common article 3 which applies to all situations involving non-international armed conflict. The requirement of ‘substantiated territorial control by dissident armed forces’ is very relative in individual terrains and hard to prove.⁴²⁹ In some cases even where all the requirements for the declaration of an armed conflict are satisfied, states are usually reluctant to acknowledge that certain areas in their territory are under the control of dissidents, or that there is armed conflict or civil war at all.⁴³⁰ In such circumstances the uprooted populations are actually not protected by international humanitarian law because they fall through its application gaps on the basis of ‘definitional’ technicalities.⁴³¹

An additional source of protection from and during displacement found in the Guiding Principles can be found in article 49 of the Geneva Convention IV. The article provides more protection to uprooted and displaced populations in times of humanitarian crisis. The article

⁴²⁶ Training on the protection of IDPs ‘Guiding principles: legal origins and international obligations’ as above at 3.

⁴²⁷ Article 1 of Protocol II 1977 as above; Ahlbrandt 2004 as above at 13; Junod 1983 as above at 29.

⁴²⁸ In art 1 para 1 of Additional Protocol II it is provided that ‘ This Protocol...shall apply to all armed conflicts... which take place in the territory of a High contracting party, between its armed forces and dissident armed forces or other organized armed groups which, under a responsible command, exercise such control of a part of its territory as to enable them to carry out sustained and concerted military operations...’.

⁴²⁹ Article 1 para. 1 of Additional Protocol II 1977 as above.

⁴³⁰ Circumstances that are regarded as falling below the threshold of armed conflict, may involve internal strife which is most of the time characterized by or followed by civil war, internal disturbance, a state of serious political, religious, racial or social tension, the suspension of legal guarantees, recourse to emergency measures and procedures which might result in the ceasing of application of the rule of law, which in most cases is regarded as a guarantee to individual freedom under State Constitutions. These will eventually result in mass arrests, degrading inhumane treatment, disappearances, and eventually mass population displacements; Junod 1983 as above at 30.

⁴³¹ Ahlbrandt 2004 as above at 14.

provides that ‘...Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.’ The article deals with the return and reintegration aspect of internal displacement and is relevant to circumstances following the end of displacement.⁴³² International humanitarian law lastly addresses the issue of displacement by providing for the property rights of displaced persons. This provision is eventually reflected in the Guiding Principles in the III section. The provision is important for durably addressing displacement, because failure to address property rights has resulted in conflicts and further displacement upon return. Section IV of the Guiding Principles which is constituted of principle 24 to 27 is a reflection and explicit restatement of humanitarian law as provided above and has been tailored to specifically apply to the situation of internally displaced persons.

3.3.3 *International Human Rights Law*

In disturbances and other violent situations not covered by humanitarian law, international human rights law offers suitable recourse.⁴³³ Human rights are freedoms and entitlements that every individual should enjoy.⁴³⁴ International human rights law which happens to consist of both customary and treaty law, guarantees these rights and requires states to respect and fulfill their obligations to protect and realize the human rights of all persons within those states without discrimination of any kind.⁴³⁵ This includes prohibition of discrimination based on grounds of age, gender, ethnicity, language, religion, political or other opinion, as well as national or social origin, property, birth or other status, including discrimination on grounds of being or having been internally displaced.⁴³⁶

International protection based on the human rights regime is very relevant to the situation of internal displacement because displacement in itself raises a wide range of human rights issues.⁴³⁷ Internally displaced persons like any other human beings benefit or should benefit

⁴³² Training on the protection of IDPs ‘Guiding principles: legal origins and international obligations’ as above at 4.

⁴³³ Lavoyer J ‘Refugees and internally displaced persons: international humanitarian law and the role of the ICRC’ *International Review of the Red Cross* 1995 No. 305 at 162.

⁴³⁴ IASC Handbook for the protection of IDPs 2010 as above at 21.

⁴³⁵ IASC Handbook for the protection of IDPs 2010 as above at 21.

⁴³⁶ IASC Handbook for the protection of IDPs 2010 as above.

⁴³⁷ IASC Handbook for the protection of IDPs 2010 as above.

from protection offered by international human rights law without any distinction or discrimination. In circumstances that do not qualify as armed conflict, for instance situations involving internal strife or unrest, where humanitarian law cannot apply, the only form of legal protection left for internally displaced persons is human rights law.⁴³⁸ Human rights law is capable of offering legal protection in all phases of internal displacement, starting from its cause, prevention of the conditions for displacement, protection during displacement and eventually the search for solutions to displacement.

Human rights seem appropriate for circumstances of internal displacement because the fact of fleeing one's home is already a violation of certain rights under human rights law such as the right to security of a person, the freedom to choose one's residence and so forth. Very often factors that contribute to internal displacement in the first place are matters such as discrimination, armed conflict, generalized violence which in themselves constitute violations of human rights. Displacement, especially internally, results in a rapid change of status quo of individuals and increases vulnerabilities such as: health risks, lack of permanent residence and homelessness resulting from residing in inhabitable places; break down of social structures; separation of families resulting in women and children taking on non traditional roles and exposure to dangerous circumstances such as sexual violence. Forced removal from sources of income and livelihood may also be an independent vulnerability in itself as well as a further disruption of access to social amenities such as schools.

These increased vulnerabilities require an increased form of protection that the human rights regime is better equipped to offer.⁴³⁹ It sets out the obligations of states, which are first and foremost responsible to ensure the survival, well being and dignity of internally displaced persons. Although during the development of the human rights system, internally displaced persons were not taken into account as a specific category and forced displacement was not independently focused on, there are existing human rights instruments that contain general provisions that are of particular relevance to internally displaced persons.⁴⁴⁰ These general norms have been adapted and explicitly tailored for internally displaced people through Guiding Principles on Internal Displacement.

⁴³⁸ Ngugi 2008 as above at 32.

⁴³⁹ Ngugi 2008 as above at 33.

⁴⁴⁰ Ngugi 2008 as above at 34.

They include: The right to life, freedom of movement, the right to liberty, security, freedom from torture and cruel and inhuman punishment or degrading treatment, the right against slavery, prohibition of retrospective application of penal law and arbitrary interference with the family, home or privacy.⁴⁴¹ These rights can be found in the following human rights documents: The Universal Declaration of Human Rights (UDHR);⁴⁴² the International Covenant on Civil and Political Rights (ICCPR);⁴⁴³ the International Covenant on Economic, Social and Cultural Rights (ICESCR);⁴⁴⁴ the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT);⁴⁴⁵ the Convention on the Prevention and Punishment of the Crime of Genocide;⁴⁴⁶ the International Convention on the Elimination of All Forms of Racial Discrimination (CERD);⁴⁴⁷ the Convention on Elimination of Discrimination Against Women (CEDAW);⁴⁴⁸ and the Convention on the Rights of the Child (CRC).⁴⁴⁹ All these existing human rights documents and the provisions therein that are relevant to the conditions of internal displacement have been synthesized together with other forms of international law, into one main document that is regarded as the international basis for the legal protection of internally displaced persons, the Guiding Principles on Internal Displacement.⁴⁵⁰

The original foundation of human rights was the United Nations Charter.⁴⁵¹ It is imperative to discuss its provisions as a source of general norms providing for the protection of IDPs. The Charter is the foundation treaty of the United Nations. It contains reference to the promotion of human rights, this reference is first seen in the preamble to the charter which states that:

We the people of the United Nations, determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small... have resolved to combine our efforts to accomplish these aims...

⁴⁴¹ Ahlbrandt 2004 as above at 10.

⁴⁴² GA Res 217 A (III) UN Doc A/810 (1948).

⁴⁴³ GA Res 2200 A (XXI) UN Doc A/6316 (1966) 999 UNTS 171, entered into force on 23 March 1976.

⁴⁴⁴ GA Res 2200, 21 UN GAOR Supp No. 16, 49 U.N Doc A/6316 (1966), 993 UNTS 3, entered into force on 3 January 1976.

⁴⁴⁵ GA Res 39/46 UN Doc A/329/51 (1984) 1465 UNTS 85 entered into force on 26 June 1987.

⁴⁴⁶ GA Res 260(III) UN Doc A/810 (1948) 78 UNTS 277, entered into force on 12 January 1951.

⁴⁴⁷ GA Res 2106 (XX) UN Doc A/6014 (1965) 660 UNTS 195, entered into force on 4 January 1969.

⁴⁴⁸ GA Res 34/180 UN Doc A/34/46 (1979) 1249 UNTS 13, entered into force on 3 September 1981.

⁴⁴⁹ GA Res 44/25 UN Doc A/44/49 (1989) 1577 UNTS 3, entered into force 2 September 1990.

⁴⁵⁰ Ngugi 2008 as above at 35.

⁴⁵¹ United Nations Charter of 1948.

The provisions of the preamble describe the main objective of the charter as well as the formation of the United Nations to be reaffirmation of fundamental human rights of all peoples without discrimination or distinction to ensure the promotion of human dignity, and self worth. It actually seems that in this small statement therein lay the basis of all subsequent human rights protection norms. The statement in the preamble is reinforced in article 1 of the charter which sets out the purpose of the United Nations as aiming to ‘achieve international cooperation in promoting and encouraging respect for human rights and fundamental freedoms for all.’ An additional important reference to human rights which seems to apply directly to the situation of internally displaced persons can also be found in article 55 and 56 of the charter. Article 55 provides that the United Nations shall promote ‘universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. On the other hand, article 56 provides that ‘all members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purposes set forth in article 55.’

The Universal declaration of Human Rights⁴⁵² was simply a more detailed human rights document, created at the eve of the second world war, as a way of addressing atrocities that had been committed by various nations before, during and after the war.⁴⁵³ Article 55 and 56 of the United Nations Charter provides that United Nations members will promote ...universal respect for, and observance of human rights and fundamental freedoms for all.⁴⁵⁴ The United Nations assumes responsibility and is charged and legally obliged to assume this responsibility by using means and taking measures deemed necessary to further this end.⁴⁵⁵ In line with this idea, in 1945 after the United Nations Charter had entered into force, it was recommended that the Economic and Social Council should immediately establish a Commission on Human Rights which would be tasked with preparing an international Bill of Rights.⁴⁵⁶

The Human Rights Commission deals with the elaboration of legal instruments that identify and define human rights, as well as maintaining and outlining procedures for

⁴⁵² GA Res 217 A (III) UN Doc A/810 (1948).

⁴⁵³ Robertson and Merrills 1996 as above at 27.

⁴⁵⁴ In as much as there are various sections in the Charter that provide for protection of human rights internationally, the basis of this protection can be found in Article 55 (c).

⁴⁵⁵ Robertson and Merrills 1996 as above at 27.

⁴⁵⁶ Robertson and Merrills 1996 as above.

implementation.⁴⁵⁷ A Universal Declaration of Human Rights was later adopted on 10th December 1948. It went on to clarify the duty of the human rights commission, the United Nations and the international community at large.⁴⁵⁸ This instrument has managed to lay down the widest protection norms that have been reflected in specific protection mechanisms for IDPs.⁴⁵⁹ The Declaration establishes the main civil, political, economic, social and cultural rights to which persons, including the displaced are entitled to without discrimination.

The Declaration was not a binding instrument in itself, but it gained binding force after its principles were reaffirmed numerous times by the United Nations and treaties as a reinforced international standard of principles that all states should observe.⁴⁶⁰ It has inspired various constitutions, regional human rights treaties and legislation and because of its widespread recognition, most of its provisions can now be regarded as part of customary international law.⁴⁶¹ This means that international human rights law has other sources of human rights norms that do not necessarily constitute treaty law and do not require ratification. Such norms have been accepted as binding upon all states through constant use and out of a sense of legal obligation. These norms bind all states as long as there is no express and persistent objection to such norms. These norms are non-derogative in nature.⁴⁶² A state might be regarded as having violated the provisions of customary international human rights law if it engages in genocide, slavery, torture, cruel inhuman or degrading treatment or punishment, arbitrary arrest and detention, or if it fails to exercise the presumption of innocence principle. As long as these acts are directed towards its citizens, whether internally displaced or not, the state will be violating human rights law.⁴⁶³

⁴⁵⁷ Robertson and Merrills 1996 as above.

⁴⁵⁸ Since the Declaration was adopted unanimously without a dissenting vote, it actually may be regarded as the highest authoritative interpretation of the United Nations Charter, even though it was initially not directly binding on the United Nations members, it strengthened the obligations of the Charter by making them more precise.

⁴⁵⁹ Ahlbrandt 2004 as above at 10; Robertson and Merrills 1996 as above at 27.

⁴⁶⁰ Robertson and Merrills 1996 as above at 29; See also the IASC Handbook for the protection of IDPs 2010 as above at 21.

⁴⁶¹ Robertson and Merrills 1996 as above at 29.

⁴⁶² Ahlbrandt 2004 as above at 10.

⁴⁶³ Ahlbrandt 2004 as above at 10;

3.3.3.1 The international Covenant on Civil and Political Rights and its optional protocols (UN/ICCPR)

At the time the Universal Declaration of Human Rights was being adopted under Resolution 217 (III) of 10th December 1948, it had also been decided that more work would be done with regard to the other two remaining parts of the International Bill of Rights. One of the initiatives included a covenant containing legal obligations to be assumed by states and co-relating implementation measures.⁴⁶⁴ The starting point in the when it comes to matters of forced displacement is article 12 of the covenant. The article specifically deals with the freedom of movement. It provides for liberty of movement and freedom to choose residence within a particular territory to ‘every one lawfully within the territory of a state.’ The article goes on to provide to ‘everyone’ the right to leave ‘any country’ including his own’ and it finally provides to everyone , the right not to be arbitrarily deprived of the right to enter one’s ‘own country.’⁴⁶⁵

The above rights provided by the covenant on civil and political rights can also be applied in the event of internal displacement, but these are rights applicable where one is regarded to be lawfully within the territory of a certain state. There is also no provision that such rights may not be derogated from. It should be noted that most of the time internal displacement occurs during times of ‘internal strife’ or the like. Under most of these circumstances, the state regards the circumstances as emergency situations and may mostly claim derogation from the application of this right.⁴⁶⁶ The final hindrance in implementation of this clause is that that this right is not specifically tailored for internal displacement situations it is simply a general norm.⁴⁶⁷

The Guiding Principles on Internal Displacement have addressed the gap within this provision by tailor making a similar provision for internally displaced persons and extending it explicitly within situations on internal displacement.⁴⁶⁸ The principles provide for the right to liberty of movement for internally displaced persons and freedom to choose residence. They also provide for the right of the internally displaced to move freely in and out of camps

⁴⁶⁴ Robertson and Merrills 1996 as above at 30.

⁴⁶⁵ Scheinin M ‘Forced displacement and the covenant on civil and political rights’ in Bayefsky A and Fitzpatrick J *Human Rights and forced displacement* Refugees and Human Rights Series Vol. 4 2000 at 66.

⁴⁶⁶ Scheinin 2000 as above at 67.

⁴⁶⁷ Scheinin 2000 as above.

⁴⁶⁸ See principle 14 and 15 of the Guiding Principles on Internal Displacement 1998 as above.

or other settlements.⁴⁶⁹ The displaced can under the principles seek safety in another part of the country, leave their country or seek asylum subject to the instructive principle similar to *non refoulment*.⁴⁷⁰

3.3.3.2 International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴⁷¹

The ICESCR contains the most explicit and specific international legal provisions establishing economic, social and cultural rights.⁴⁷² It also represents one of the widest provisions available to the displaced with regard to the right to self determination.⁴⁷³ The covenant is one of the two hard law limbs of the Universal declaration of human rights. The other one being the above discussed International covenant on civil and political rights (ICCPR). The two covenants represent enforcement mechanisms of varying nature, even though they deal with norms that originate from the same document, the UDHR. The reason for this separate application was among other things influenced by the assumption that unlike civil and political rights, economic social and cultural rights were incapable of immediate implementation.⁴⁷⁴

Social and economic rights have additional limitations under international law. This is because the status of these rights varies depending on each country or region within which they are claimed as well as the resources and capabilities of such states.⁴⁷⁵ In every country the satisfaction of what is regarded as a basic right will depend on that country's communal context. The ICESCR has provided that the obligations of states to fulfill their obligations to their nationals are subject to the availability of resources and should be implemented

⁴⁶⁹ See principle 14 (1 and 2) of Guiding Principles on Internal Displacement 1998 as above.

⁴⁷⁰ See principle 15 of Guiding Principles on Internal Displacement 1998 as above.

⁴⁷¹ GA Res 2200A (XXI) 16 December 1966 entered into force on 3 January 1976.

⁴⁷² Chirwa D 'An overview of the international covenant on economic, social and cultural rights in Africa' at 1Community law centre at <http://www.communitylawcentre.org.za/clc-projects/socio-economic-rights/research> on 18-08-2011.

⁴⁷³ Article 1 of G.A Res 2200, 21 UN GAOR Supp No. 16, 49 U.N Doc A/6316 (1966), 993 UNTS 3 (hereinafter ICESCR).

⁴⁷⁴ Of course this view has been rebuffed, and in the context of Africa, it seems post independence African States promoted civil and political rights over social, economic and cultural rights; See Liebenberg S 'The international covenant on economic, social and cultural rights' *South African Journal of Human Rights* 1995 Vol. 11 at 359; Onyango O 'Beyond the rhetoric: Reinvigorating the struggle for economic, social and cultural rights in Africa' *California Western International Law Journal* 1995 at <http://www1.umn.edu/humanrts/africa/Oloka-Onyango/html> accessed on 28 March 2012.

⁴⁷⁵ Guariglia O 'Enforcing economic and social human rights' in Pogge T (ed.) *Freedom from poverty as a human right: who owes what to the poor?* 2007 at 346-347; See also Chirwa as above at 2.

progressively.⁴⁷⁶ It has been argued that this provision should not be interpreted at the expense of deferring efforts to ensure the enjoyment of rights specified in the ICESCR. Rather the obligation is for states, regardless of their level of national wealth, to act swiftly, to the maximum of their available resources to ensure the realization of rights in the ICESCR and fulfill at least “minimum core obligations”.⁴⁷⁷ It should be noted that the term ‘available resources’ refers to both domestic resources and any international assistance or cooperation made available to a state party.⁴⁷⁸

Economic, social and cultural rights become imperative in the case of internally displaced persons because of the situations that they find themselves in. Their most necessary survival needs include: food, water, emergency shelter, healthcare, education, and sanitation. These are basically what make up the essence of social economic rights.⁴⁷⁹ These types of rights make a specific claim in each case, for a certain demand to be satisfied with regard to matters such as food, or clothing, housing, medical care and other basic needs.⁴⁸⁰ This provision is of importance because it gives people within a state the freedom to choose their political status, and even determine their own economic, social and cultural development. Since IDPs are usually within the realms of their states, they should, by virtue of this article be afforded the above freedom and opportunities in whatever parts of the country they might have relocated to.

Article 11(1) of the covenant recognizes the right of everyone to an adequate standard of living, including housing. The right has been described as an equivalent to the right to ‘live somewhere in security, peace and dignity.’⁴⁸¹ This applies directly to the situation of IDPs and other displaced persons, who by virtue of disturbances have to leave their homes or places of habitual residence. The Committee on Economic, Social and Cultural Rights has stated that instances of forced evictions are prima facie also a violation of provisions of the covenant and can only be justified under circumstances that are exceptional and where such

⁴⁷⁶ See article 2 of the ICESCR 1966 as above.

⁴⁷⁷ Chirwa as above at 3; the “minimum core obligations” include the essential levels of rights such as basic nutrition, primary healthcare, shelter and basic education.

⁴⁷⁸ Chirwa as above at 3; General Comment No. 3 (fifth session, 1990) “The nature of state parties obligations” (article 2(1) of the ICESCR) paras. 13 and 14; see also article 22 of ICESCR General comment No. 2 (Fourth session 1990) “International technical assistance measures”.

⁴⁷⁹ Langford M (ed.) *Social rights jurisprudence: emerging trends in international and comparative law* 2008 at 3.

⁴⁸⁰ Guariglia 2007 as above at 346.

⁴⁸¹ See ICESCR 1966 as above; Stavropoulou M ‘On the right not to be displaced’ *East African Journal of Peace and Human Rights* 1998 Vol. 5 No. 1 at 92.

evictions have occurred in accordance with international law.⁴⁸² It should be noted that the right to internal movement, freedom from forced evictions as well as arbitrary interference with one's home are applicable to citizens and non-citizens alike.⁴⁸³ Additional protection against individual and mass expulsions of citizens is afforded by international customary law as found in the Universal Declaration of Human Rights which prohibits "arbitrary exile."

The substantive rights contained in the covenant which seem applicable to IDPs include the right to work,⁴⁸⁴ the right to protection and assistance of the family,⁴⁸⁵ the right to an adequate standard of living which includes adequate food, clothing, housing as well as continuous improvement of living conditions.⁴⁸⁶ Other relevant rights include having the highest standard of physical and mental health, which IDPs are usually lacking either as a result of psychological traumas associated with forced movement, violence involved in the process, rape, social stigma, or as a result of deprived physical health resulting from physical maiming, and lack of reproductive support among others.⁴⁸⁷ The right to culture provided in article 15 of the covenant is also relevant to the displaced, who usually lose social, cultural and traditional ties as well as values as a result of the displacement.

The issue of competing claims on which of these rights, civil and political, or economic, social and cultural are preferential has affected how the two covenants have been implemented in Africa. The consequences of these claims are highly relevant for displaced groups. In Africa the status of economic, social and cultural rights in relation to the civil and political rights have been contentious. The progressive nature of social economic rights leaves vulnerable groups like IDPs unprotected. Mostly because the situation IDPs find themselves in requires immediate reaction, as opposed to progressive realization.⁴⁸⁸ The marginalization associated with displacement compounds realization gaps for such rights as far as IDPs are concerned.

⁴⁸² Article of ICESCR 1966 as above.

⁴⁸³ Stavropoulou 1998 as above at 92.

⁴⁸⁴ Article 6 of ICESCR 1966 above; which among other things covers the right to choose work, and to vocational training and guidance.

⁴⁸⁵ Article 10 of ICESCR 1966 as above.

⁴⁸⁶ Article 11 of ICESCR 1966 as above.

⁴⁸⁷ Article 12 of ICESCR 1966 as above.

⁴⁸⁸ Ngugi 2008 as above at 44.

At the same time, promoting security for IDPs, which is a civil and political right is given prerogative in some cases, but this leaves one wondering, how protection can be offered if people are starving.⁴⁸⁹ There are also those cases where humanitarian organizations come in and offer aid and assistance, but disregard protection and security. This also leaves a gap, because being fed without protection is redundant.⁴⁹⁰ There is a need to balance the provisions of these two covenants, because the provision of civil and political rights, in the absence of social, economic and cultural rights is self defeating as far as IDP protection is concerned. The Guiding Principles on Internal Displacement have attempted to include the provisions of both covenants. The principles provide for both civil and political rights, as well as social, economic and cultural rights.⁴⁹¹

3.3.3.3 Other Human rights instruments relevant to IDPs

Other human rights instruments that are relevant and have been reflected in the Guiding Principles on Internal Displacement include: The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁴⁹² This convention defines and prohibits torture under all circumstances. It also provides that states cannot transfer a person to another state if there are grounds for believing that he or she will be tortured (*non-refoulement*).⁴⁹³ This principle is the main basis of refugee protection, and would have been ideal for IDP protection, but the circumstances of application are different. Seeing that IDPs are usually displaced within the borders of their own countries, it is hard to apply the principle even though the concept underlying its creation is relevant to IDPs as well. But the Guiding Principles on Internal Displacement have dealt with similar matters in principle 15 (d). The principle provides internally displaced persons with the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and or health would be at risk. Despite this provision it has become obvious that the provision is hardly implemented practically and the effect of this is the return of masses of formally displaced persons to areas they feel uncomfortable.⁴⁹⁴

⁴⁸⁹ Ngugi 2008 as above.

⁴⁹⁰ Cohen 2004 as above at 467; Ngugi 2008 as above at 44.

⁴⁹¹ See Section III of the Guiding Principles on Internal Displacement 1998 as above.

⁴⁹² (CAT) GA Res 39/46 of 10 December 1984, entered into force 26 June 1987, in accordance with article 27 (1) United Nations, Treaty Series, vol. 1465, at. 85, available at <http://www.unhcr.org/refworld/docid/3ae6b3a94.html> accessed 10 April 2012.

⁴⁹³ IASC Hand book for the protection of IDPs 2010 as above at 22.

⁴⁹⁴ See return process such as 'operation rudi nyumbani' in Kenya where IDPs were without consultation obligated to leave areas they were seeking refuge and return to communities that had

The other relevant human rights instrument is the International Convention on the Elimination of All forms of Racial Discrimination.⁴⁹⁵ This convention prohibits racial discrimination, which happens in most cases when a person or a group is treated differently because of race, colour, descent, national origin, or ethnic origin with the aim of denying their human and fundamental rights.⁴⁹⁶ This convention is relevant to the circumstance of IDPs because when actual displacement takes place, there is usually a form of discrimination advanced against a certain communities. Such discrimination results in either their torture, or genocide or marginalization that eventually culminates in their displacement either by direct use of force or indirectly through fear of threats of such.⁴⁹⁷

Principle 6(2) (a) of the Guiding Principles on Internal Displacement lists the above factors as prohibited causes of arbitrary displacement. The Convention on the Prevention and Punishment of the Crime of Genocide⁴⁹⁸ is also closely related to the issue of internal displacement. This is because a good number of internally displaced persons are usually in that precarious situation because they are targeted victims of among others, systematic genocidal acts in their own countries. Hence any protection offered by the Convention would go far in offering protection to internally displaced persons as well as minimizing or addressing internal displacement through the prevention and punishment of the crime of genocide.⁴⁹⁹

The Convention on the Elimination of All Forms of Discrimination against Women sets a framework for national action for ensuring that women are treated equally to men. The convention protects their rights in all fields including, employment, education, and administration of property. The Convention also ensures that they are protected against threats aimed at their physical safety, rape and sexual exploitation. In situations of internal displacement, women are among the most vulnerable populations, they require extra care and protection. This Convention provides such forms of protection even though the protection

previously visited harm upon them. The effect of this operation was further displacement as IDPs as they sought safer places to relocate to.

⁴⁹⁵ Of 1965 (CERD).

⁴⁹⁶ IASC Handbook for the protection of IDPs 2010 as above at 22.

⁴⁹⁷ IASC Handbook for the protection of IDPs as above.

⁴⁹⁸ Of 1948 as above.

⁴⁹⁹ IASC Handbook for the protection of IDPs 2010 as above at 22; See principle 10 (a) of the Guiding Principles on Internal Displacement 1998 as above.

offered is not aimed specifically at displaced women. The Guiding Principles distinctly adapt such provisions and tailor them to the situation of internally displaced women.⁵⁰⁰

The Convention on the Rights of the Child⁵⁰¹ together with the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography,⁵⁰² as well as the Optional Protocol on the Involvement of Children in Armed Conflict⁵⁰³ and the Convention on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour,⁵⁰⁴ provide for the concerted protection of the rights and best interests of children (below the age of 18). These instruments require states to take reasonable measures to ensure protection, care, psychological recovery, and social reintegration of children affected by armed conflict including unaccompanied minors or separated children. The Optional Protocol on the Involvement of Children in Armed Conflict specifically prohibits compulsory recruitment of children and direct use of persons below the age of 18 in any situations of hostility.⁵⁰⁵

On the other hand, the ILO Convention on Child Labour obliges states to take all the necessary measures to eliminate the worst forms of child labour, including slavery, trafficking, prostitution or forced labour. It also covers the recruitment of children below the age of 18 into armed militia.⁵⁰⁶ These instruments are relevant in circumstances of internal displacement because once again, children below the age of 18 are vulnerable groups in such situations. They can easily be taken advantage of in circumstances where the social fiber has broken down as a result of displacement.⁵⁰⁷ These provisions have been explicitly tailored for situations involving internally displaced children through principle 11 (2) (a and b), 17 (3) and 13 (1) of the Guiding Principles on Internal Displacement.

Another vulnerable group that is easily affected by internal displacement and hence the requirement of specific protection is that of Indigenous and tribal people. Their rights are provided for in the Indigenous and Tribal Peoples Convention.⁵⁰⁸ The convention provides a

⁵⁰⁰ See principles 7 (d), 11(a and b), 20 (3) and 19 (20) of the Guiding Principles on Internal Displacement 1998 as above.

⁵⁰¹ 1989 (CRC) as above.

⁵⁰² Of 2000.

⁵⁰³ Of 2000.

⁵⁰⁴ ILO Convention No 182 of 1982.

⁵⁰⁵ IASC Handbook for the protection of IDPs as above at 23.

⁵⁰⁶ IASC Handbook for the protection of IDPs as above at 32.

⁵⁰⁷ IASC Handbook for the protection of IDPs as above at 23.

⁵⁰⁸ ILO Convention No 169 of 1989.

framework for ensuring that indigenous and tribal people enjoy equal rights to exist with other persons. Considering their special attachment to land, the convention specifically addresses the issue of their relocation, and ensures that when this has to happen it is done lawfully and provides for certain conditions and guarantees that offer them protection against arbitrary displacement.⁵⁰⁹ The Guiding Principles reflect a similar provision that is explicitly tailored for situations of internal displacement.⁵¹⁰

3.3.3.4 Critiquing human rights law

It has also been noted that when applied to specific situations involving internally displaced persons, human rights law can be critiqued. The right of some documents to be derogated from, especially during emergency times is a very contentious issue.⁵¹¹ Fundamental rights such as the right to life, and freedom, may not be derogated from at any given time. Rights that are in essence very useful to internally displaced persons, such as the right not to be subjected to arbitrary arrest and detention, the right to freedom of movement and the right to residence for instance, may be derogated from.⁵¹²

It is this distinction in human rights law that becomes imperative when highlighting the setbacks of the existing framework with regard to protection offered to internally displaced persons. It is important to note that internal displacement occurs predominantly in situations involving internal strife or armed conflict, which in most cases lead the existing governments to define the existing status quo as an emergency. In such circumstances it is acknowledged that internally displaced persons are subject to a higher risk over their personal safety than non-displaced persons.⁵¹³ This is because during displacements, the ‘emergency’ or security justification can always be raised by governments to suppress rights of individuals and at the same time derogate from guaranteeing their human rights. By virtue of being displaced IDPs are not even in a position to invoke their normal citizen rights, the prerogative to derogate weakens even the little protection in existence.

⁵⁰⁹ IASC Handbook for the protection of IDPs 1998 as above at 32.

⁵¹⁰ See principle 9 of the Guiding Principles on Internal Displacement 1998 as above.

⁵¹¹ In as much as the right to life and freedom cannot be derogated from, other rights such as the right against arbitrary detention (Guantanamo- Bay matters), unlawful or unsubstantiated detention, and the rights such as freedom of movement and residence can be limited. See Article 4 of ICCPR 1966 as above.

⁵¹² Ahlbrandt 2004 as above at 11; See article 4(2) of the ICCPR 1966 as above.

⁵¹³ Ahlbrandt 2004 as above.

The human rights system as it exists is by and large based on treaty or customary international law. This becomes problematic especially with reference to treaty law. When addressing issues of internal displacement difficulties manifest if the concerned states have yet to ratify the relevant treaties, or if they are party to the treaty, but have invoked limitation clauses or derogated from certain guarantees citing public emergency.⁵¹⁴ Derogation should not be used as an excuse to violate existing rights, it has been stated that even if states do invoke derogation clauses, they are still required to respect various fundamental and non-derogative human rights such as the right to life, the prohibition of torture and cruel inhuman or degrading treatment and punishment.⁵¹⁵

The other failure of the human rights system is that mass transfers, humanitarian and forced displacements which are a result of these conflicts, are not specifically addressed. It should be noted that a general norm (freedom of movement) does exist as provided for in article 12(1) of the ICCPR. Similar protections can be found in Article 13(1) of the UDHR as well as regional instruments, but no specific guarantees exist under human rights law to protect internally displaced populations against mass transfers or forced return to places regarded as potentially dangerous.⁵¹⁶ The Guiding Principles have adopted these general norms and specifically used and expanded their function, whilst clarifying grey areas so they could apply to internally displaced persons explicitly.⁵¹⁷

Implementation is also another setback when it comes to the application of human rights to situations of internal displacement. There is no efficient implementation mechanisms despite recent developments in attempts internationally and domestically bring violators of human rights to justice. The existing reporting and complaints systems do not effectively or specifically address the acute needs of internally displaced persons. The process of addressing violations is slow and not sufficient when it comes to compelling states to remedy most grave circumstances involving violations before, during and after internal displacement.

⁵¹⁴ Ngugi 2008 as above at 51.

⁵¹⁵ Article 4(2) of the International Covenant on Civil and Political Rights, 19 Dec 1966:999 *UNTS* (ICCPR); Geissler N, 'The International Protection of Internally Displaced Persons', *International Journal of Refugee Law* 1999 Vol. 11 No. 3 at 459.

⁵¹⁶ Ahlbrandt 2004 as above at 11; See the Compilation and Analysis of Legal Norms –Report of the Representative of the Secretary General, Mr Francis Deng submitted pursuant to the Commission on Human Rights Resolution 1995/57, Doc E/cn.4/1996/Add. 2, p. 58, 105.

⁵¹⁷ See principle 15 of the Guiding Principles on Internal Displacement 1998 as above.

The most problematic impasse so far is caused by the presence of non-state actors, who are leading violators next to states when it comes to internal displacement, because they are not bound by existing human rights law.⁵¹⁸

3.3.4 International Refugee Law

This is a branch of law that provides for the protection of refugees. Refugees are defined as people that are compelled to leave their habitual countries of residence across borders to another country to seek refuge as a result of fear of persecution. Over the years the definition of a refugee has altered, but the main content is the ‘border crossing’ factor. This law does not apply directly to situations of internal displacement, and in as much as there are numerous references to refugee law by analogy in the process of protecting IDPs, such references should be minimized.⁵¹⁹ Yet refugee law still mainly focuses on issues arising during displacement, this means that some of its principles can be instructive in matters of internal displacement. There are nevertheless key differences between the systems of law that are meant to protect refugees and those created to protect the internally displaced. The differences can be noted in the definitions adopted. Internal displacement is defined negatively in terms of international refugee law:

Unlike a refugee, a person fleeing from internal armed conflict does not seek to disestablish his ties of nationality or allegiance to his country on a temporary or permanent basis...His need for relief, and therefore temporary refuge, lasts only until his government can assure him de facto protection.⁵²⁰

While internally displaced persons are regarded as having much in common with refugees, the critical and most important distinction that sets them apart is that the former have not crossed an international border, and thus cannot formally claim the protection of international refugee law.⁵²¹ UNHCR has, despite these limitations, undertaken to protect internally displaced persons. The United Nations General Assembly through its various resolutions has over the years conferred special limited mandate on UNHCR to undertake humanitarian assistance and protection activities on behalf of the displaced provided certain conditions are

⁵¹⁸ Geissler as above at 459.

⁵¹⁹ IASC Handbook for the protection of IDPs 2010 as above at 21.

⁵²⁰ Ahlbrandt 2004 as above at 14.

⁵²¹ Ahlbrandt 2004 as above.

met.⁵²² Even though the UNHCR may undertake these activities in certain isolated cases, IDPs are not automatically entitled to the international protection of refugee law. Border crossing still remains a critical factor in the services they can get.

3.3.5 *International Criminal Law*

It should be noted that national authorities are first and foremost responsible towards the criminalization of any violations of international human rights and humanitarian law within their territories. They also have the responsibility to prosecute and take punitive measures against those responsible by bringing them before national courts or tribunals.⁵²³ The Rome Statute of the International Criminal Court (ICC)⁵²⁴ defines a number of crimes that are of international concern and which can be investigated and prosecuted by the Court, provided that the Court has jurisdiction over the particular violations. The Court has jurisdiction over the following acts, which in turn have direct or indirect effect on internal displacement: war crimes, these include grave breaches of the Geneva Conventions and serious violations of international humanitarian law covering a wide range of acts such as willful killing, torture and inhuman treatment; rape and sexual slavery; starvation of civilians; recruitment of children into armed forces or armed groups, or using them to participate in hostilities; launching attacks against civilians or civilian objects; and ordering the displacement of civilians; unless this is a requirement for the security of civilians or for military imperatives.⁵²⁵

The Court also has jurisdiction over crimes against humanity. This includes acts committed as part of a widespread or systematic attacks directed against civilians, whether this is done in times of war or peace. For instance acts of murder, extermination, enslavement, deportation or forcible transfer of population, arbitrary imprisonment or any other severe deprivation. Acts of rape and sexual violence, as well as persecution, enforced disappearance and other inhuman acts intentionally causing great suffering or serious injury to body or to

⁵²² Ahlbrandt 2004 as above.

⁵²³ IASC Handbook for the protection of IDPs 2010 as above at 31.

⁵²⁴ Statute of the International Criminal Court 1998 UN Doc A/CONF. 183/9; (ICC-hereafter referred to as the Court).

⁵²⁵ Article 8 of the Statute of the ICC 1998 as above; IASC Handbook for the protection of IDPs 2010 as above at 31.

mental or physical health also fall in this category.⁵²⁶ The last international criminal provision that is relevant to the protection of internally displaced persons relates to punishment for the crime of genocide. This involves any acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group.⁵²⁷ This provision is of particular importance to IDPs because sometimes acts of displacement are usually a result of a population's attempt to flee causes or consequences of the crime of genocide, or genocidal tendencies. Where local and national governments fail to provide for their protection or provide punishment to the perpetrators of these violent crimes, international criminal law can be invoked through provisions of the Statute of the International Criminal Court.⁵²⁸

It should be noted that International criminal law is complementary to national law, this means that international courts such as the ICC, only exercise their jurisdiction where national courts are either unwilling or unable to prosecute and punish the crimes in question.⁵²⁹ *Ad hoc* Tribunals have also been established by the international community to deal with crises involving the violation of international human rights law and humanitarian law including situations involving internal displacement. These tribunals have based their mandates and subsequent decisions on existing rules of international criminal law.⁵³⁰ Matters dealt with in such tribunals range from matters involving genocide, crimes against humanity, as well as other war crimes which are usually the main causes of mass population movements resulting in among others, the crisis of internal displacement.⁵³¹ Guiding Principles on Internal Displacement reflect these provisions of international criminal law specifically to address situations of internal displacement. Principle 10 of the principles includes provisions for protection against murder, genocide, summary executions, enforced disappearance, starvation as a method of combat, using human beings as military shields, use of landmines, and so forth.⁵³²

⁵²⁶ Article 7 of the Statute of the ICC 1998 as above; IASC Handbook for the protection of IDPs 2010 as above at 32.

⁵²⁷ Article 6 of the Statute of the ICC 1998 as above; See also the 1948 Convention on the Prevention and Punishment of the Crime of Genocide as above.

⁵²⁸ IASC Handbook for the protection of IDPs 2010 as above at 32.

⁵²⁹ IASC Handbook for the protection of IDPs 2010 as above.

⁵³⁰ These tribunals include International the Criminal Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, which were established by the United Nations Security Council as well as hybrid tribunals such as the Special Court for Sierra Leone; See Article 7 (1)(d), 8(2)(e)(viii) of the Rome Statute of the ICC 1998 as above.

⁵³¹ IASC Handbook for the protection of IDPs 2010 as above at 32.

⁵³² Principle 10 of the guiding principles reflects article 7 of the Statute of the ICC.

3.4 Institutional frameworks: the collaborative response and cluster approach

Internal displacement usually follows or occurs during complex crises that are represented by total breakdown of state authority and this affects their willingness or ability to provide protection.⁵³³ Such emergencies require multidimensional responses including humanitarian, human rights, development, security, political as well as the cooperation of various actors nationally and internationally.⁵³⁴ The set back is that there is no one particular institution that is responsible for addressing the needs of internally displaced persons. Additionally, the scale and dynamics of such emergencies are usually beyond the capacity of one single agency.

It was realized that emergencies that breed internal displacement require action by multiple organizations even beyond the United Nations systems, including human rights humanitarian and development agencies, as well as national local and IDP communities themselves. During such circumstances an urgent need for joint collaboration and coordination became obvious.⁵³⁵ Such collaboration required teamwork that had to be based in various mandates, expertise and operational capacities involving a wide range of actors to ensure a comprehensive response.⁵³⁶ A collaborative system was initially set up to address this but it was not well coordinated because there were no clearly defined responsibilities. To bridge the gaps that arose and maintain coordination, the Inter Agency Standing Committee (IASC) comprehensively reformed the system and additionally adopted the cluster approach.

The cluster approach in addition to what is done by collaborative response ensures greater leadership and accountability in key sectors where gaps in humanitarian response have been identified.⁵³⁷ It is aimed at ensuring partnerships among humanitarian, human rights and development agencies. Both systems operate at global and country-levels and are applied to crises in natural disasters and complex emergencies.⁵³⁸ Under this approach agencies will be held accountable for specific aspects of the global and country-specific humanitarian

⁵³³ IASC Handbook for the protection of IDPs 2010 as above at 43.

⁵³⁴ IASC Handbook for the protection of IDPs 2010 as above.

⁵³⁵ IASC Handbook for the protection of IDPs 2010 as above.

⁵³⁶ IASC 'Implementing the collaborative response to situations of internal displacement: Guidance for UN humanitarian and or resident coordinators and country teams' September 2004 at 14 at <http://www.unhcr.org/refworld/pdfid/41ee9a074.pdf> accessed on 14-05-2012.

⁵³⁷ IASC Handbook for the protection of IDPs 2010 as above at 44.

⁵³⁸ IASC Handbook for the protection of IDPs 2010 as above.

response.⁵³⁹ Response by agencies is no longer a choice, but an obligation, hence HC in the field have a specific agency to turn to organize the relevant relief in times of crisis. It is hoped that such approach will not only improve predictability, timeliness and effectiveness, but will also strengthen collaborative approaches already existing with enhanced accountability.⁵⁴⁰

3.4.1 The role of the United Nations

As the nature of conflict changed from being interstate to in-state, so did the nature of response from the international community. With the increase of internally displaced persons worldwide, there seemed to be a gap in the existing system for providing protection and assistance. The international community has started showing an increased interest in taking responsibility for internationally displaced persons whenever the governments concerned are unable or unwilling to carry out their responsibilities.⁵⁴¹ The process of facilitating this was initially complicated because there is no single organization responsible for assisting the internally displaced. An initiative was made involving a wide range of human rights, humanitarian, and development organizations that took responsibility for providing aid and protection to the internally displaced within the limits of their mandates.⁵⁴² The process started in 1990 when the General Assembly through the General Secretary's recommendation assigned the United Nations Resident Coordinators the task of coordinating assistance to internally displaced persons in the field.

This was in the following year followed by the creation of the post of the Emergency Relief Coordinator (ERF) who was meant to improve the UN's response to emergency situations including those of the internally displaced persons.⁵⁴³ The ERC who is also the United Nations Under-Secretary on Humanitarian Affairs, is among other things responsible for the coordination of inter-agency humanitarian action, in complex emergencies as well as in natural disasters. Duties related to the above functions include advocating for protection and assistance, mobilizing political and financial support as well as briefing the Security Council

⁵³⁹ Bijleveld A 'Towards more predictable humanitarian responses Inter-agency cluster approach to IDPs' *Refugee Survey Quarterly* 2006 Vol. 25 Issue 4 at 31.

⁵⁴⁰ Bijleveld 2006 as above 31.

⁵⁴¹ The Brookings Institution, Refugee Policy Group Project on Internal Displacement 'Improving institutional arrangements for the internally displaced' 1995 at 2.

⁵⁴² Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above at 3.

⁵⁴³ Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above at 2.

and engaging with governments, humanitarian agencies and other relevant actors.⁵⁴⁴ The Inter Agency Standing Committee (IASC) was established a year after the creation of the post ERC with the aim of supporting his work, it is actually chaired by the ERC.⁵⁴⁵ The IASC's purpose was to provide a forum that brought together the major United Nations and non United Nations humanitarian, human rights and development partners, NGO umbrella groups and the Red Cross or Red Crescent Federations. Its main role was to formulate policy, advocate and to ensure coordinated and effective humanitarian responses to complex emergencies and natural disasters.⁵⁴⁶

At the same time, as concerns over protection were increasing, the Commission on Human Rights requested the Secretary General to prepare an analytical report on internally displaced persons. In 1992 at the request of the commission, the Secretary General appointed a Representative (RSG) on the Human rights of Internally Displaced Persons. His responsibility was to focus specifically on the human rights aspect of internal displacement and also serve as an advocate for the internally displaced.⁵⁴⁷ In this same year the IASC created a task force on internally displaced persons. At the recommendation of the task force, the IASC decided in 1994 that the ERC would serve as the UN's reference point for any request for assistance and protection in situations of internal displacement. The Representative of the Secretary General for the internally displaced was further invited to participate in the work of the IASC.⁵⁴⁸ He is a standing invitee to the IASC's subsidiary bodies as well. He has participated actively and contributed in integrating protection concerns into international response mechanisms.⁵⁴⁹

The RSG's duties have since encompassed monitoring internal displacement worldwide, undertaking country missions, establishing dialogues with governments, collaborating with intergovernmental, regional and non-governmental organizations and making recommendations to improve international and regional institutional arrangements. He is

⁵⁴⁴ IASC Handbook for the protection of IDPs 2010 as above at 43.

⁵⁴⁵ IASC Handbook for the protection of IDPs 2010 as above.

⁵⁴⁶ Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above at 2; United Nations GA Report of the Special Representative of the Secretary General on Internally Displaced Persons A/58/393 of 26 September 2003 at 14.

⁵⁴⁷ Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above at 2.

⁵⁴⁸ Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above.

⁵⁴⁹ Inter-Agency Standing Committee XXIIInd Meeting 'Protection on internally displaced persons: inter agency standing committee policy paper' December 1999 at 11 at <http://www.icva.ch/printer/doc0000008.HTML> accessed on 26-08-2011.

also responsible for assessing international legal protection, as well as publishing reports on which governments, the Commission, General Assembly and international organizations are expected to act.⁵⁵⁰ The RSG basically focuses on advocacy for IDPs, setting global protection standards, and making recommendations on how the application of existing instruments can be made more effective. These duties are mainly to facilitate means of assessing the extent to which protection, assistance and development needs of internally displaced persons are addressed at ground level. Additionally, during such missions the conversations that take place are later reflected in the RSG's reports and this serves to raise national and international awareness over areas that need attention. Lastly the findings provide the office of the RSG with advocacy tools as well as a platform to solicit support from IASC in implementing the recommendations adopted.⁵⁵¹

The IASC adopted the cluster approach in 2005 to bridge gaps that existed within institutional coordination. The system aims to facilitate a predictable, effective and accountable inter-agency response in protecting IDPs. It operates within the collaborative response mechanisms at both global and local levels.⁵⁵² Each cluster or sector is led by an international agency or organization with specific expertise in the area. The agency is usually accountable to the ERC and has the responsibility of ensuring predictable and effective inter-agency preparedness and response in this area.⁵⁵³ This cluster lead is responsible for chairing and coordinating the work of the relevant global cluster working group which involves all relevant international actors.

The existing cross cutting areas within which clusters are set up depend on capacities needed to respond to the internally displaced. These widely differ depending on the needs of the IDP's involved. In some circumstances food is predominantly needed, which immediately requires the attention of the WFP. In other circumstances women and children might be in dire conditions. This automatically calls for the attention of UNICEF. At times the internally displaced might be facing a potentially refugee generating situation, in which case the UNHCR will be encouraged to provide support.⁵⁵⁴ Protection of conflict generated IDPs is carried out by UNHCR, civilians affected by conflicts other than IDPs and those affected by

⁵⁵⁰ Inter-Agency Standing Committee XXIIInd Meeting 1999 as above.

⁵⁵¹ Inter-Agency Standing Committee XXIIInd Meeting 1999 as above.

⁵⁵² IASC Handbook for the protection of IDPs 2010 as above at 44.

⁵⁵³ IASC Handbook for the protection of IDPs 2010 as above.

⁵⁵⁴ IASC Handbook for the protection of IDPs 2010 as above at 45.

disasters are protected by UNHCR or OHCHR or UNICEF. Camp coordination and camp management falls to UNHCR when conflict is involved and IOM when it's a consequence of disaster. Early recovery is addressed by UNDP as the cluster lead. Technical areas such as emergency shelter are addressed by UNHCR and IFRC depending on whether it is displacement resulting from conflict or disaster. Other technical areas such as health, water and sanitation, nutrition, education and agriculture are covered by WHO, UNICEF, Save the children and FAO respectively. Common services such as logistics and emergency telecommunications fall under WFP and UNHCR. Food and refugee sectors to which clear accountabilities already existed are covered by WFP and UNHCR respectively.⁵⁵⁵

3.4.1.1 United Nations Organization for Coordination of Humanitarian Affairs (UNOCHA)

This office was originally known as the Department of Humanitarian Affairs (DHA). In 1991 the UN made it clear that there was a need to bring together international, humanitarian and development agencies dealing with displaced persons for effective coordination.⁵⁵⁶ There were delays in the dissemination of aid and assistance, it also seemed difficult for the *ad hoc* system to work with so many organizations trying to help the same group of people whilst employing different approaches and disagreeing every step of the way. It was observed that even within the United Nations agencies themselves it was time consuming for any agreement to be made regarding the acceptable coordination arrangements concerning either division of responsibility, plan of action, or dissemination on ground.⁵⁵⁷

The Department of Humanitarian Affairs was eventually created by the Secretary General after the above mixed efforts to address internal displacement.⁵⁵⁸ The Emergency Relief Coordinator was nominated to be its head. This was followed by the creation of the Inter Agency Standing Committee which was composed of all heads of major United Nations,

⁵⁵⁵ IASC Handbook for the protection of IDPs 2010 as above.

⁵⁵⁶ This was achieved through a General Resolution in December 1991, and subsequently led to the creation of the post of Emergency Relief Coordinator at the Under-Secretary level.

⁵⁵⁷ Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above at 35.

⁵⁵⁸ In 1992, with a mandate of coordination and leadership among those providing humanitarian assistance in complex emergency situations as well as natural disasters; providing services that maximize the efficient use of resources for humanitarian assistance such as consolidating and managing information including needs assessments, preparation for interagency appeals, financial tracking of donor response, maintenance of centralized data bases, early warning services and training programs; acting as the focal point for advocacy on humanitarian concerns, and for maximizing opportunities for preventive action, for securing access to people affected by conflicts; ensuring that emergency relief contributes to future development and that development plans incorporate measures for disaster mitigation, preparedness and prevention.

humanitarian and development agencies.⁵⁵⁹ It operated as one of the mechanisms for the DHA's coordinating role and was chaired by the Emergency Relief Coordinator.⁵⁶⁰ Other responsibilities of the Emergency Relief Coordinator included the Central Emergency Revolving Fund, as well as the Consolidated Appeals Process.⁵⁶¹ The DHA succeeded in some matters but failed to deliver in a lot others.⁵⁶² In 1997 the DHA was replaced by a more compact office of the 'Coordinator for Humanitarian Affairs', which is mainly involved with policy development and coordination functions in support of the Secretary General; advocacy of humanitarian issues with political organs, specifically the Security Council and Coordination of humanitarian emergency response.⁵⁶³

At the country level, the United Nations Coordinator (HC) is responsible for ensuring the smooth coordination of humanitarian affairs, including but not limited to the protection and assistance of internally displaced persons in dire emergency situations at the country level. The HC is in most cases appointed by the Emergency Relief Coordinator (ERC) in consultation with the Inter Agency Standing Committee (IASC). In limited number of cases, the United Nations Resident Coordinator (RC) who usually happens to be the most senior United Nations official in a particular country can also be designated as the HC. In countries that are affected by displacement, where the HC has not yet been appointed, the RC is responsible for ensuring an effective international response to any internal displacement crisis that arises in the area.⁵⁶⁴

The responsibilities of the HC are as follows: ensuring that protection gaps are addressed; promoting respect for human rights and humanitarian law and for the Guiding Principles on Internal Displacement; advocating with national authorities and other actors for promotion of respect for humanitarian principles including unrestricted access to IDPs; promoting gender

⁵⁵⁹ Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above at 35; Ahlbrandt 2004 as above at 29.

⁵⁶⁰ Brookings Institution Refugee Policy Group on Internal Displacement 1995 as above; the purpose of the agency was to create a forum to discuss policy matters in the humanitarian area and to serve as the mechanism for delegating responsibility for internal displacement to different UN agencies to ensure that both assistance and protection needs were being addressed. This was further complimented by the creation of the IASC Task force in 1992 which was created to strengthen information exchange on IDPs. In 1994 the IASC designated the Emergency Relief Coordinator as the 'reference point' for requests for assistance and protection in situations of internal displacement.

⁵⁶¹ Ahlbrandt 2004 as above at 29.

⁵⁶² It was criticized with regard to its work on IDPs because despite having been confirmed as the focal point for IDPs it accorded very little attention to them and was often reluctant to assign responsibilities to other agencies in the field; See Ahlbrandt 2004 as above at 30.

⁵⁶³ See Ahlbrandt 2004 as above at 31.

⁵⁶⁴ IASC Handbook for the protection of IDPs 2010 as above at 47.

mainstreaming and women's rights at the policy, planning and implementation levels and; mobilizing resources for humanitarian response.⁵⁶⁵ In the process of carrying out the above responsibilities the HC and, or RC works with and in consultation with relevant organizations on the ground including NGOs and the International Red Cross and Red Crescent Movement. This coordination is facilitated by an Inter-Agency humanitarian team, created to bring such actors together.⁵⁶⁶ The team in consultation with relevant partners decides on the specific country coordination arrangements which are supposed to be similar to those adopted at the international level. For purposes of support and in the process of extending coordination capacities of the HC and or RC, OCHA field presence is usually required. Whether the presence is in the form of a humanitarian advisor or something more concrete is dependent on the request of the RC or HC. This might also be a result of the recommendation of the ERC.⁵⁶⁷

3.4.1.1. (i) OCHA and the Inter Agency Internal Displacement Unit/Division

The internal displacement unit is a non-operational inter-agency unit within the office for the coordination of humanitarian affairs. It was officially launched by the UN Secretary General in January 2002.⁵⁶⁸ The OCHA-IDP unit is based at OCHA-Geneva offices, but it also has a liaison in the office of the ERC in New York.⁵⁶⁹ The name of the unit was changed to 'IDP Division' it was also re-structured.⁵⁷⁰ The unit is staffed by people seconded from various UN agencies and humanitarian and development partner institutions including UNDP, UNHCR, IOM, UNICEF, a consortium of NGOs as well as staff from the office of the Representative of the Secretary General on IDPs (RSG).⁵⁷¹

The Division is responsible for providing advice and support on issues of internal displacement to the Emergency Relief Coordinator (ERC), and the director of the Division

⁵⁶⁵ IASC Handbook for the protection of IDPs 2010 as above.

⁵⁶⁶ IASC Handbook for the protection of IDPs 2010 as above at 48.

⁵⁶⁷ IASC IDP policy package 2004 as above at 7.

⁵⁶⁸ McNamara D 'The mandate of the emergency relief coordinator, and the role of OCHA's Inter-Agency internal displacement division' *Refugee Survey Quarterly* 2005 Vol. 24 Issue 3 at 65.

⁵⁶⁹ Sites E and Tanner V 'External evaluation of OCHA's internal displacement unit' *OCHA IDP UNIT* 21 January 2004 at 7.

⁵⁷⁰ In 2004 it was re-named the Inter Agency Internal Displacement Division; See McNamara 2005 as above at 65.

⁵⁷¹ IASC IDP policy package 2004 as above at 41.

reports directly to the ERC.⁵⁷² The unit is also responsible for providing technical expertise as well as advisory support to UN country teams in the field and undertaking country missions to fulfill this obligation.⁵⁷³ The purpose of establishing the Division has mainly been to ensure effective support and implementation of the collaborative response to situations of internal displacement as well as maintaining effective application of the IASC policy package.⁵⁷⁴ The Division was intended to support the ERC in promoting predictable and coordinated response to internal displacement.⁵⁷⁵ The IDD does not necessarily involve itself with all countries battling with internal displacement crisis. At the recommendation of the ERC, the division is usually requested to focus on a limited number of selected countries where the collaborative response is considered inadequate.⁵⁷⁶ The level of inadequacy is determined after taking into consideration focal areas of protection or assistance having gaps in a particular country.⁵⁷⁷

After a certain criteria has been applied by the division to determine the effectiveness of the collaborative response, and where the response has been proved to be inadequate, the IDD (Internal displacement division), may intervene. The intervention may include deployment of IDP advisors to provide advise, specifically on protection issues and coordination support to HCs and/ or RCs and country teams. Intervention may also be in the form of deployment of missions to assist the HCs and /or RCs and country teams in the process of either developing or refining already existing IDP strategies and making sure that they are effectively implemented. Intervention may also take the form of making recommendations to the ERC for an improved international response to situations of internal displacement. Lastly, intervention may take the form of providing training to heads of OCHA offices on the content and implementation of IASC policy package. Intervention may also include provision of advocacy on specific issues relating to IDPs as well as any other efforts to raise awareness among donors and obtain their increased engagement in the crisis of internal displacement.⁵⁷⁸

⁵⁷² Sites and Tanner 2004 as above at 7.

⁵⁷³ Sites and Tanner 2004 as above; the unit has under taken more than 20 country missions since its establishment, including the missions it has undertaken on behalf of the inter-agency.

⁵⁷⁴ IASC IDP policy package 2004 as above at 41.

⁵⁷⁵ IASC IDP policy package 2004 as above at 5.

⁵⁷⁶ McNamara 2005 as above at 66.

⁵⁷⁷ IASC IDP policy package 2004 as above at 41.

⁵⁷⁸ IASC IDP policy package 2004 as above.

In addition to the above efforts by the internal displacement division to intervene in specific countries, it also is responsible for maintaining a watching brief on other current and emerging situations of internal displacement.⁵⁷⁹ Where it is clear that a crisis of internal displacement is arising or on-going, the division directly, or OCHA together with other partners engaged in the response to internal displacement, may provide *ad-hoc* support. Such response is of course subject to the availability of resources as well as the urgency of the crisis.⁵⁸⁰

3.4.1.2 UNHCR and internal displacement

The UNHCR's engagement with internally displaced persons dates as far back as the 1970s during its operations in Bangladesh and Indochina. Over the years the role of the UNHCR has gradually changed in response to the constant changing nature of humanitarian crises. The agency became more prominent in the 1990s after involving itself with humanitarian activities in areas such as Somalia, Iraq, the Balkans as well as Liberia, and other states in Africa.⁵⁸¹

The UNHCR seemed to be well equipped to deal with internally displaced persons from the on set. The reasons for this included the fact that the agency's protection expertise and its operational experience were regarded as the best means by which the international system could ensure a more consistent, reliable and accountable response to the needs of internally displaced persons.⁵⁸² This confidence in the UNHCR was further compounded by the fact that UNHCR seemed to already have a special interest in the protection and welfare of persons forcibly displaced by either persecution, situations of general violence, conflicts or massive violations of human rights. This could have been interpreted largely to mean UNHCR could also be responsible for all those 'internally displaced persons' who but 'for the border crossing' factor would have had a claim for international protection.⁵⁸³

⁵⁷⁹ OCHAs IDP Unit 'The Internal Displacement Unit-OCHA' *FMR 20* at 44 at www.reliefweb.int/idp/docs/references/UnitEvaluationJan2004.pdf accessed on 12-11-2011.

⁵⁸⁰ IASC IDP policy package 2004 as above at 41.

⁵⁸¹ Zard M 'Towards a comprehensive approach to protecting refugees and internally displaced persons' in Bayefsky A (ed.) *Human Rights and refugees, internally displaced persons and migrant workers: essays in memory of Joan Fitzpatrick and Arthur Helton* 2006 at 44.

⁵⁸² Zard 2006 as above at 46.

⁵⁸³ Inter Agency Standing Committee (IASC) 'Protection of internally displaced persons' *Inter-Agency Standing Committee Policy Paper* December 1999 at 17.

There is a major similarity between groups of internally displaced persons and refugees especially with regard to the causes and consequences of their displacement and humanitarian needs.⁵⁸⁴ This operational and needs based similarity is recognized by the UNHCR Statute in article 9 which is the legal basis for the UNHCR's activity with IDPs. The article provides that the High Commissioner may in addition to working with refugees "engage in such activities ... as the General Assembly may determine within the limits of the resources placed at (his or her) disposal."⁵⁸⁵ On the basis of this article, and over a long period of time, a series of General Assembly Resolutions have acknowledged UNHCR's particular humanitarian expertise and encouraged its involvement in situations of internal displacement. An additional important contributing factor was UN General Assembly resolution 48/116 (1993) which set out important criteria to guide UNHCR's decisions on when to intervene on behalf of the internally displaced. These resolutions, together with article 9 of the UNHCR Statute, provide the legal basis for UNHCR's action on behalf of the internally displaced persons.⁵⁸⁶

It should be noted that according to the criteria adopted in 1993 at the General assembly, with regard to clarifying UNHCR involvement with IDPs, it is specified that consideration must be made for the agency to assume primary international responsibility for IDPs only where there is a direct link with its basic refugee activities. This specifically involved return circumstances where refugees are mingled with IDPs, or where there is a significant risk that IDPs would eventually become a refugee problem.⁵⁸⁷ In addition to advocating on behalf of internally displaced persons, and mobilizing support for them, the UNHCR provides protection and assistance to internally displaced persons after certain conditions are met. First there has to be specific authorization from the UN Secretary General or other competent principal organs of the United Nations.⁵⁸⁸

⁵⁸⁴ IASC 1999 as above.

⁵⁸⁵ Statute of the Office of the United Nations High Commissioner for Refugees G.A Res. 428 (V) adopted 14 December 1950, annex at art. 9 (hereafter referred to as the UNHCR Statute). There were also several other resolutions in the Economic and Social Council authorizing UNHCR involvement in specific humanitarian activities (G.A Res. 47/105 specifically referred to UNHCR activities with respect to IDPs).

⁵⁸⁶ Protection of internally displaced persons IASC 1999 as above at 18.

⁵⁸⁷ Ahlbrandt 2004 as above at 21; Such situations include circumstances where IDPs are present or are returning in same areas as refugees, or areas in which refugees are expected to return.

⁵⁸⁸ IASC 1999 as above at 18.

Additionally, since internal displacement usually affects and involves internal affairs of a state, the consent of a particular state must be obtained. Where there are other parties involved in the conflict resulting in displacement, they might have to be involved as well.⁵⁸⁹ There must be a possibility of accessing the affected population as well as adequate security for UNHCR personnel and other partners for effective operation. There has to be clear set degrees of responsibility and accountability. Additionally, provisions to intervene directly with all parties involved must be made, especially when it comes to matters of protection. Lastly the availability of resources to carry out such operations is of paramount importance.⁵⁹⁰

It has to be taken into account that UNHCR is not traditionally mandated to deal with matters involving internally displaced persons. It has for decades operated outside the realms of international and national politics and traditional refugee law was more humanitarian in content. In as much as this original mandate can be revisited to accommodate internally displaced persons, the operational involvement of the UNHCR depends on considering that its participation should not compromise the non-political and humanitarian nature of the mandate. Its activities in the field of prevention must complement its international protection responsibilities and maintain consistency with international human rights and humanitarian law while at the same time making sure that the institution of asylum is not undermined.⁵⁹¹

The nature of UNHCRs involvement in the matter of internal displacement varies depending on the phase of the displacement. It also depends on the degree to which internal displacement is linked to the refugee problem, and the ‘complimentarity’ of the mandates and expertise of other agencies present or contemplating presence in the area. Issues such as political and operational environment including security considerations can also dictate or restrict UNHCR activities. There is also a need to recognize the importance of co-operation and collaboration based on complementary mandates involving other UN agencies as well as the Emergency Relief coordinator (ERC) and other relevant government and non-governmental organizations.⁵⁹²

⁵⁸⁹ IASC 1999 as above.

⁵⁹⁰ IASC 1999 as above.

⁵⁹¹ Ahlbrandt 2004 as above at 21; stated by the UNHCR Executive Committee; See Barutciski 1998 as above at 3.

⁵⁹² IASC 1999 as above at 18.

The main objective of the office of the UNHCR with regard to internally displaced persons is to improve their protection and promote solutions to their plight. The agency has tried to achieve this objective through international presence, monitoring as well as interventions and other assistance attempts. In the case of Africa UNHCR has been involved with internally displaced persons mostly in post-conflict reintegration operations for returnees.⁵⁹³ It should be noted though that the agency has been mostly instrumental in cases involving mixed populations of returnees constituting other forced populations such as refugees and internally displaced persons as well.⁵⁹⁴ In as much as great good seems to have been done by the UNHCR, its work has not been done without hardship, critique or even hesitation on the part of the agency itself.

3.4.1.2 (i) Critiquing UNHCR

There have been a lot of debates centered on whether the agency should be solely responsible for internally displaced persons, and whether any duties it performs on behalf of the internally displaced do not in any way affect the asylum regime. Critics of UNHCRs involvement with internally displaced persons advance a number of arguments. It has been stated that a broadened application of the mandate of the agency to include in-country protection contradicts the agency's original mandate.⁵⁹⁵ There is also a camp that subscribes to the notion that the idea of an increased interest in in-country protection is simply an attempt by asylum states to curb refugee influxes, lastly it has been contended that UNHCR is incapable of successfully providing comprehensive protection to groups of displaced persons within their countries of origin.⁵⁹⁶

The arguments advanced above have some merit to them. This can be evidenced by situations where the UNHCR has found itself in dilemma after extending aid to groups of internally displaced only for borders to be closed on any other groups of internally displaced

⁵⁹³ Bijleveld 2006 as above at 30.

⁵⁹⁴ IASC 1999 as above at 19; For instance, in Bosnia and Herzegovina and in Tajikistan the UNHCR complimented its protection monitoring role with measures to strengthen national protection. For example it built the capacity of national legal and judicial institutions, local NGOs and community groups in cooperation with international governmental and non-governmental organizations. The search for solutions to situations of internal displacement has required UNHCR to cooperate with international conflict resolution processes, for instance in the Balkans and the Caucasus. Following these protection and solution-oriented strategy, UNHCR has managed to phase out situations of internal displacement in areas such as Tajikistan and some parts of Northern Iraq.

⁵⁹⁵ Bijleveld 2006 as above at 29.

⁵⁹⁶ Ahlbrandt 2004 as above at 22.

persons intending to seek asylum. There are countries that have taken advantage of the situation to minimize their asylum responsibilities.⁵⁹⁷ What further compounds operational matters is that UNHCR staff are mostly conversant with refugee law, but not the core principles of international human rights law, or international humanitarian law.⁵⁹⁸ This makes it difficult to operate within a country because these are the main legal principles relied on for in-country protection.⁵⁹⁹

The process of protecting refugees differs from measures that have to be taken to protect internally displaced persons, especially the lack of clarity in existing legal framework as well as lack of enforcement of states' failure to adhere to the existing peace-meal framework.⁶⁰⁰ Lastly there are many impediments resulting from the legal, administrative and political nature of dealing with groups of people that are still within their states of origin which are characterized by red-tape policies as well posing an increased danger to personnel on the ground, not to mention lack of resources.⁶⁰¹ As a result of the above concerns and impediments, UNHCR has been cautious in approaching and providing aid and protection to internally displaced persons. This can be noted from the varying levels of provision of assistance to refugees versus IDPs.⁶⁰²

3.4.1.3 IOM (The International Organization for Migration)

This is a migration organization, which is responsible for providing a broad range of services to individuals, including transport and other basic needs such as food, shelter and supplies. In the process of providing the above mentioned services the organization offers a form of protection to internally displaced persons. IOM is particularly responsible for organizing transport and the whole process of evacuations and returns; providing temporary shelter and

⁵⁹⁷ This situation happened in Bosnia when UNHCR took on an expanded role to protect within borders, again it happened in the Kosovo conflict of 1999, and in Afghanistan in 1994 where the UNHCR tried to manage camps for the internally displaced in Jalalabad, only for the Pakistan government to respond by imposing strict requirements for Afghans, and restricting asylum in Pakistan and stating that the creation of UN camps in Jalalabad constituted a safe haven for fleeing Afghans and an alternative to seeking asylum in Pakistan; See Zard M 2006 as above at 49.

⁵⁹⁸ Bijleveld 2006 as above at 29.

⁵⁹⁹ Ahlbrandt 2004 as above at 22.

⁶⁰⁰ The existing international framework internationally is the UN Guiding Principles, these principles are soft law, they cannot be enforced and are dependent on the discretion of states for application, they are also in most cases not even disseminated, and the internally displaced are not even aware that there is a document they can rely on at least for claiming some measure of protection.

⁶⁰¹ Ahlbrandt 2004 as above at 22; Bijleveld 2006 as above at 29.

⁶⁰² Ahlbrandt 2004 as above at 22.

other material relief; providing early warning and emergency analysis of migratory flows; developing national population information systems and censuses as well as providing expert advice to governments on migration policies and laws.⁶⁰³ IOM is also involved in carrying out projects dealing with reintegration and vocational training and assistance of IDPs in long term settlement. The organization has concluded bilateral cooperation agreements with various governments which specifically provides for the IOM to get involved in assisting internally displaced persons.⁶⁰⁴

3.4.1.4 UNICEF (United Nations children's Education Fund)

Other organizations involved in the cluster approach include UNICEF which specifically deals with providing protection to children that happen to be internally displaced as well. UNICEF ensures that the rights that are provided for in the Convention on the Rights of the child are upheld. Protection for displaced children focuses preferentially on protecting them from physical and psychosocial harm inflicted by others including violence, exploitation, sexual abuse, neglect, cruel or degrading treatment as well as possible recruitment into military forces.⁶⁰⁵ It should be noted that the mandate of UNICEF is to protect children, but in the case of internally displaced children, their status renders them even more vulnerable to each of the above forms of abuse. The protection role of UNICEF entails protection in the wide sense. This involves attempts to preserve the identity and cultural value and inheritance rights of internally displaced children, because sudden movement from communities, threatens the loss of the children's heritage.⁶⁰⁶ It also includes the traditional role of protection which entails the provision of basic needs to children in the form of food, health needs, and education.

The mandate of UNICEF specifies that the organization is responsible whenever and wherever women and children are in need. Such groups of women and children may include refugees and or displaced persons, affected by conflict, by inequity as well as poverty.⁶⁰⁷ UNICEF is especially useful to the population of the internally displaced because it has experience in capacity development, community participation as well as development of

⁶⁰³ IASC 1999 as above at 24.

⁶⁰⁴ IASC 1999 as above at 24.

⁶⁰⁵ IASC 1999 as above at 19.

⁶⁰⁶ IASC 1999 as above at 19.

⁶⁰⁷ IASC 1999 as above at 19.

coping skills for children, parents, families as well as communities which is imperative for the survival, development and protection of displaced communities in situations of violence, armed conflict or extreme poverty.⁶⁰⁸

UNICEF is also experienced and capable of providing support in matters involving maternal and child healthcare, education, water supply, sanitation and promotion of durable solutions to internal displacement through the creation of self-help capacities at the family level.⁶⁰⁹

UNICEF also plays a part in reintegration of communities, especially provision of assistance to unaccompanied children and re-unification with their families, prevention of recruitment of these children into militia and other armed groups, and demobilization and re-integration of children that were already recruited into militias.⁶¹⁰ The role of UNICEF in the area of child protection is strengthened by the Convention on the rights of the child, which promotes UNICEF's advocacy and protection roles with regard to children in the widest range of difficult circumstances, especially when internal displacement is involved since it places greater obligations on the state of the child and family.⁶¹¹

3.4.1.5 WFP (World Food Program)

The World Food Program (WFP) is mandated to provide food aid to the world's most vulnerable and food insecure populations. In recent years this mandate has extended to cover IDPs as well. The WFP has taken responsibility in providing food and assistance to IDPs not only during the displacement phase, but also during the process of return, resettlement, reintegration and post conflict recovery.⁶¹² WFP activities in relation to IDPs include the engagement in negotiations on access and safe passage of humanitarian supplies, including food. These negotiations are conducted either with governments, or non-state actors. Access to internally displaced persons, includes, but is not limited to provision of assistance and protection. It additionally involves access to regular and systematic needs assessments and follow-up monitoring by the WFP.⁶¹³

⁶⁰⁸ IASC 1999 as above at 19.

⁶⁰⁹ IASC 1999 as above at 19.

⁶¹⁰ IASC 1999 as above at 19, 20.

⁶¹¹ IASC 1999 as above at 20; see also Convention of the Rights of the Child 1989 as above.

⁶¹² IASC 1999 as above at 20.

⁶¹³ IASC 1999 as above.

3.4.1.6 WHO (World Health Organization)

The World Health Organization plays a key role in supporting national authorities to strengthen health services as well as improving health care for the general population, including internally displaced persons. The Constitution of WHO mandates it to ‘provide or assist in providing, upon the request of the UN, health services and facilities to special groups’ which include IDPs.⁶¹⁴ Provision of assistance to IDPs by WHO, is totally dependent on the presence of a WHO country office in the particular country. This ensures that there is a permanent presence by the organization before, during and after emergencies. The country office can be supported during a crisis depending on the needs by the regional office concerned, while WHO headquarters ensures the coordination with other agencies and donors, as well as facilitating technical backstopping from relevant WHO programmes. Normally WHO does not provide health care directly, it operates through local or international health care providers. WHO can involve itself with provision of assistance at various phases, including during the emergency phase, where it participates in the assessment of the health situation, by identifying the health needs of IDPs and bringing them to the attention of national authorities, other UN agencies as well the donor community.

It also can give technical assessment which serves as a basis for advocacy relating to the protection of IDPs either to the national authorities or the international community. WHO also fosters and facilitates the involvement of national authorities in the provision of health care to IDPs and supports them in coordinating with other national and external agencies available. Lastly, when the integration phase approaches, WHO, together with other UN agencies, assists national authorities and NGOs to ensure that IDPs are reintegrated. It also ensures that they are provided the same level of health services as the rest of the population. This necessitates the formulation of health plans for IDPs which are integrated into long term strategies and can promote equitable and sustainable healthcare systems for the all population.⁶¹⁵

⁶¹⁴ IASC 1999 as above at 21.

⁶¹⁵ IASC 1999 as above at 22.

3.4.1.7 UNDP (United Nations Development Program)

The General Assembly⁶¹⁶ assigned UNDP resident representatives, in their capacities as UN resident coordinators of humanitarian relief, the duty of coordinating assistance for IDPs.⁶¹⁷ The organization's role in long term development was to a large extent regarded by resident coordinators as being incompatible with its ability to address displacement especially in emergency situations.⁶¹⁸ As a result of these concerns, and government objections to combining human rights, humanitarian and development issues, the UNDP nowadays seems more inclined to involve itself with IDPs only when rehabilitation and development activities begin to take place.⁶¹⁹

UNDP has an important role in the resettlement of internally displaced persons. During the displacement stage, it is easy for IDPs to attract aid and support, but they are most vulnerable in the return and re-settlement stage.⁶²⁰ UNDP's sustainable human development role becomes more effective and necessary wherever the target-ability of internally displaced persons fades especially in: facilitating joint planning of various interventions well ahead to ensure that development activities are comprehensively harmonized with relief; supporting the development of the communities that the displaced have been integrated into; implementing rehabilitation programs in the displaced communities of return in order to facilitate their sustainable reintegration and; providing local capacity building support to local entities to enable them to take an active role in the reintegration and resettlement

⁶¹⁶ Through Paragraph 7 of Resolution 44/136 of 27th February 1990.

⁶¹⁷ In 1988, through Resolution 43/116 of 8th December 1988, the General Assembly called upon the Secretary General to follow up on the need for an international mechanism to coordinate relief programs for internally displaced persons. It was then announced in 1989 by the Secretary General that UNDP resident representatives, citing the capacity of resident coordinators, would be the focal point for coordinating relief to the internally displaced (report of the Secretary General, A/44/520, of 28th September 1989, at 19; Ahlbrandt 2004 as above at 31.

⁶¹⁸ Ahlbrandt 2004 as above; The UNDP was not given protection responsibilities as such, hence it was not equipped to deal with emergencies, further, the organization's development responsibilities require it to work continuously closely with governments. This meant that coordinating assistance to IDPs in emergency situations and raising protection or human rights concerns placed the organization in an awkward relationship with the governments it worked with. Most coordinators feared overstepping their boundaries considering the sensitivity surrounding the politics of internal displacement; See Report of the Representative of the Secretary-General on Internally Displaced Persons to the Commission on Human Rights at its 51st session, Doc .E/CN.4/1995/50, para. 159.

⁶¹⁹ Ahlbrandt 2004 as above at 32; See Note by the Secretary General on field representation of the United Nations system organization: a more unitary approach. Doc A/49/133/Add, of 22nd April 1994.

⁶²⁰ More attention tends to be paid to them whilst in camps or shelters, but once they are absorbed into communities, or decide to return to their original communities, support seems to waiver, and they are forgotten' IASC 1999 as above at 17.

process.⁶²¹ UNDP plays an important role in assisting the resident coordinators to provide support to IDPs during the displacement phase. It assists in linking rehabilitation activities to emergency and humanitarian relief, as well as providing support to joint planning among international and local actors to ensure that the needs of IDPs are not forgotten after the displacement phase is over.⁶²²

3.4.2 *International Commission of the Red Cross (ICRC)*

The ICRC was founded in 1863 and has to date been mandated by the community of states under the Geneva Conventions and in recognition of its long standing practical experience to ‘work for the faithful application of international humanitarian law’.⁶²³ Of all institutions that have been included in the cluster approach to provide for internally displaced persons, the ICRC has the clearest mandate to protect and assist victims of internal conflict, who happen to largely or most complexly constitute the internally displaced.⁶²⁴ The ICRC is a private, non-UN organization with an overall statutory responsibility for the application of international humanitarian law including the Geneva Conventions and their Additional Protocols in situations of international and non-international armed conflict.⁶²⁵

3.4.2.1 ICRC mandate

The ICRC has recently expanded its role especially in issues concerning the protection and assistance of civilians in non-international armed conflict. The basis of this protection is in initiatives to deal with internal conflict to which the Geneva Conventions do not apply. This can be drawn from the Statutes of the International Red Cross and Red Crescent Movement. On the basis of these Statutes, the ICRC may provide services to governments in order to protect civilians exposed to internal strife, many of whom happen to be internally displaced persons.⁶²⁶

⁶²¹ IASC 1999 as above.

⁶²² IASC 1999 as above.

⁶²³ Lavoyer 1995 as above at 162.

⁶²⁴ The Brookings Institution Refugee Policy Group Project on Internal Displacement 1995 as above at 19

⁶²⁵ The Brookings Institution Refugee Policy Group Project on Internal Displacement 1995 as above.

⁶²⁶ The Brookings Institution Refugee Policy Group Project on Internal Displacement 1995 as above.

It should be noted that out all the institutions that are equipped to provide for the internally displaced, the ICRC is the only one that does not make a distinction between protection and assistance.⁶²⁷ This distinction has been invoked numerous by aid humanitarian and development organizations, that are not ready to provide the former for fear of this affecting their assistance role. ICRC has gained acceptance by both government and insurgent forces in carrying out its joint assistance and protection mandates.⁶²⁸ The reason why the organization has managed to operate in both instances successfully is because its representatives extend protection to both sides of the conflict, whilst seeking to reach those who other humanitarian organizations cannot reach because of the nature of the dangerous security risks or political restrictions.⁶²⁹

The ICRC mandate is intended to take responsibility for people who happen to be victims of conflict, whereas the United Nations is mainly responsible to governments. ICRC also has the benefit of the capability to delegate its work in the field to other organizations or government based humanitarian sectors.⁶³⁰ This makes it easy for the organization to operate in areas where other organizations can not reach, either by lack of capacity or due to lack of integrating factors.⁶³¹ The protection role of the ICRC involves monitoring the implementation of the Geneva Conventions and Protocols with regard to civilian populations, making representations to governments and non-state actors when violations occur, gaining access to and securing release of detainees as well as facilitating the release or evacuation of civilians from dangerous situations, creating protected areas, establishing tracing networks and arranging for the creation of humanitarian ceasefires.⁶³²

The Federation of the Red Cross and Red Crescent works for inspiring, facilitating and promoting all humanitarian activities carried out by its member national societies to improve the situation of most vulnerable people. The federation directs and coordinates international

⁶²⁷ Kellenberger J 'The ICRC's response to internal displacement: strengths, challenges and constraint' *International Review of the Red Cross* 2009 Vol. 91 No. 875 at 475.

⁶²⁸ The Brookings Institution Refugee Policy Group Project on Internal Displacement 1995 as above at 20; Ahlbrandt 2004 as above at 27.

⁶²⁹ This willingness to operate in areas that are regarded as dangerous was noted in situations such as those of Somalia in 1990-91, when the UN absented itself and the ICRC assumed the main responsibility for delivering aid to the Somalis, including masses of internally displaced people.

⁶³⁰ Such as the Red Cross and Red Crescent.

⁶³¹ Kellenberger 2009 as above at 479.

⁶³² Plattner D 'The legal framework of international relief in situations of armed conflict' *Comite International De La Croix-Rouge* 26 March 1992 Meeting on conflict and international relief in contemporary African famines at 5.

assistance of the movement to victims of natural and technological disasters, to refugees and displaced people as well as those in health emergencies. It acts as the official representative of its member societies in the international field. The national Red Cross and Red Crescent Societies act as auxiliaries to the public authorities of their own countries in the humanitarian field and provide various services.⁶³³

Under the International federation of the Red Cross and Red Crescent Societies it becomes easy to disseminate aid and protection to internally displaced persons. The main reason for this is that in most countries there are already existing national branches of the Red Cross and Red Crescent. These become useful in times of crises because they contribute to matters such as early warning systems through information sharing, building national and local standby capacity, mobilizing local, national and international emergency relief, as well as promoting respect for humanitarian principles through dissemination and training. These societies also become more useful because they are already mandated to be in the vicinity of the humanitarian crises sometimes even before the crises begin. They are acquitted to local demands and practices, they also are capable of being in the area throughout all displacement phases until solutions are attained.⁶³⁴ Despite these achievements and the unique approaches that the ICRC has adopted to access the internally displaced whilst maintaining good relationships with governments, there are significant obstacles that the organization still faces because of its policies.⁶³⁵

3.4.3 Non governmental organizations (NGOs) and International organizations (IOs)

This sector is largely involved in the process of protecting and assisting IDPs. At an operational level, humanitarian NGOs usually work with IDPs in various areas worldwide.⁶³⁶ These operational humanitarian NGOs do not specifically aid only the IDP population, they generally aim to provide support as part of an overall relief effort or sometimes work as implementing partners for various UN agencies. There are various NGOs and IOs involved in the protection and assistance of IDPs. These include: The Norwegian

⁶³³ IASC 1999 as above 23; the services include provision of disaster relief, health as well as social programmes

⁶³⁴ IASC 1999 as above.

⁶³⁵ The ICRC operates under confidentiality policies and its neutral independent status; See The Brookings Institution Refugee Policy Group Project on Internal Displacement 1995 as above at 21.

⁶³⁶ The areas that have benefited from a wide array of NGO support, include, the Former Yugoslavia, the great lakes region, the Balkans, and the South America.

Refugee Council (NRC), Through its Internal displacement monitoring centre (IDMC), The Danish Refugee Council (DRC), the Citizenship Rights in Africa Initiative (CRAI), Minority Rights Group International (MRGI), Centre for Housing Rights, Women's Commission for Refugee Women and Children (WCRWC) as well as organizations such as CARE and IRIN.

It should be noted that in the process of offering protection, NGOs respond to the needs of IDPs and vulnerable people based on their mandates and expertise. They can be instrumental in the implementation of the collaborative approach of protecting IDPs. NGOs are better suited and located to collect and provide information on protection and assistance to IDPs. They are capable of operating in areas where the government or other international organizations are incapable of penetrating either because of location, or because of lack of trust from the locals, and the IDPs themselves.⁶³⁷ Their response capacity is better because they are usually already located in areas of crisis even before the crisis occurs, and they mostly employ local people who are conversant with among other things, the language, culture, and way of life of the people in the particular area.

The process of displacement marginalizes IDPs and takes away their voices. NGOs are a contributing factor to IDPs regaining their voices, as well as negotiating and making sure that IDPs participate and are consulted as far as integration programmes are concerned. NGOs are capable of providing data and information on IDPs which might not be easily available to other organizations. They are best informed about the conditions of IDPs because they have on ground and constant access to the group. They also have a unique way of accessing quantitative and qualitative data before and after displacement, hence their ability to provide detailed information. They can facilitate access to IDPs on behalf of international organizations as well as national human rights organizations (NHRIs).⁶³⁸ These visits, consultations and external relations between IDPs and NHRIs or international organizations might prove beneficial when it comes to including the needs of IDPs in facilitation of long term durable solutions as well as reintegration and development programmes.

⁶³⁷ Training on the protection of IDPs 'The collaborative response to situations of internal displacement' IDMC-Norwegian Refugee Council as above at 3; Beau C 'Protecting IDPs: what NGOs can do to support NHRIs' Global IDP Project of the Norwegian Refugee Council APF/Brookings-Bern Regional Workshop on National Human Rights Institutions and Internally Displaced Persons Colombo-Sri-Lanka 25th October 2005 at 1.

⁶³⁸ It should be noted that at times physical access is possible, but most IDPs communities have suffered grave human rights injustices and violations, mostly at the hands of governments and people in positions of authority. The access referred to here is psychological and social access, which might require trust and can easily be gained by NGOs who the displaced regard as neutral.

Lastly NGOs are capable of providing quasi-judicial mechanisms for IDPs. During times of displacement it is generally difficult for populations to access protection from judicial systems such as the police, and courts, sometimes even the NHRIs. NGOs provide the necessary external support needed under the circumstances. This might include the development of programmes providing legal advice and services to the vulnerable populations. NGOs have also played an essential role under circumstances of vulnerability by directing individual cases from IDPs to relevant NHRIs and eventually the international arena.⁶³⁹ They have also been instrumental in monitoring the implementation of the recommendations made accordingly.⁶⁴⁰

3.4.4 Peace keeping Operations and Integrated Missions

An additional sector that has contributed to the protection of internally displaced persons but has not been given credit is the peacekeeping sector. Peace keeping operations play an important role in protection of civilians including displaced persons. Security Council resolutions have provided for the protection of civilians generally and in specific country situations.⁶⁴¹ International and regional peacekeeping missions have been forefront in contributing to the protection of civilians as well as taking over specific protection duties in respect of displaced populations.⁶⁴²

The United Nations integrated peace missions have been a new approach to addressing complex conflicts and post conflict situations. Such an approach brings together within a specific country various components relating to political, military, human rights, gender, development and rule of law as well as humanitarian activities. The integrated peace keeping approach also is usually not led by a military commander, rather it is under the guidance of the United Nations Deputy or Special Representative of the Secretary General. Such missions have been deployed in Afghanistan, Burundi, Central African Republic, Cote d'Ivoire, the Democratic Republic of Congo and the Darfur region of Sudan among others.⁶⁴³

⁶³⁹ In Africa this might include the submission of cases to the African Commission, or sub-regional judicial bodies.

⁶⁴⁰ Beau C 2005 as above at 4.

⁶⁴¹ See Security Council Resolution 1265 (1999), as well as Resolution 1296 (2000) and Resolution 1674 (2006).

⁶⁴² IASC handbook for the protection of IDPs 2010 as above at 53.

⁶⁴³ IASC handbook for the protection of IDPs 2010 as above at 55.

When it comes to matters of internal displacement, where countries are suffering from massive displacements that result in or threaten to result in increased instability and serious protection concerns, peace keeping missions provide protection and assistance to displaced populations and facilitate durable solutions to the plight of the displaced. Peacekeeping missions have carried out protection roles through providing physical protection involving patrols around IDP camps,; improving the conditions in which humanitarian assistance is provided; establishing humanitarian corridors; assisting to facilitate safe, voluntary and sustainable return of refugees, and IDPs; contributing to the promotion and respect of human rights situation in the country and contributing to the efforts to bring those responsible for the serious human rights violations to justice.

Finally they have been responsible for assisting in strengthening the rule of law, the implementation of a transitional justice strategy and the development of a legal framework, after consultation with relevant authorities. Peace keeping operations have also been responsible for providing training to local police, armed forces, as well as non-state armed groups on matters of human rights, international humanitarian law, IDP protection, child protection and prevention and response to sexual and gender-based violence.⁶⁴⁴

There have been various peace-keeping missions with protection mandates that have inadvertently provided protection to civilians, especially IDPs. These include MONUC in the DRC, UNAMID in Darfur, UNAMIS in Sudan and UNAMIL in Liberia. In missions such as the one in DRC the United Nations Security Council made the protection of civilians a priority when the mandate was extended in December 2009.⁶⁴⁵ The renewed mandate allowed MONUC to use force to ensure protection of civilians including contributing to the improvement of the security conditions in which humanitarian assistance is provided, as well as assisting the voluntary return of refugees and IDPs. Such peace keeping forces have over the years participated in the work of the protection cluster as field teams. They have worked closely with humanitarian, protection and development actors to provide security. Their presence in areas of conflict have minimized or prevented attacks by armed groups on IDPs and humanitarian actors. They have further cooperated with humanitarian actors to develop

⁶⁴⁴ IASC handbook for the protection of IDPs 2010 as above.

⁶⁴⁵ See UN Security Council Resolution 1906 (2009).

contingency plans for possible displacement, resulting in the deployment of patrols in areas of risk.⁶⁴⁶

3.4.5 Global protection cluster working group (PCWG)

This is ideally the main forum for the operational coordination of ‘protection’ activities in humanitarian action at the global and local level. It is chaired by UNHCR and includes aspects of protection in most of the above discussed humanitarian, human rights as well as development and peace keeping agencies. The PCWG is responsible for setting up standards and policies on matters such as protection, identification and dissemination of good practices as well as supporting the development of strengthened protection capacity. The PCWG has over the years provided operational field support to humanitarian country teams in countries that have the cluster system as well as those that do not.

The PCWG has accomplished this by among other things, undertaking support missions to assist country teams in identifying protection gaps and developing strategies for response; providing guidance and support for mainstreaming human rights, age, gender and diversity and HIV/AIDS; supporting advocacy on protection; providing technical support and policy advice on protection issues; strengthening the protection capacity of humanitarian actors and other stakeholders, including national and local authorities as well as affected populations through the provision of training programmes; lastly it provides support in processes of addressing specific protection concerns in specific countries, and participates in resource mobilization for protection activities.⁶⁴⁷

Protection is a complex matter, to adequately facilitate it the PCWG’s responsibilities are two-fold, it is responsible for specific areas of responsibility, as well as focal point agencies. The PCWG is responsible for the coordination of following focal points under the global protection cluster: rule of law and justice (UNDP/OHCHR), prevention and response to gender-based violence (UNFPA/UNICEF), protection of children (UNICEF), mine action (UNIMAS), as well as land, housing and property rights (UN-HABITAT). The PCWG basically ensures that issues of protection are incorporated into the work of all clusters and

⁶⁴⁶ IASC handbook for the protection of IDPs 2010 as above at 56; In DRC the protection cluster together with MONUC have developed a training booklet for peacekeepers with guidance on specific measures to protect civilians at risk.

⁶⁴⁷ IASC handbook for the protection of IDPs 2010 as above at 46.

sectors through encouraging clusters or sectors to establish focal points for protection; offering technical expertise and advice to other cluster or sectors, as well as to individual agencies, organizations and governmental counterparts.

It has also provided support and facilitated participation in joint assessments and analyses, as well as supporting monitoring and evaluation exercises. Other inputs of the PCWG have included participation in meetings of other cluster or sectors and involvement of other cluster representatives in meetings of the protection cluster. It also convenes joint meetings or workshops among various clusters or sectors on themes of common concern as well as maintaining regular dialogue and sharing information necessary for promotion of protection activities.⁶⁴⁸ At the local level the above mentioned protection arrangements translate into protection clusters or sectors at the country level. This is most of the time achieved by establishing a protection working group at country level to ensure that gaps are bridged, and partnerships are built to improve protection response as well as accountability and effectiveness. Such cluster initiatives have been observed in counties like Uganda, Liberia, DRC and recently were applied Kenya to address internal displacement.

3.5 Conclusion

Internal displacement has emerged as one of the great tragedies of this century. In its wake it has left millions of people homeless and vulnerable trapped within their national borders. This has in turn created a challenge for the international community in terms of adopting ways to respond to a crisis that is essentially internal in nature. Numerous attempts to assist the displaced have been made, but in line with these attempts protection is also essential and has to be provided comprehensively by involving humanitarian, human rights as well as development agencies and local agents.⁶⁴⁹ The challenge lies in the harmonization of such attempts at an international level and how such attempts can be translated into implementation on the ground.

In the process of addressing these dilemmas direction and support was drawn from already existing international legal frameworks that were constituted with general norms that could

⁶⁴⁸ IASC handbook for the protection of IDPs 2010 as above at 47.

⁶⁴⁹ Annan K (Former UN Secretary General) 'Preface' to Deng and Cohen 1998 as above at 'introduction'.

offer protection to internally displaced populations. Such frameworks include international human rights law, international humanitarian law, refugee law as well as international criminal law. General norms found within these frameworks have been helpful but they lack practical efficacy as far as IDPs are concerned because they are not meant to specifically address situations of internal displacement. The consequence of such generality has resulted in IDPs falling through protection gaps when such norms have been applied.

To address the situation the newly appointed Representative of the UN Secretary General on the rights of IDPs facilitated the adoption of a set of Guiding Principles which among other things were a restatement of existing general norms of international law from which IDP protection could be deduced. These principles tailored these norms to the specific situations of internal displacement and expanded their application to explicitly address such conditions. The Guiding Principles have been instrumental in providing for assistance and protection of internally displaced persons worldwide. Even though they are only soft law, they have received international recognition and have been incorporated into regional and national laws thus attaining a binding character in some cases.

Despite such widely acclaimed usage, protection of internally displaced persons still remains a contentious issue. The principles have not been accepted without resistance. Their soft law nature has rendered them useless in conditions where states have been unwilling. The constant need to balance them with state sovereignty has meant less protection for the displaced they are meant to protect. There is also the problem of disseminating the principles, in most situations IDP communities and civil society have not been equipped to receive or raise awareness about the principles. The dissemination and practical application of the principles including their adoption has in most cases depended on the efforts of individuals as opposed to a system wide initiative, this has a negative implication in situations where there are no groups or individuals driven enough to support and initiate the adoption and usage of the principles.

Another raging issue is implementation of the principles, there is no specific institution set up to facilitate the implementation of the principles. Efforts that exist are ad hoc and sometimes highly uncoordinated. The collaborative response system was set up to address this lack of coordination by bringing together all institutions that deal with humanitarian and human rights crises including internal displacement. Such approach has been effective to an extent in

the sense that systems such as the IASC, the office of the ERC and the Inter Agency-Internal Displacement Division (IA-IDD) were set up within it and they have played a significant role in setting up guidance policies and increasing awareness over protection issues faced by IDPs.⁶⁵⁰

Yet the system has been ridden by absence of inconsistent coordination, unaccountability and lack of specific institutional responsibility giving rise to humanitarian gaps in protection of IDPs.⁶⁵¹ To bridge these gaps in humanitarian response an additional response mechanism in the form of cluster based approach has been introduced. Under this system sectoral responsibilities have been assigned to specific agencies.⁶⁵² The approach is aimed at ensuring a more predictable, effective and accountable inter-agency response for the protection of IDPs in key sectors where gaps have been identified.⁶⁵³ The approach also singles out protection as a key humanitarian activity in critical need of strengthened coordination and response. The Global protection cluster working group (PCWG) is the main forum set up to coordinate protection activities in all cross sectoral humanitarian activities and agencies.

At the same time there are numerous challenges this system still faces, such challenges consequently make comprehensive IDP protection problematic. The effective functionality of the cluster approach depends on interdependence and complementarity of all the agencies involved. This requires close cooperation, communication and accountability.⁶⁵⁴ If one of the relevant agencies fails to function, the effect is distributed throughout the whole system and some agencies will be forced to perform additional duties.⁶⁵⁵ Additionally there is misunderstanding and miscommunication in terms of interpretation of responsibilities between so many stakeholders to an extent that some responsibilities are lost in translation and cannot be reflected on the ground.⁶⁵⁶ The clusters have also in some cases failed to integrate local partners effectively leaving them to operate in isolation and fragmentation in certain countries thus minimizing their effectiveness.

⁶⁵⁰ McNamara 2005 as above at 69.

⁶⁵¹ IASC *Implementing the collaborative response to situations of internal displacement* September 2004 at 5.

⁶⁵² McNamara 2005 as above at 31.

⁶⁵³ There are sectors such as food and refugees that were well provided for and hence have less humanitarian response gaps

⁶⁵⁴ Bijleveld 2006 as above at 32.

⁶⁵⁵ Bijleveld 2006 as above.

⁶⁵⁶ Bijleveld 2006 as above.