

## **Chapter II**

### **Protection of Internally Displaced Persons under International Human Rights Instruments**

## CHAPTER - II

# PROTECTION OF INTERNALLY DISPLACED PERSONS UNDER INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

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### 1. OVERVIEW

In the last chapter an attempt was made to discuss the genesis of internal displacement. The chapter discussed various aspects related to displacement. It discussed the definition of IDPs and tried to distinguish IDPs and refugees. Further the chapter makes an attempt to discuss the causes of displacement. After having discussed the conceptual part of IDPS, in this foregoing chapter I will discuss the protection mechanism available to the IDPs in the International Human Rights Instruments.

The UN has facilitated domestic responses to internal displacement not only through the humanitarian assistance provided by its specialized agencies, but also through the identification of the rules of international law that governs all states' responses to displacement.<sup>1</sup> The first Representative of Secretary General, Dr. Francis Deng, was appointed in 1992 with a mandate to compile international standards composing the normative framework for addressing displacement. The challenge of meeting the needs of the internally displaced, it must be emphasized,

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1. These efforts have been strengthened since 2006 with the gradual implementation of a reform of the humanitarian system composed of three components: (1) Creation of a Central Emergency Relief Fund (CERF); (2) Improved support for UN resident and humanitarian coordinators; and (3) Introduction of the cluster approach by designating clusters with an agency responsible for leading the cluster at the international as well as the country levels and for acting as provider of last resort if no other organizations are available in given situations to undertake necessary cluster activities. The clusters and designated agencies are nutrition (UNICEF), water and sanitation (UNICEF), health (WHO), shelter in conflict for IDPs (UNHCR), protection in conflict for IDPs (UNHCR), logistics (WFP) telecoms (OCHA/UNICEF/NFP), early recovery (UNDP), and education (UNICEF). Cited from, *"Protecting Internally Displaced Persons: Manual for Law and Policy makers"* [www.brooklin.edu/projects/idps/Policies.index.aspx](http://www.brooklin.edu/projects/idps/Policies.index.aspx) visited on 15.12. 2008.

is both one of providing material assistance to the needy and of ensuring their protection and respect for their human rights.

Since the end of the Cold War, the number of people uprooted by conflict, ethnic strife and human rights violations has soared. In 2004 there were between 20-25 million internally displaced persons. By then the number of refugees- those who fled or had been pushed out of their own countries- had declined to 9.2 million from 9.6 million in 2003. This trend was already apparent in 2001 during the war in Afghanistan, when the number of internally displaced persons in the country stood at two million. However, in the same year only 2, 00,000 Afghans crossed into Pakistan as refugees. In 2003, during the war in Iraq, hundreds of thousands of displaced people remained at risk inside the country; only a very few small number were able to flee abroad. In some African humanitarian crises, there can be ten internally displaced persons for every refugee. Currently there are an estimated 1.4 million people displaced by conflict in Uganda, at least 1.5 million in the Democratic Republic of Congo and 6 million in Sudan. But only 30,000 displace people from Uganda have gone on to become refugees, while the number for the DRC and Sudan are 4, 69,000 and 7, 03,000 respectively.<sup>2</sup>

Despite the intensity and scope of internal displacement, there is no system of protection and assistance for the displaced people, "*no specific legal instrument covers the particular needs of the internally displaced and no specific institution is mandated to address those needs*". Within the perspective of the international community the crisis of the IDPs is that they fall within the domestic jurisdiction of the state and are therefore, not covered by the protection normally accorded to refugees, whereas, the fundamental rights and human needs of IDPs for international protection and assistance appear to be greater. The UNHCR has underlined the importance of establishing a legal framework that could be used by

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2. UNHCR; UNWRA; US Committee for Refugees (1990-2000); The Global IDP Project/Norwegian Refugee Council (2001-2004)

humanitarian organizations in their discussion with relevant authorities. The value of having a legal framework has become increasingly evident.<sup>3</sup>

The millions of people caught in the midst of violent conflict without the basic necessities of life present a political and strategic concern, not to mention a profound humanitarian and human rights problem, requiring international action. Conflict and massive displacement can disrupt stability, turn countries into breeding grounds for lawlessness and terrorism, and undermine regional and international security. Whether in the Great Lakes region of Africa, the Horn of Africa, West Africa, or the Balkans, conflict and displacement have spilled over borders, overwhelming neighboring countries with large numbers of refugees and even igniting regional wars. Unless addressed, situations of displacement can create political and economic turmoil in entire regions.<sup>4</sup>

IDPs are entitled to enjoy equally and without discrimination, the same rights and freedoms under international and national laws, as enjoyed by others in their country. International law does not specifically address the plight of IDPs, but this does not mean that they are not protected under the law. In fact, as citizens or habitual residents of their country, IDPs remain entitled to full and equal protection under the State's national law, which should be compatible with the State's obligations under international law.

## **2. THE ROLE OF UNITED NATIONS IN PROTECTION OF THE RIGHTS OF IDPs**

Human rights and humanitarian law may be seen as the principal source of existing protections for IDPs; along with refugee law, they may also be the foundations for articulating a basis for further protections. While these bodies of

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3. Sumit Sen. *“Exiled at home: The International Regime of Internally Displaced Persons”*; Indian Journal of International Law, Volume 38; 1998, Pp. 182-207, at p. 183

4. Kofi Annan, *“Preface,”* in Roberta Cohen and Francis M. Deng, *“Masses in Flight : the Global Crisis of Internal Displacement”*, Washington DC : The Brooking Institution 1998, at p. xix

law are conceptually distinct, they have influenced and informed each other and also contribute to a generous corpus of laws capable of application to the problems experienced by the IDPs.

Before we proceed with the system of examining different international legal framework it is essential here to examine different violations of human right which are faced by the displaced population. The most reported human rights abuses against IDPs are extra-judicial execution, torture, rape, sexual assault, abductions and forced recruitment. Those responsible for the violations are largely government and rebel forces. However, in some instances, civil members of the resident population are also to blame. While the greatest volume of human rights violations is reported out of the continent Africa, extremely poor human rights records in Burma and Colombia- to name just few countries-underline the fact that the IDPs are at high risk across the globe. The worst violations generally occur at the height of the fighting when perpetrators are more easily able to act with impunity. Women and children are widely recognized as the most vulnerable of IDPs. In camp, non-camp situation, they are victim to rape, sexual assault, forced recruitment and other form of forced labour. In many instances, vulnerable women and children are reported to be under to sell their goods and even their bodies in order to procure scarce food and other rations.<sup>5</sup>

The principal sources of the existing standards for protection, as well as the foundations for articulation for protection in all situations of internal displacement, including during armed conflict are, *International human rights law; International humanitarian law; and Refugee law embodied in the 1951 Convention.*

These international standards may be discussed as under;

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5. Internally Displaced People: A Global Survey, Norwegian Refugee Council, 2nd Edition, Earthscan Publications Ltd, 2002, U.K and U.S.A 2002 at p 6

## **A. Human Rights Law**

Unlike refugee law, which largely applies only when a border is crossed, or humanitarian law, which applies to situations of armed conflicts, human rights law proclaim broad guarantees for the fundamental rights of all human beings.

International human rights law, which consists of both customary and treaty law, guarantees these rights and obliges states to respect, protect and fulfill the human rights of all persons without discrimination of any kind, such as, on the grounds of age, gender, ethnic origin, language, religion, national or social origin, birth, sex or other status, including on the grounds of being or having been internally displaced.

The International Bill of Human Rights mainly comprises of Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>6</sup> The Universal Declaration of Human Rights, 1948 is the first human rights instrument developed by the United Nations. It provides the main civil, political, economic, social and cultural rights to which all persons are entitled without discrimination of any kind. The later two rights were built upon the UDHR and incorporate its principles in the two legally binding covenants. Although none of these instruments specifically address internal displacement, they do cover a range of risks that IDPs often face and reinforce protection for particular group of persons who tend to be disproportionately affected by displacement.

A Government that is responsible for or condones the large scale displacement of its own citizens violates its obligations under the Charter of

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6. The others include the 1966 First Optional Protocol and 1989 Second Optional Protocol to the International Convention on Civil and Political Rights (XLI) of ECOSOC and Resolution 1503 (XXVIII) of ECOSOC.

United Nations. Most specifically, under Article 55<sup>7</sup> and 56<sup>8</sup> of the Charter of United Nations, according to which, all member states of the UN are obliged to promote universal respect for, and observance of human right and fundamental freedom for all. Not only the Charter, the Declaration clearly spells out in its Preamble, the inherent dignity and equal and inalienable rights of all the members and is the foundation of freedom, justice and peace in the world.

Not only the UDHR and the other two covenants, but there are other selected international human rights instruments that definitely care for the protection and promotion of the welfare of the IDPs. These key international instruments are; *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984 (CAT)*. The Convention defines and prohibits torture under all circumstances. *International Convention on the Elimination of All Forms of Racial Discrimination, 1966 (CERD)*, prohibits racial discrimination when a person or group is treated differently. Next, the *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, defines genocide as an act committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group and declares it as a crime, whether committed during peace time or war. The *Convention on the Elimination of All Forms of Discrimination against Women, 1979 (CEDAW)*, sets a framework for national action for ensuring women enjoy an equal footing with man. *Convention*

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7. Article 55 of the Charter of the United Nations provides, "With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) Higher standard of living, full employment, and conditions of economic and social progress and development;
- (b) Solutions of international economic, social, health, and related problems and international cultural and educational co-operation; and
- (c) Universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."

8. Article 56 of the Charter of the United Nation provides, "All members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55".

*on the Rights of the Child, 1989 (CRC) together with Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, 2000 and Optional Protocol on the Involvement of Children in Armed Conflict, 2000, is a comprehensive code to protect the rights and best interest of children (under 18 years of age). The Convention obliges the State to take measures to ensure protection, care, psychological recovery and social reintegration of children affected by armed conflict, including unaccompanied or separated children. The Optional Protocol on the Involvement of Children in Armed Conflict prohibits compulsory recruitment and direct use in hostilities of persons less than 18 years of age. with); Declaration on the Protection of All Persons against Enforced Disappearances, 1992, defines and prohibits enforced disappearance under any circumstances and obliges states to prevent such acts, to prosecute and punish or extradite those responsible, and provide reparations for victims and their families. Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Form of Child Labour (ILO Convention No. 182), 1999, obliges states to take all necessary measures to eliminate the worst forms of child labour, such as, slavery, trafficking, prostitution or forced labour, including recruitment of children (under 18 years) for use in armed conflict. The International Convention on the Protection of All Migrant Workers and Members of their Families, 1990, provides a framework for the protection of the human rights of migrant workers during all stages of the migration process before departure, during transit and in the country of employment.*

**a) Prohibition of Discrimination**

A basic concept underlining international human rights law is the prohibition of discrimination. The idea underlying non-discrimination is that the rights and freedoms recognized by international human rights apply to everyone and that the state shall not make any distinction. *Article 2 of the UDHR affirms that;*

*“Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind, such as race, sex, language, religion, political or other opinion, national or social origin, property birth or other status.”*

Similar kind of provision—‘prohibition of discrimination’ has been spelt out in *Article 2(1) of the International Covenant of Civil and Political Rights* which says;

*“Each state party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present covenant without distinction of any kind, such as, race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”*

The international human right instrument of ‘prohibition of discrimination is to be read along *Article 7 of Universal Declaration of Human Rights*, which provides that;

*“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”*

Other international human right instruments prohibit discrimination and prescribe positive or special measure in favour of vulnerable groups. Although such measures result in different treatments they are not prohibited as being discriminatory; rather they are required by the basic principles that what is

different must be treated differentially, as long as they respond to genuine vulnerability of the groups.<sup>9</sup>

**b) Movement Related Rights**

Freedom of movement encompasses the right of everyone lawfully within a country to move freely and to choose one's place of residence within its borders as well as the right to leave one's own country and freely to return to it. This right is recognized in *Article 13* of the Universal Declaration of Human Rights;

*"Every one has the right to freedom of movement and residence within the borders of each State.*

*Everyone has the right to leave any country, including his own, and to return to his country."*

*Article 12* of the International Covenant on Civil and Political Right also recognizes this right. The Article provides;

- 1) Everyone lawfully within the territory of a state shall, within that territory, have the right to liberty of movement and freedom to choose his residence.*
- 2) Everyone shall be free to leave any country, including his own.*
- 3) The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.*
- 4) No one shall be arbitrarily deprived of the right to enter his own country.*

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9. Article 1(4) of the CERD and Article 4 of CEDAW

Movement related rights are subject to the constitutional provision, in such cases, limitations on free movement and choice of residence should be set out in domestic laws, which should be reviewed in times of displacement in order to ensure that they do not impose unreasonable burden on IDPs.

The Convention on the Right of Child also protects the right of child movement through *Article 10* of the Convention.

**c) Right to Family**

Family is protected in international human rights laws and every IDP has the right to respect of his or her family. Family being the fundamental unit of society, the widest possible protection and assistance should be accorded to the family. *Article 12* of the Universal Declaration on Human Rights affirms that-

*“No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, or to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks”*

*Article 16* of the Declaration further elaborates this article by providing that-

*“Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.*

*Marriage shall be entered into only with the free and full consent of the intending spouses.*

*The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”*

The two articles read together explain the fact that the family and marriage are inter-related. That is to say, right to family encompasses within its ambit the right to marry and to found a family. This right is further found in *Article 17* of the International Covenant on Civil and Political Right –

- 1) *No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, or to unlawful attacks on his honor and reputation.*
- 2) *Everyone has the right to protection of the law against such interference or attacks.*

This right is again supported by *Article 23* of the International Covenant on Civil and Political Rights which provides that

- 1) *The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.*
- 2) *The right of men and women of marriageable age to marry and to found a family shall be recognized.*
- 3) *No marriage shall be entered into without the free and full consent of the intending spouses.*
- 4) *State Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibility of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.*

*The Convention on Elimination of all Forms of Discrimination against Women, 1979* also provides an obligation on the state to eliminate discriminate against women in matters relating to marriage and family relation.<sup>10</sup>

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10. Article 16 of the *Convention on Elimination of all Forms of Discrimination Against Women, 1979*

**d) Right to Food**

Food is necessary for survival, its provision, therefore, is an essential precondition for the exercise of virtually all other human rights. *Article 11* of the Convention on Economic Social and Cultural International Covenant Rights affirms the right of everyone to an adequate standard of living for himself and his family including adequate food, clothing and housing and to the continuous improvement of living conditions.

The right is affirmed under *Article 14(h)* of the Convention on Elimination of Discrimination against Women;

*“To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communication.”*

The Convention on Right of Child also affirms the ‘right to food’ under *Article 27(1)*;

*“State parties recognize the right of every child to a standard of living adequate for the child’s physical, mental spiritual, moral and social development.”*

Displacement disrupts access to food by both separating those who supply them with food as well as those with the means of producing it (for e.g. productive land) and also separate those who purchase their food from both the income sources and the markets necessary to buy it. As a result, all IDPs, regardless of the causes of their displacement, tend not to enjoy access to their

traditional sources of food and therefore, are inherently vulnerable to deprivation of this most vital resource.<sup>11</sup>

**e) Right to Health**

Every person has the right to enjoy the highest attainable standard of physical and mental health without discrimination. *The Universal Declaration of Human Right* enunciates the right to health. This right extends to the IDPs. *Article 25(1)* of the Declaration provides;

*“Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services.”*

The Covenant on Economic Social and Cultural Rights under *Article 12(1)* also provides this right;

*“The states parties to the present covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.”*

The *Convention on Elimination of Racial Discrimination* provides the right to public health, medical care, social security and social service.<sup>12</sup> Similarly, the CEDAW also provides the right to protection of health and to safety in working conditions including the safeguarding of the function of reproduction.<sup>13</sup>

The trauma of displacement tends to aggravate pre-existing physical and mental conditions and also causes serious implications during displacement which can give rise to new health conditions. IDPs are at a high risk of attack, injury and

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11. *“Protecting Internally Displaced Persons: A Manual for Law and Policy Makers”*, Brooking Institution – University of Bern, at p. 107, cited from [www.brookin.edu/project](http://www.brookin.edu/project) visited on 11.12.2008

12. Article 5 (e) (iv) of the CERD

13. Article 11 (1) of the CEDAW

sexual assault in the course of flight, and they often find themselves isolated from family and without any access to medical care.

**f) Right to Recognition**

The core right of human right is the right to recognition everywhere, as a person before the law. *Article 6* of the *Universal Declaration of Human Rights* asserts;

*“Everyone has the right to recognition everywhere as a person before the law.”*

This right is further enunciated in *Article 16* of the International Covenant on Civil and Political Rights. This right is not subject to exceptions and is non-derogable in times of crisis and it must be respected without distinction of any kind.<sup>14</sup>

In accordance with this principle, state should take affirmative steps to ensure that IDPs have sufficient documents to be able to establish their identities and enjoy their human rights and legal entitlements on the same basis as other citizens. Every person is entitled to registration and name immediately at birth. *Article 24 (2)* of the International Covenant on Civil and Political Rights affirms this right;

*“Every child shall be registered immediately after birth and shall have a name.”*

**g) Right to Property**

The International Instruments also extend to providing the right to property. The Declaration on Human Rights affirms under *Article 17* that;

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14. Article 2 of UDHR and Article 2(1) of ICCPR

- 1) *Everyone has the right to own property alone as well as in association with others.*
- 2) *No one shall be arbitrarily deprived of his property.*

The right to own property also encloses within its ambit, the right to adequate housing and to freedom from arbitrary or unlawful interference with the home, including the right to legal security of the term.<sup>15</sup>

Many times, countries experiencing conflict and displacement have significant resource constraints. In this situation the state, with very limited resources, might not have the capacity to ensure full realization of certain economic, social and cultural rights of the IDPs. But the state can not use 'lack of resources' as an excuse to do nothing to ensure the protection of IDPs. The state is under an obligation to take steps to the optimum of its available resources with the objective of achieving progressively the full rights of IDPs.

## **B. International Humanitarian Law**

International humanitarian law (IHA) is a system of legal rules specially conceived for the implementation in the event of armed clashes, but it does not supersede the other system of international rules protecting the individuals in situations of armed conflicts, which means that it also contains principle which are applicable to the displaced population, such as, the principles which state that those who are not participating directly in hostilities, should be treated humanely. Important to International Humanitarian Law is the distinction between the civilian population, persons who do not take a direct part in hostilities and combatants. The parties to a conflict must, at all times, distinguish between the civilians and combatants, in order to spare the civilian population and civilian property.

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15. Article 12 and 25 of UDHR, Article 17 of ICCPR and Article 11 of ICESCR

International law does not explicitly provide for right of IDPs to humanitarian assistance, except in situations of international armed conflicts, where civilians in occupied territories have the right to directly select and receive humanitarian assistance from international humanitarian organizations.

The core instruments of international humanitarian law are the four *Geneva Conventions of 1949*<sup>16</sup> and their two *Additional Protocols of 1977*.<sup>17</sup> The four Geneva Conventions are particularly relevant because they prohibit violence to life and/or persons. While other articles deal with international armed conflicts, *Article 3 is common to all the four Geneva Conventions, which categorically-*

*“Prohibit violence to life and person, the taking of hostages and outrages upon personal dignity of persons in situations of armed conflict not of an international character occurring in the territory of one of the high-contracting parties”.*<sup>18</sup>

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16. The Four Geneva Conventions are;

- (a) *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949;*
- (b) *Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949;*
- (c) *Geneva Convention Relative to the Treatment of Prisoners of War, 1949; and*
- (d) *Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949.*

17. *Protocol Additional to the Geneva Convention of 12th August 1949 and Protocol Relating to the Protection of Victims of Non-International Armed Conflicts* was adopted on 8th June 1977.

18. *Common Article 3 to the Four Geneva Convention states*, “In the 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:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria. To this end the following acts are and shall remain prohibited at any time and in any place whatsoever, with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

The Article assures a due process requirement and imposes obligations to provide the sick and wounded with medical care. The obligation to apply Article 3 is absolute for “each party to the conflict and is not contingent on reciprocity.”

The specific need for protection of IDPs during civil conflict is recognized by *Article 17 (1)* of the *1977 Second Protocol to the Geneva Conventions*, which underlies that-

*“The displacement of the civil population shall not be ordered for reasons related to the conflict unless the security of the civilian involved or imperative military reasons so demand, in which case, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, safety and nutrition.”*

*Article 17 (2)* states;

*“Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”<sup>19</sup>*

We find that the internal displacement occurs often in situations of armed conflict. International Humanitarian Law is especially important for the protection of IDPs and other affected populations. Indeed, in many instances, respect for international humanitarian law would prevent the displacement of civilians. If displacement does occur, IDPs, like all other civilians, are entitled to protection and assistance as required. Parties to a conflict have a duty to allow humanitarian

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(d) 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 people.

(2)The wounded and the sick shall be collected and cared for.

(3)The parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present convention.

(4)The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

19. Article 17, Protocol II, *Geneva Convention of 1977*

access and assistance to civilian population in need. In addition to the express prohibition of displacement, the rules of international humanitarian law that are intended to spare civilians from the effects of hostilities help prevent forced displacement. It is often the violation of these rules that cause civilians to flee their homes and become displaced.<sup>20</sup>

These wordings make it clear that Article 17 prohibits, as a general rule, the forced displacement or movement of civilians during internal hostilities. The forced displacement of civilians is prohibited, unless the parties to the conflict were to show that the security of the populations or a meticulous assessment of the military circumstances so demand. Clearly imperative reasons can not be justified by political motives, such as the movement of population in order to exercise more effective control over a decedent ethnic group.

In situation of armed conflict, both involuntary transfer of civilian population within their own countries and deportations across international borders are prohibited except when justified by considerations of their own security or imperative military reasons, and evacuated persons must be permitted to return to their homes as soon as hostilities in the area have ceased.<sup>21</sup>

*Article 49* of the Geneva Convention further states that any removal must be carried out in satisfactory conditions of hygiene, health, nutrition and accommodation. It provides that-

*“The occupying power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene,*

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20. *The Hand Book for the Internally Displaced Persons, Provisional Release, 2007*, Chapter Two, The Legal Framework, at p. 25

21. Article 49 of the Geneva Convention

*health, safety and nutrition, and that members of the same family are not separated.”*

The Convention contains a general prohibition on individual or mass forcible transfers both within the occupied territory and beyond its borders, either into the territory of the occupying power or as is more often the cases in practice, into third states. In addition to prohibiting displacement and laying down protection to be granted to displaced civilians, international humanitarian law requires state parties to the Geneva Conventions to criminalize the violation of the prohibition under their national law and to search for and prosecute persons alleged to have violated it.<sup>22</sup>

In armed conflict settings, arbitrary displacement is most often a consequence of violations of international humanitarian law, including disregard for the obligation to all times. Hence, the need is to distinguish between civilians and combatants and the prohibition of directing attacks against civilians, of indiscriminate attacks, and of spreading terror among the civilian population.

In all situations of armed conflict, parties to the conflict are entitled to carry out controls of humanitarian relief, but must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and provided without adverse distinction.<sup>23</sup>

However, the existing international standard humanitarian law has certain shortcomings. According to the protocol, this provision applies only to persons displaced because of armed conflict, and only to states parties to it.

### **C. Refugee Law**

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22. E. Gillard, *“The Role of International Humanitarian Law in the Protection of Internally Displaced Persons”*, Refugee Survey Quarterly, Volume 24 (3), p. 38, 39

23. Article 23 and 59 of the Fourth Geneva Convention; Article 70 of the First Additional Protocol to the Geneva Convention; Article 18 of the Second Additional Protocol to the Geneva Convention

The international refugee regime came into existence in the aftermath of the First World War, when governments were confronted by massive numbers of homeless people devastated by the war and the break up of multi-ethnic empires, mainly in Europe and Asia. Millions of uprooted people rendered stateless by their governments, without national passports and therefore, without identification or protection, wandered outside their home countries searching for refuge. Fearing huge flows of displaced people, European governments rushed to erect protective barriers, closed borders and expelled thousands of individuals across national frontiers.<sup>24</sup>

. The United Nations Convention relating to the Status of Refugees was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons held at Geneva in July 1951. The Convention opened for accession on 28 July 1951 and entered into force on 22<sup>nd</sup> April 1954. Today, the 1951 Convention remains the most prominent instrument in international refugee law. Besides defining the term 'refugee' and providing for their rights and obligations as well as laying down minimum standards for the treatment of persons who are found to qualify for such status, the Convention was confined by a date line and a geographical limitation. This date line referred to the application of the Convention to "...events occurring before 1 January 1951...." And the geographical limitation generally referred to events occurring in Europe prior to January 1951.<sup>25</sup>

With time and during the late 50s and early 60s new refugee situations emerged across the globe necessitated a widening of both the temporal and geographical scope of the 1951 Convention. This was broadly recognized by Governments and achieved through the conclusion of the 1967 Protocol to the

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24. Dr. N. Subramanya, *"Human Rights and Refugees"*, APH Publishing Corporation, New Delhi, Pp. 1-12. Please see, V.Vijaykumar, *"Refugees and Human Rights, International and National Experiences"* in Human Rights in India, C.J. Nirmal Edition, Oxford University Press 1999.

25. Sumbul Rizvi, *"International Dimensions of Refugee Law"*, ISIL Yearbook of Internal Humanitarian and Refugee Law, Volume 4, 2004, pp 103-115

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Convention which was approved by the United Nations General Assembly in 1966 and opened for accession on 31<sup>st</sup> January 1967 and came into force in October 1967<sup>26</sup>.

India is not a party to these legal instruments relating to refugees i.e. not signatory to the 1951 Convention or the 1967 Protocol, neither it has passed any domestic legislation on the subject of Refugees.

The archetypical example of forced migration is that of the refugee, who according to the *UN Convention Relating to the Status of Refugees, 1951*, must be outside his or her country of nationality and unable or unwilling due to well-founded fear of persecution for any one of the five reasons; race, religion, nationality, membership of a social group, or political opinion. It is the definition that has been accepted and endorsed by 135 member states and that guides the work of the UNHCR.

The narrow conventional definition, combined with the lack of international institutional control over the interpretation and application of the refugee law instrument, provides a possible basis for states to restrict their own obligations. In the industrial states, the inclination is to consider would-be immigrants, including asylum-seekers, as threat to stability and security. Ambiguities or contradictions arise when persons who are within UNHCR's competence for international protection only receive protection by states on a discretionary basis or are denied any form of humanitarian status. There are 'persons of concern' to UNHCR but they do not necessarily fall under the provisions of the 1951 Convention and 1967 Protocol. Other persons in need of international protection or assistance are not covered by either the existing legal instruments or the expanded institutional arrangements. Plight across an international border can occur from the effects of anarchy, the devastation of war, famine or other disasters where no direct persecution was involved. While some

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26. *Ibid.*

refugees from war are covered by the 1951 Convention, as they are also fleeing persecution, others are not necessarily covered because they seek to escape mainly from the indiscriminate dangers of attack by fire and bombardment. IDPs, who are disqualified from conventional status and from UNHCR's statutory mandate because they do not cross a state boundary, equal or outnumber refugees. The concept of 'persecution' itself remains without an explicit or generally accepted definition in international law.<sup>27</sup>

Further, the difficulties as well as the complexities inherent in the circumstances and developments described above, the use of terms become more nuanced in the practice of states and international organizations. For example, the expression 'displaced persons' is found with several meanings, but for UNHCR it refers to internal displacement within a state. Hence, the general expression currently favoured is 'persons considered to be of concern to UNHCR'.<sup>28</sup>

The dynamics of displacement have changed greatly over the half century of UNHCR's existence. So too, have international responses to the problem of forced displacement. The UNHCR has frequently been called upon to address the needs of persons who have been forced to flee their homes. To address the contemporary challenges facing refugees and other displaced people, UNHCR has formed new kind of strategic partnership, with human rights organizations, military forces, the private sector and range of other actors. It has been involved in a number of activities which might previously have been considered beyond its mandate; environment protection, mine clearance, community development

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27. Macalister Peter Smith, "*Refugees and Displaced Persons in a Troubled World: Human Needs, Human Rights and the Role of the United Nations High Commissioner for Refugees*"; *Indian Journal of International Law*, vol. 37, 1997, Pp. 633-657 at p. 638

28. *Ibid.*

projects and anti-racism campaigns – to name but a few. UNHCR helps refugees and displaced people to find what are indeed durable.<sup>29</sup>

Since comparison exists between IDPs and refugees, certain analogy may be drawn from refugee laws for the protection of IDPs. For instance;

- *Right not to be returned forcibly to areas where the life or the freedom of the displaced persons could be threatened.*<sup>30</sup>
- *Right not to be identified as displaced person if that would result in discrimination.*<sup>31</sup>
- *The freedom of movement especially in and out of the camp or the shelter for the displaced.*<sup>32</sup>
- *Right to be provided with adequate documentation.*<sup>33</sup>
- *Right to benefit from measures towards family unification.*<sup>34</sup>
- *The right to voluntary return to the original area of residence.*<sup>35</sup>

There has been persistent concern both from UNHCR itself and by government and other agencies, over the possible contradiction in trying to help the two groups simultaneously. According to the UNHCR and the government concerned, helping people in situ, in their own country could complicate another vital branch of the agency's work; helping refugees to seek asylum. With refugees, UNHCR basically defends their legal right to asylum and refoulement. With IDPs, they are in their own countries and should enjoy the same rights as other citizen, but there are no international legal agreements to help.

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29. The Changing Dynamics of Displacement, in *"The State of World Refugees: Human Displacement in the New Millennium"*, Oxford University Press. Cited from, [www.unhcr.org/cgi-bin/texts](http://www.unhcr.org/cgi-bin/texts). Visited on 6-8-2007

30. Article 33 of the Refugee Convention 1951

31. Article 3 of the Refugee Convention 1951

32. Article 26 of the Refugee Convention 1951

33. Article 27 of the Refugee Convention 1951

34. Article 17 of the Refugee Convention 1951

35. Article 19 of the Refugee Convention 1951

In March 2000, noting the continued lack of protection and assistance for large number of IDPs as well as a renewed international interest in finding solutions, UNHCR drafted a position paper on its role with IDPs. Among the key points of the paper were,<sup>36</sup>

- *UNHCR has an interest in the protection and welfare of persons who have been displaced by persecution, situations of general violence, conflict or massive violations of human rights, because of their similarities to refugees in terms of the causes and consequences of their displacement and their humanitarian needs.*
- *The interest places upon UNHCR responsibility to;*
  - a) *Advocate on behalf of the internally displaced;*
  - b) *Mobilize support for them;*
  - c) *Strengthen its capacity to respond to their problems; and*
  - d) *Take the lead to protect and assist them in certain situations.*
- *UNHCR's involvement in a specific operation will require;*
  - a) *A request or authorization from Secretary General or a competent principal organ of the UN;*
  - b) *Consent of the state concerned and where applicable, other entities in a conflict;*
  - c) *Access to the affected population;*
  - d) *Adequate security for staff of UNHCR and implementing partners;*
  - e) *Clear lines of responsibility and accountability with the ability to intervene directly on protection matters; and*
  - f) *Adequate resources and capacity.*
- *Recognizing the fundamental importance of co-operation and collaboration, UNHCR will work closely with the emergency relief coordinator (Office for the Coordinator of Humanitarian Affairs)*

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36. *Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees.* [www.unhcr.org](http://www.unhcr.org). Visited on 15th Feb 2007 at p. 1

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*and relevant organizations concerned and to improve the mechanism for allocating responsibilities.*

Though it has committed to 'greater engagement' with the internally displaced and to greater cooperation with an array of other organizations and actors, UNHCR has insisted that such engagement must remain "*within the parameters of its principles and prerequisites for operational involvement*". In terms of possible involvement with development-displaced populations, the UNHCR position seems fairly clear that this could only happen if such populations had been displaced by persecution, general violence, conflict, or massive violations of human rights. In other words, if it involved, "those, who, had they crossed an international frontier, would have had a claim to international protection".<sup>37</sup>

Where UNHCR does assume responsibility for IDPs, its involvement is comprehensive, comprising both protection and assistance. 'Humanitarian action', the High commissioner has affirmed, '*is not only about the delivery of relief but first and foremost about ensuring the basic human rights and security of the victims on all sides of conflict*'.

UNHCR's greater involvement with the IDPs has raised a serious concern for the agency. There are fears that its involvement will change the character of the agency and detract from its primary responsibility of helping refugees in countries of asylum. Additional problems have also been raised; the shortage of resources, the lack of legal framework, the difficulty of protecting persons in a situation of armed conflict, the high risk to staff and, most importantly, the conflict that invariably arises between protecting people in their countries of origin and simultaneously defending their rights to leave their country and seek

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37. *Ibid.*

asylum from persecution. Further problems have arisen when UNHCR has sought to address the problems of both refugees and IDPs in the same country.<sup>38</sup>

Nevertheless, UNHCR has made it increasingly clear that it may not always be reasonable or feasible to make distinction between the IDPs and refugee movements. As pointed out to its Executive Committee the UNHCR in its recent report has observed thus;

*“To the extent that refugees flows and internal displacement have the same causes, it makes little sense to deal only with the trans-frontier aspects of coerced population movements, either in responding to immediate humanitarian needs or in seeking solutions. From the vantage point of UNHCR, as the international agency responsible for refugees, it is clearly preferable, where possible, to operate the need for people to leave their country, and thus to become refugees in order to find safety and to obtain vital humanitarian assistance”.*<sup>39</sup>

UNHCR has an interest in the protection and welfare of persons who have been displaced by persecution, situations of general violence, conflict or massive violations of human rights; in other words, all those, who, had they crossed an international frontier, would be entitled to claim international protection. This interest arises from the similarity between such IDPs and refugees in terms of the causes and consequences of their displacement and their humanitarian needs.

While UNHCR’s statute makes no reference to IDPs, it recognizes that the High commissioner may, in addition to the work with refugees, ‘engage in such activities as the General Assembly may determine, within the limits of the

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38. Report of the Representative of the Secretary General, Francis M. Deng, submitted pursuant to the commission on Human Rights Resolutions 1993/95 and 1994/68, Commission on Human rights, Fifty-First Session. E/CN.4/1995/50, at p. 40

39. *Ibid*

resources placed at its disposals'. Based on this article and over a period of several decades, a series of UN General Assembly resolution have acknowledged UNHCR's particular humanitarian expertise and encouraged its involvement in situations of internal displacement.<sup>40</sup>

The interest, arising from the office's humanitarian mandate, places upon UNHCR a responsibility to:

- *Advocate on behalf of the IDPs;*
- *Mobilize support for them;*
- *Strengthen its capacity to respond to their problems, and*
- *Take the lead to protect and assist them in certain situations.*

In view of the growing linkages between refugee problems and internal displacement, UNHCR is committed to greater engagement with the IDPs within the parameters of its principles and pre-requisites for operational involvement. In specific situations of internal displacement, they will analyze the needs, opportunities and constraints and assess the impact of its proposed involvement in the light of relevant considerations and conditions. The pros and cons of involvement will be assured carefully in each case, keeping in mind the importance of promoting effective humanitarian action to address the problem and the 'value added' which UNHCR could bring to bear on it.<sup>41</sup>

The internally displaced persons require not only humanitarian assistance but also protection against further displacement and also protection of their human rights while they are displaced and following their return. The fact is that whenever, UNHCR is called upon to extend protection and assistance to IDPs, internationally recognized human rights and humanitarian law is involved. The office also takes cognizance of the relevant national laws.

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40. Article 9 of the United Nation Statute of the Office of UN High Commissioner for Refugees

41. *Supra.* note 36

Within the UN agency, UNHCR has taken on the broadest assistance and protection role for the IDPs. Although its mandate does not include the IDPs, UNHCR has increasingly become involved in situations of internal displacement at the request of Secretary General or the General Assembly. The criteria provide that it will assume prime responsibility in situations where there is a 'direct link' with its basic activities for refugees, in particular, in those situations in which returning refugees are mingled with IDPs and also where there is a 'significant risk' that the IDPs will become a refugee problem. Although its criteria are broad, UNHCR does not become involved in all situations of internal displacement.<sup>42</sup>

UNHCR and its partners who were struggling to cope with the massive population displacements unleashed by the ethnic conflict that followed the end of the cold war, no longer restricted to the care and protection of refugees who had crossed international borders, they are now much more widely engaged in the dangerous and uncertain task of trying to assist and protect displaced people within their countries of origin usually in situations of continuing violence and political upheaval. These developments compelled UNHCR and its allied agencies to reassess their priorities and capacities. They renewed their efforts to seek durable solutions to displacement crisis through better links between humanitarian relief and longer term development and peace building effort. With the majority of new forcibly uprooted populations remaining within their countries of origin, more attention was focused on assisting and protecting the internally displaced.<sup>43</sup>

UNHCR's long experience with refugees and its comprehensive mandate, encompassing both protection and assistance, makes it an obvious candidate for dealing with the IDPs for e.g. In 2004, following a visit to camps for IDPs in

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42. *Supra*. note 38, at p. 39

43. "Current Dynamics of Displacement" in *The State of World Refugees: Human Displacement in The New Millennium*, Oxford University Press, [www.unhcr.org/cgi-bin/texts](http://www.unhcr.org/cgi-bin/texts), visited on 6-8-2007 at p 9.

Darfur, the UK's Secretary of State for International Development, *Hilary Benn*, posed the question; "Is it really sensible that we have different systems for dealing with people fleeing their homes dependent on whether they happen to have crossed an international border?" "I have my doubts." In 2005 in the United States, a congressionally mandated bipartisan task force on the United Nations recommended 'redefining' the mandate of UNHCR to ensure the delivery of aid to refugees, IDPs and those affected by natural disaster. Similarly, a report of the US Institute of peace called upon the United Nations to designate UNHCR the lead agency for IDPs.<sup>44</sup>

Currently UNHCR is engaged in helping some 5 million IDPs, one-fifth of the world's total. This number includes million people in Africa, the continent most ravaged by conflict and displacement. Those in favour of a 'UNHCR Solution' also argue that current institutional arrangements; namely the collaborative approach under the Emergency Relief Coordinator have failed in protecting especially the IDPs. As no other agency has the background or experience when it comes to uprooted populations, they see UNHCR as the only realistic alternative for dealing with the problem.<sup>45</sup>

UNHCR's parameter of operational involvement in a specific situation will be based on a thorough assessment of the situation and fulfillment of certain operational pre-requisites.<sup>46</sup> The assessment will analyze the risks and the

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44. "Internally Displaced Persons", in "The State of World Refugees: Human Displacement in the New Millennium", Oxford University Press, cited from [www.unhcr.org/cgi-bin/texts](http://www.unhcr.org/cgi-bin/texts) visited on 6-8-2007 at p 166

45. *Ibid.*

46. "Internally Displaced Persons: The Role of the United Nations High Commissioner for Refugees", cited from, [www.unhcr.org](http://www.unhcr.org), visited on 15th February 2007, at p. 7-8

Parameters of Operational Movements will include:

- i) *Impact on the non-political and humanitarian nature of UNHCR's mandate:* Internal displacement is usually most acute in situations of unresolved and prolonged conflict. These are also situations of gross and systematic violations of human rights and humanitarian law, of high security risk for humanitarian staff, and manipulation of

opportunities as well as the possible impact of the proposed involvement. Further, the nature of operational involvement of UNHCR<sup>47</sup> will vary, depending upon

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- humanitarian aid and actors for political purposes. In making its decision UNHCR will seek to ensure that its involvement does not compromise its humanitarian mandate.
- ii) *Impact on refugee protection and the institution of asylum:* There can be both positive and negative fall-out of UNHCR's involvement. Countries of asylum may be more inclined to maintain their asylum policies if something is done to alleviate the suffering of the internally displaced, reduce their compulsion to seek asylum and create conditions conducive to return. On the other hand, UNHCR's activities for internally displaced may be (mis)interpreted as obviating the need for international protection and asylum. UNHCR's involvement should seek to improve the situation of the internally displaced while upholding their right to seek asylum.
  - iii) *Impact on internal displacement:* To what extent will UNHCR's involvement actually improve the protection situation and solutions possibilities of the internally displaced? This will depend not only on UNHCR's skills and resources but also on the presence and support of other organizations, and most importantly, on concurrent political action to resolve the conflict. As an organization committed to the pursuit of solutions, UNHCR will give preference to engagement in operations where political efforts to resolve displacement are underway or being clearly contemplated.
  - iv) *Relevance of UNHCR's experience and expertise:* UNHCR's "value added" lies in its protection and solutions skills. It will be necessary in any given situation to measure their relevance in relation to the needs of the victims and to consider how they would complement or compare with the mandates and expertise of other agencies present or contemplating presence.

**47. Ibid. Nature of Operational Involvement:**

The nature and degree of UNHCR's involvement will vary, depending upon circumstances and the skills and activities that are needed at different stages of the problem. UNHCR may take the lead in providing protection and assistance with the co-operation of other agencies, or it may play a subsidiary role, depending upon:

1. *The phase of the displacement:* In the early or pre-displacement phase, when tensions are heightened but there has been no significant displacement, the main focus will be on defusing tension, promoting appropriate national laws and policies, building awareness, training, and preparedness measures. At this stage, UNHCR's role may be only catalytic or supportive of other actors and organizations that have clear responsibility for conflict prevention and promotion of human rights. During displacement, UNHCR's skills of providing protection and assistance will be most relevant, and in such situations UNHCR can be expected to take the lead. Once displacement has stopped or slowed down and solutions can be implemented, given its expertise in humanitarian solutions, UNHCR can again take the lead in promoting return or settlement elsewhere.
2. *Relationship to refugee solutions:* By virtue of its mandate, UNHCR has the responsibility to promote solutions to refugee problems, including the voluntary repatriation and reintegration of refugees. In situations where the successful reintegration of returnees requires addressing the needs of the internally displaced. UNHCR will be ready to take the lead because a comprehensive strategy to address displacement on both

various circumstances and also the skills and activities that are needed at different stages of the problem. UNHCR may take the lead in providing protection and assistance with the cooperation of other agencies, as it may play a subsidiary role.

UNHCR has been concerned with the discontinuity between emergency relief and long-term development assistance. Displacement has many a times caused poverty and causes wide discrepancies in living standards, which turns out to be a fertile ground for conflict and displacement. Refugees and IDPs often suffer greater, from the lack of resources to re-establish a sustainable livelihood, when they return to their homes in post-conflict situation. This in turn provokes the recurrence of conflict and renewed displacement of people. Hence, UNHCR is therefore working with the World Bank, UN agencies and other key donor governments to bridge the institutional and funding gaps between emergency relief and longer term development efforts.

In 2005, OCHA's Internal Displacement Division proposed that UNHCR carve out areas of responsibility for which it could be relied upon in emergencies. By assuming responsibility for specific functions, it could help make the overall UN response more predictable and the collaborative approach work better. UNHCR's greater involvement, moreover, would not diminish other agencies' roles and they would have to work together, just as they do now, when protecting refugees. In support of an enlarged role, the positive consequences of UNHCR's

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sides of the border is often the best way of promoting a lasting solution. As in the case of refugee reintegration, UNHCR will seek to work closely with development organization in an effort to close the gap between relief and rehabilitation.

3. *The presence and activities of other organizations:* At each phase of the displacement it will be important to assess whether the needs of the displaced are being adequately met by others, and whether it is necessary for UNHCR to address a gap relevant to its expertise. The political and operational environment, including security considerations may limit UNHCR's presence and activities. UNHCR's operational experience has shown that in certain situations it is difficult to draw a meaningful distinction between the internally displaced and other vulnerable war-affected population in the same area. In such cases it may be necessary, in addressing the needs of the internally displaced, to adopt a border, more comprehensive approach towards all those affected in the community, for instance through co-operation and co-ordination with other agencies.

involvement have been pointed out. Countries of asylum might be more inclined to maintain their asylum policies if something is being done to alleviate the suffering of the IDPs, reduce their need to seek asylum and create conditions conducive to their return.<sup>48</sup>

Lastly, UNHCR's 12 September 2005 agreement to assume lead responsibility, for protection, camp management and emergency shelter for IDPs enclosed by the Inter-Agency Standing Committee, makes a milestone in the evolution of UN policy on this issue. Beginning in January 2006, UNHCR will take on this role in two or three countries, if it performs effectively, calls to expand its mandate will no doubt continue, and so will the debate on the best way to deal institutionally with the IDPs.

### **3. UNITED NATION AND OTHER INSTITUTIONAL ARRANGEMENTS FOR THE PROTECTION OF INTERNALLY DISPLACED PERSONS**

Within the United Nation framework, there are few agencies and offices that have authority to serve IDPs, refugees and migrants. The agencies can be classified under two heads, namely, agencies specifically for IDPs, United Nations specialized agencies.

#### **A. Agencies Specifically For IDPs**

In the international scenario, a multitude of organization exists to offer protection to IDPs and help them with aid for reintegration and development. The agencies which have been specifically dedicated to the protection of IDPs may be discussed as under:

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48. *Supra.* note 44 at p. 167

**a) The Representative of the Secretary General**

In recent years, the international community has become increasingly aware of the plight of the IDPs and is taking effective steps to address their needs. In 1992, on the request of the Commission on Human Rights, the Secretary-General of the United Nations appointed a Representative on IDPs to study the causes of internal displacement, the status of the IDPs in international law, the extent of the coverage accorded to them within existing international institutional arrangements and ways in which their protection and assistance could be improved, including through dialogue with Government and other pertinent actors.

The mandate of the Representative of the Secretary General on IDPs derives from resolution 1992/73 of 5<sup>th</sup> March 1992 of the Commission on Human Rights, approved by the Economic and Social Council in its decision 1992/243 of 20<sup>th</sup> July 1992, the Commission, “*deeply disturbed by the serious problem that the large number of internally displaced persons throughout the world and their suffering is creating for the international community*”, recognized that “*internally displaced persons are in need of relief and of protection*”<sup>49</sup>

Taking note of the analytical report, the Commission requested the Secretary-General, “to designate a representative to seek again views and information from all Governments on the human rights issues related internally displaced persons, including an examination of existing international human rights, humanitarian and refugee law and standards and their applicability to the protection of and relief assistance to IDPs.” The Commission encouraged the Secretary-General “to seek also views and information from the specialized

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49. Note by the Secretary-General, Annex: comprehensive Study prepared by Mr. Francis. M. Deng, Representative of the Secretary General on the Human Rights Issues Related to Internally Displaced Persons, UN. E/ CN.4/ 1993/35 at p 5

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agencies, relevant United Nations organs, regional intergovernmental and non-governmental organizations and experts in all regions on these issues.”<sup>50</sup>

In accordance with his mandate, thus interpreted, the Representative of the Secretary-General (RSG) formulated and sent a questionnaire to all Governments, organizations and agencies specified in the resolution, requiring information on the pertinent themes of the stipulated study, drawing attention to the analytical report and in particular to a number of issues. In the course of carrying out his mandate, the RSG encountered a certain number of issues which demonstrated the gaps in the United Nations system in so far as responsibility for IDPs is concerned and, therefore, the importance of the Commission’s initiative in this area. Among these issues are scope of the mandate, the alternative models from which the Commission might choose a mechanism for its future work in this area, and the need for a comprehensive multi-faceted approach to the problems of the internally displaced.<sup>51</sup>

Since the appointment of the Representative, his role as defined by the various resolutions of the Commission on Human Rights and the General Assembly, as well as by the guidance of the Secretary-General himself has evolved into one of a catalyst, a liaison, and an advocate for the displaced. During intervening period the RSG has compiled and analyzed legal norms relevant to the protection of IDPs from arbitrary displacement. Not only this, the RSG has undertaken field study in different part of the country.

In his 1998 report to the Commission on Human rights, the RSG submitted a compilation and analysis of legal norms relevant to the protection of IDPs from arbitrary displacement. This analysis reiterates;

*“Forced removal from one’s home and home area and relocation to another area of the country may be based on legitimate grounds*

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50. *Ibid.* at p. 5

51. *Ibid.* at p. 8

*and undertaken in accordance with international law. In other cases, they maybe based on legitimate grounds and undertaken in accordance with international law. In other cases they may not be compatible with international law and will be arbitrary.”<sup>52</sup>*

- *First, the eviction or displacement of persons is unlawful if it is based on grounds not permissible under international law. This aspect of the right not to be arbitrarily displaced implicitly derives from the rights to freedom of movement and residence, to the inviolability of the home and to housing.*
- *Second, a violation might occur if minimum procedural guarantees are not complied with.*
- *Third, the manner in which an eviction is carried out may violate other human rights such as personal liberty, freedom from torture, inhuman and degrading treatment or even the right to life.*
- *Finally, the effects of evictions and displacement may have a negative impact on the enjoyment of other human rights, in which case the State is required to take measures to respond to the concerns that arise.*

This report formed the basis for the provision in the Guiding Principles on protection against displacement. The office of the RSG is limited—the Representative is a voluntary position with a few resources and staff at its disposal.

The Representative of the Secretary General has focused the activities of his mandate on developing appropriate normative and institutional framework for the protection and assistance of IDPs, working in close collaboration with a team

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52. Report by Francis M. Deng, Representative of the Secretary General, 1998, “*Internally Displaced Persons, Compilation and Analysis of Legal Norms: Legal Aspects Relating to the Protection Against Arbitrary Displacement*”, submitted pursuant to Commission on Human Rights Resolution 1997/39, E/CN.4/1998/53/Add.1, February 11, 1998

of international legal experts, the Representative prepared a “*Compilation and Analysis of Legal Norms*” relevant to the needs and rights of IDPs and to the corresponding duties and obligations of states and the international community for their protection and assistance. The Compilation and Analysis was submitted to the Commission on Human Rights by the RSG in 1996. The RSG has focused the activities of his mandate on developing appropriate normative and institutional frameworks for the protection and assistance of the internally displaced, undertaking country missions in an ongoing dialogue with governments and others concerned, and promoting a systemic international response to the plight of IDPs.

**b) The Internal Displacement Unit**

A second IDP focused body within the UN system is even newer one. The IDP Unit was set up in the Office for the Co-ordination of Humanitarian Affairs (OCHA) in 2002. Housed within OCHA and staffed with IDP advisors seconded by IASC member agencies, the new IDP Unit has a four fold mission statement:

- *Using the Guiding Principles as an overall framework, the unit will identify and draw attention to gaps in response to internal displacement, particularly protection, and upon its own initiative, or the request of involved actors, will seek to provide recommendations and guidance.*
- *This unit will seek to bring increased attention and greater understanding to the needs of the displaced, especially women and children, by issuing reports, studies and providing field-focused training.*
- *Recognizing sovereignty as a form of responsibility, the unit will seek to use all force to engage governments and non-state actors to provide access and physical security to the displaced.*

- *The unit will call on UN agencies, inter-governmental and non-governmental organizations as well as the displaced themselves, to enhance their commitment and accountability to a credible institutional response to internal displacement.*<sup>53</sup>

### **c) Collaborative Approach**

In an effort to develop a more effective response to the assistance and protection needs of the IDPs, the Inter-Agency Standing Committee (IASC), chaired by the Emergency Relief Coordinator (ERC), created an Inter-Agency Task Force on IDPs in 1992. The IASC strengthened this decision by approving the recommendations of its Task Force that the Emergency Relief Coordinator serve as the reference point in the U.N. system to receive request for assistance and protection on the actual or developing situations of IDPs that require a coordinated international response.

In December 1994, the IASC agreed that the Emergency Relief Coordinator should establish sufficient capacity within Department of Humanitarian Affairs (DHA) to allow him effectively to serve as reference point, and also called upon all IASC member organizations to establish within their organizations sufficient capacity on matters relating to IDPs.

A second IDP-focused body within the collaborative framework was the decision of the Secretary-General, to establish the Inter-Agency Internal Displacement Division (IADD) in July 2004 within the Office for Coordination of Humanitarian Affairs (OCHA) with the sole purpose of achieving that international organizations collaborate to adequately address the need of IDPs.

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53. UN Internal Memorandum, "IDPs Units Mission Statement and 2002 Work Plan" February 26, 2002 quoted in W. Courtland Robinson: "Risks and Rights: The Causes, consequences, and Challenges of Development-Induced Displacement"; The Brookings Institution, SAIS Project on Internal Displacement, May 2003, [www.brooklin.edu](http://www.brooklin.edu), visited on 31.12.2007, at p. 38

Under the 'collaborative approach' all the United Nation agencies are expected to work together, coordinated by the UN Emergency Relief Coordinator at Headquarters and Resident/Humanitarian Coordinators in the field.

At the global level, the Emergency Relief Coordinator, who also heads the Office for the Coordinator of Humanitarian Assistance, is responsible for providing support to the field, including negotiating access to IDPs, advocating for both assistance and protection, and mobilizing resources. The UN Resident Coordinator/Humanitarian Coordinator (RC/HC) works closely with, and provides leadership to the UN Country Team, which includes representative of the UN humanitarian agencies present in the affected country. The RC/HC would thus be able to call upon cluster leads for support as required.<sup>54</sup>

However, most UN and independent evaluations have found the collaborative approach inadequate to the task and difficult to implement. Critics charge that UN agencies regularly resist coordination and that there is no real centre of responsibility for the displaced in the field.

The collaborative approach has been found inadequate to the task. The UN agencies regularly resist coordination and that there is no real head of responsibility for the displaced in the field. There is also a truth in the statement when it is said that there is 'lack of predictability', since the different agencies basically pick and choose the situations in which they react on the basis of their mandates, resources and interests.

For instance, most agencies rushed to South and South-East Asia to help those displaced by the 2004 Tsunami, but only a limited international presence

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54. J. Egeland, "Towards a Stronger Humanitarian Response System", *Forced Migration Review*, vol. 4, at p. 4-5

could be mobilized for northern Uganda, where tens of thousands of children were at risk each night, of abduction or maiming.<sup>55</sup>

## **B. United Nation Specialized Agencies**

Within the United Nations other institutional arrangement exist which offer assistance and protection needs that best address the needs of IDPs. In this regard we can study the following:

### **a) International Committee of the Red Cross**

The Committee was founded in 1863, and it has a presence in over eighty countries, acting 'to help all victims of war and internal violence', attempting to ensure implementation of humanitarian rules restricting armed violence. In the field, the ICRC performs a variety of tasks, which include providing protection and assistance to civilian populations, conducting health-related activities, visiting prisoners of war and security detainees, and restoring contact between family members separated by war.

ICRC makes no distinction between assistance and protection activities. While relief and development agencies often consider that protection responsibilities could jeopardize their assistance role when faced with a situation of internal displacement in an armed conflict, the ICRC invokes the principles and rules of humanitarian law. At the same time, the ICRC's independence and insistence on confidentiality sometimes complicate its ability to work with other agencies in the field. This is because it has its own rules of operation or because the U.N. operation are not always perceived as neutral, in which situation the ICRC may wish to distance itself to ensure respect for its neutrality. ICRC may also be precluded from involvement when internal displacement is unrelated to

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55. "Internally Displaced Persons" in *The State of World Refugees: Human Displacement in The New Millennium*, Oxford University Press, at p. 39, cited from [www.unhcr.org/cgi-bin/texts](http://www.unhcr.org/cgi-bin/texts), visited on 6-8-2007 at p 168

warfare and when its conditions for involvement are not met. In recent years, the ICRC has endeavored to find ways of working in closer consultation with other agencies while maintaining its independence.<sup>56</sup>

ICRC independence and insistence on confidentiality sometimes complicate its ability to work with other agencies in the field. The enormity of humanitarian emergencies makes collaborative work essential. Collaboration is not always easy, however, either because ICRC has its own rule of operation or because the United Nations operations are not always perceived natural, in which case ICRC may wish to distance itself to ensure respect for its independence and utility. ICRC may also be precluded from involvement when internal displacement is unrelated to warfare and when its conditions for involvement are not met. In such cases it needs to continue its exploration of ways it can cooperate with United Nation agencies and NGOs that can provide additional support in the area of protection<sup>57</sup>.

When faced with a situation of internal displacement in an armed conflict, the ICRC invokes the principles and rules of humanitarian law. The Guiding Principles could nonetheless serve a useful purpose in contexts where humanitarian law does not make provision for certain needs<sup>58</sup>.

#### **b) International Organization for Migration**

Established in 1951, IOM helps governments and civil society through rapid humanitarian responses to sudden migration flows, post-emergency return and re-integration programs. The Organization has been involved with IDPs in rapid analysis of migratory flows, in organizing transport for IDPs and assistance

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56. Report of the Representative of the Secretary General, Francis M. Deng, submitted pursuant to the Commission on Human Rights Resolutions 1993/95 and 1994/68, Commission on Human Rights, Fifty-first session. E/CN.4/1995/50 at p. 41

57. *Ibid.* at p. 42

58. Jean Phillippe Lavoyer, " Guiding Principles on Internal Displacement", International Review of the Red Cross, No 324, September 1998, pp 467-480, at p 469

during re-settlement and re-integration. To IOM, migrants include both, those who migrate internally and internationally.

On the basis of this mandate, the organization has concluded with numerous members and observer states' cooperation agreements that stipulate the involvement of IOM in internal migration and the provision of migration assistance or protection to internally displaced persons. In this connection, a number of pertinent issues need to be addressed, for instance

- *The organization of the registration of IDPs requires that effective safeguards be developed against potential abuse.*
- *Transporting people back to war-torn countries or moving ethnic groups from one area of a country to other raises the question of whether the movements are voluntary and whether conditions are sufficiently safe to warrant return.*
- *Guidelines may well be needed to address such collaborative approach undertaken with human rights bodies to ensure that protection is ensured during the return and resettlement process.*<sup>59</sup>

In May 2000, IOM Director *General Brunson Mc Kinley* stated that, "the human rights of migrants' deserve greater attention. Trafficked migrants are routinely exploited, mistreated or even killed. Migrant workers often find themselves without protection or recourse, either from their own governments or in the country where they are working. IOM is dedicated to assisting migrants in distress."<sup>60</sup>

#### **c) United Nations Children's Fund**

Besides this, first created in 1946, UNICEF works for the protection of children's rights to help meet their basic needs and help them reach their full

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59. *Supra note, 56*

60. IOM Mission Statement, ([www.iom.int](http://www.iom.int)) visited on 12-2-2008

potential. While its primary concern remains assistance, UNICEF offers a good example of relief agency that has recognized the internal connection between assistance and protection. It is to be remembered that UNICEF's commitment is to children and women as a category of people in need. Where other institutions have been given a mandate to assist and protect a group of people as a whole, UNICEF takes the position that they – and not UNICEF should bear the responsibility to aid all persons, including women and children. This policy should be taken into account in deciding whether assisting and protecting IDPs should become the mandate of a single agency.<sup>61</sup>

#### **d) United Nations Development Programme**

Next is the UN's principal provider of development, technical assistance, advocacy and grant support. UNDP in particular has become increasingly involved in programs involving the resettlement and reintegration of internally displaced population. Its role with IDPs also extends to emergency situations, where the Resident Representative normally serves as the Resident Coordinator of the entire UN system. There has been some questioning within UNDP of the involvement.<sup>62</sup>

Though progress is being made, substantial effort is still required to gain clarity regarding the dual role of UNDP officials as resident representative and resident coordinators. Certainly there has been some questioning within UNDP of the involvement of their senior officials in the field with issues other than development ones. The proliferation of internal conflicts, the existence of collapsed and reforming states, and the occurrence of famine and drought, however, have generated a multiplicity of emergency situations in the developing

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61. W. Courtland Robinson, *"Risks and Rights: The Causes, consequences, and Challenges of Development-Induced Displacement"*, The Brookings Institution, SAIS Project on Internal Displacement. May 2003, at p. 44, cited from [www.brookings.edu/fp/projects/idp/gp\\_page.htm](http://www.brookings.edu/fp/projects/idp/gp_page.htm), visited on 15.12.2007

62. *Ibid.*

world that the United Nations system is increasingly called upon to address. Inevitably, UNDP officials in the field have been requested to help out.

**e) World Food Program**

The World Food Program has been providing food aid to IDPs for the past thirty years. While the essential condition for the provision of WFP is the food insecurity of the displaced people. Displacement does not automatically make a person food insecure, but it can be a major factor, either causing or contributing to food insecurity. Where WFP is providing food and WHO monitors the health situation and health care delivery system in member states, WHO becomes involved in a situation of internal displacement when the health services have been disrupted, in such case WHO assumes its responsibility for providing or assisting in the provision of health services to these persons.

The Rome based food agency's Emergency Operations assisted more than 14 million people displaced by conflict and sudden natural disasters while its Protracted Relief and Recovery operations targeted 5 million IDPs, for a total of 19 million people and identified issues that it deemed important<sup>63</sup>.

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63. World Food Program, *Reaching People in Situations of Displacement* (Rome: World Food Program), March 2000 at p 4, 6-10. Following a review of its experiences with IDPs, WFP identified five issues that it deemed most important:

*The importance of understanding the particular needs of IDPs in different situations and the special concerns of displaced women.* Distinct IDPs needs are particularly evident during initial displacement and the resettlement/ return phases and, with respect to protection, during all stages of displacement. IDP needs are influenced by: the causes of displacement (conflict/ natural disaster/ development); the phases of displacement; previous livelihood strategies; new coping mechanisms; location in urban areas; and the length and number of times they have been displaced.

*Targeting of food assistance on the basis of food insecurity.* The essential condition for the provision of WFP food is the food insecurity of the displaced people. Displacement does not automatically make a person food – insecure but it can be a major factor either causing or contributing to food insecurity. While IDPs do not have particular needs, it is not appropriate to target them specifically as a group for food assistance.....when displacement is accompanied by ethnic tension; it is preferable not to distinguish between IDPs and other conflict affected people. *Complementary inputs are essential for the effective use of food and promoting self-reliance.* The essential needs of IDPs go beyond food..... Other inputs required by IDPs include safe drinking water, shelter, health, sanitation, agricultural inputs, education and income-generating activities.

**f) High-Commissioner for Human Rights**

The Office of the High Commissioner for Human Rights (OHCHR) has been tasked with coordinating human rights promotion and protection to IDPs. The High Commissioner is also in a position to raise specific cases of internal displacement in his dialogues with governments. The

Commissioner ensures that the recommendations made by the representatives and supporters of the Commission are carried out, and also the Commission supports the work of the Representative of the Secretary General on IDPs.

Under his authority, field officers have already been deployed and actively looking into human rights issues of internal displacement in Rwanda; in Burundi, a preventive presence has been established. The High Commissioner has given special importance to strengthening the ability of the Centre for Human rights and the Commission on Human rights to react rapidly to human rights emergencies.

**g) World Health Organization**

WHO is concerned with the health situation and health care delivery systems in member States, which are requested to provide data on a set of indicators for the country as a whole as well as for the different geographical areas, and for male, female, urban rural and priority population groups. WHO becomes involved in a situation of internal displacement when health services

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*Assistance – protection linkages require greater attention.* Protection covers the prevention of physical violence against IDPs as well as ensuring respect for their rights. More systematic promotion is needed of the broad rights of the displaced and other vulnerable population groups, through joint statements with partner agencies on humanitarian principles; advocating for access to food and related inputs, freedom of movement and property right, and reporting when rights are abused.

*Assisting and protecting the internally displaced, especially during recovery, reintegration, and resettlement, requires effective collaboration with partners.* While the displaced often face some of the most difficult and hazardous situation, their care is often insufficient because of gaps in the division of responsibilities. Much work remains in ensuring a more predictable delineation of responsibilities for IDP assistance and protection among the humanitarian actors and between these actors and development agencies

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have been disrupted, or when a specific group of IDPs has been identified as “special” by the United Nations, in which case WHO assumes its responsibility for providing or assisting in the provision of health services to these persons.

#### **4. LIMITATIONS IN THE EXISTING MECHANISM**

Though there is a myriad of provisions in International Human Rights and Humanitarian law and in Refugee law, but some are applicable in certain circumstances and not in others. There are numerous gaps existing in the international legal regime as well as institutional protection regime.

For example, the Human Rights Law can be derogated from, in times of public emergency or internal strife, which coincides with the times of greatest need for protecting the displaced. It is also not binding on insurgent forces, and humanitarian law too applies only to armed conflicts situations, and not to lesser situation of civil strife in which many IDPs are caught up. The shortcomings of the scope are also evident from the fact that some states have failed to ratify these key human rights treaties, the Geneva Convention and its Protocol, and hence, the member states are not bound by their provisions unless they are reflective of customary law.

There are numerous gaps existing to address identifiable protection needs of the IDPs. No particular norm exists for the application of the general principle of law to IDPs. The right not be arbitrarily displaced is not expressly provided for in any general human rights instrument and can only be inferred from a number of provision. It can be inferred from the general provision contained in the human right treaties. These rights, however, does not provide adequate and comprehensive coverage for all instances of arbitrary displacement, as they do not provide for the circumstances under which displacement is permissible.

Another specific situation where IDPs have no protection is, the law relating to the documentation for the displaced and also for restitution or

compensation for property lost during displacement. In all the instruments discussed above, there is no explicit protection of IDPs. Governments are also not explicitly obliged to accept international humanitarian assistance.

The provisions of existing human rights and humanitarian law are not explicit in the rights applicable to IDPs and for this reason consider it essential to articulate protection more appropriately tailored to the needs of the IDPs. In particular, they have recommended that principles be explicitly enunciated to ensure safe access by displaced persons to essential facilities and commodities necessary for survival. To require that conscription practices comply with domestic and international legal standards and in particular, international law relating to due process and non-discrimination.

For ICRC there are limits for its operation. ICRC can not become involved in situations below the threshold of armed conflict and they are denied entry into conflict areas. ICRC focused exclusively on the right of displaced persons within its area of competence, and did not address the question of the possible need for standards concerning all displaced persons, including those displaced for reasons other than armed conflict.

It is to be hoped that a strengthened collaborative arrangements can be made, where it will be possible to address the vacuum of responsibility that often exists in cases of internal displacement and that the existing gap in meeting the protection and assistance concerns will be more adequately addressed. There are steps that could be taken within the United Nations system to enhance the capacity of the agency.

The inadequacy of existing law and the need for stipulating new standards that would incorporate and add to the provisions of international instruments pertaining to the internally displaced persons was underscored by the reply of the Under-Secretary-General for Humanitarian Affairs, who wrote:

*“It is evident that there are gaps in the legal protection of the various categories of displaced persons and that the current situation is not satisfactory as far as basic legal protection of displaced persons is concerned. It would consequently be desirable to undertake a more detailed review of available legislation, national and international, and on that basis, consider whether new instruments are required to improve the safety and well being of the victims of displacement.”<sup>64</sup>*

The Refugee Policy Group suggested specific areas for which new standards would be *desirable*. “While we strongly urge that greater attention be paid to better implementation of existing standards of human right and humanitarian law, and that a compilation of existing standards are necessary, the standards or guidelines should contain express prohibitions against the forcible of persons on political, racial, religious or ethnic grounds, as well as stringent restrictions on the displacement of persons in wartime. They should elaborate fully on the right to food and focus on obstruction of people’s ability to produce or find food as well as interference with humanitarian assistance. Special provisions should be included for vulnerable groups such as women, children, the elderly and the handicapped. No derogation from these standards, even in time of emergency, should be permissible. The standards should apply not only to governments, but also to insurgent groups under whose control large numbers of displaced persons are often located”<sup>65</sup>

Lastly *Roberta Cohen*, has suggested that “the need to design a more predictable and effective international system for ‘*internal refugees*’ is critical because the overall international humanitarian response system is a thoroughly inequitable one. UNHCR attends to the needs of the world’s 9.2 million refugees,

64. Note by the Secretary-General, Annex: Comprehensive Study prepared by Mr. Francis M. Deng, Representative of the Secretary General on the Human Rights Issues Related to Internally Displaced Persons, UN. E/ CN.4/ 1993/35 at p 11

65. *Ibid.* at p. 21

and a dedicated international treaty, the 1951 Convention Relating to the Status of Refugees, set forth their rights. In contrast, no organization has a global mandate to protect and assist the much larger number of IDPs, who are in far more desperate straits, when their own governments fail to do so.”<sup>66</sup>

## 5. THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT

The above loopholes in the existing mechanisms show the way for amending it to frame a new comprehensive legal document for the IDPs that would define the rights of IDPs and the obligations of governments towards them. Many, thus, began appealing for an international document that would define the rights of IDPs.

Development of a legal framework for IDPs became one of the main tasks taken on by the Representative of the Secretary General on IDPs, Francis Deng; following his appointment in 1992. In collaboration with a team of international legal experts, the Representative has prepared two studies analyzing existing legal standards pertaining to internal displacement. The first was the *Compilation and Analysis of Legal Standards*<sup>67</sup> applicable to persons once displaced and the other was the *Right not to be Arbitrarily Displaced*<sup>68</sup>. The latter document consolidates the numerous relevant norms which are at present too dispersed and diffuse to be effective in ensuring adequate protection and assistance for the internally displaced. At the same time it clarifies grey areas and gaps in the law that have been identified.

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66. Roberta Cohen, “Strengthening Protection of IDPs, The UN’s Role”, *Georgetown Journal of International Affairs*, Winter/Spring 2006, pp 101-109 at p 102

67. U.N. DOC. No. E/CN.4/1996/52/Add.2, 19 April 1996. In this resolution the commission requested the Secretary General to publish the *Compilation* and to disseminate it widely. This was reiterated in resolution 1997/39 of 11 April 1997, in which the Commission called for the rapid publication of the compilation in all of the United Nations working languages.

68. E.CN.4/1998/53/Add.2, Annex, 11 February 1998

Whether the rights of IDPs should be set forth in a Declaration, Convention or Principle was a further difficult decision. Principles were decided upon for three reasons. First, there was no support for a legally binding treaty given the sensitivity surrounding the sovereignty issue. Second, treaty making could take decades, whereas a document was needed urgently. Third, sufficient international law already existed to protect IDPs. What was needed was a restatement of the law tailored to the explicit concerns of IDPs.<sup>69</sup>

According to *Walter Kalin*, the Guiding Principles are based on the following conceptual ideas:<sup>70</sup>

- *Although internally displaced persons have departed from their home, unlike refugees they have not left the country of which they are citizens. As such they remain entitled to enjoy the full range of human rights as well as those guarantees of international humanitarian law which are applicable in a given situation.*
- *Internally displaced persons experience a very special; factual situation, and therefore, have specific needs. Like other vulnerable groups such as children, or the wounded and the sick for whom special provisions are made in international humanitarian law and refugee law, internally displaced persons do not constitute a distinct legal category. However, they have many special needs and the point of departure for the Guiding Principles has been the identification of these specific needs.*
- *It is necessary to restate in more detail those legal provisions which respond to the needs of the IDPs and to spell them out in*

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69. Cohen Roberta and Francis M. Deng, "The Genesis and the Challenges" in "Ten years of the Guiding Principles", GP10, Forced Migration Review, December 2008 at p. 4

70. Walter Kalin, "The Guiding Principles on Internal Displacement", *International Journal of Refugee Law*, Vol 10 at pp 557-560 at p 557

*order to facilitate their application in situations of internal displacement.*

The Guiding Principles are based on International Human Rights Law and international humanitarian law, and restate in greater details, guarantees relevant for the displaced that are implicit in the more abstract prescription of these bodies of law.

### **A. The Content of Guiding Principles**

The Guiding Principles consist of an introduction followed by the phases of displacement (before, during and after) as well as a particular section concerning the rights and obligations of humanitarian aid providers. The phases of displacement in the Guiding Principles are divided into five categories;

- *General Principles,*
- *Principles relating to protection from arbitrary displacement,*
- *Principles relating to protection during displacement,*
- *Principles relating to humanitarian assistance, and*
- *Principles relating to return or resettlement.*

The Guiding Principles are principally addressed to governments, taking at their point of departure, a positive notion of sovereignty not as a barrier to the realization of rights but as affirmative duty.<sup>71</sup>

#### **a) General Principles**

As set out in the Guiding Principles, National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction. The Principle provides that;

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71. Report of the Representative of the Secretary General on Internally Displaced Persons, Mr. Francis M Deng which reports on the results of four major studies on the collaborative approach, U.N.Doc.E.CN.4/2004/77, Para. 61 and 66

*“National authorities have the primary duty and responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction”.*<sup>72</sup>

The Guiding Principles call for observance of the rights they articulate not solely by governments but by ‘all authorities’, groups and persons irrespective of their legal status.<sup>73</sup> Thus, by their terms, the Guiding Principles address rebel groups (sometimes euphemistically called ‘non-state actors’), humanitarian organizations, civil society, and any other persons and entities that might impact upon the IDPs. While international norms have traditionally been considered to be binding only upon governments, this approach is consistent with humanitarian law, which binds rebel armies in addition to state forces in situations of armed conflict.<sup>74</sup>

#### **b) Principles for Protection from Displacement**

The Principles go on to ensure that individuals and groups are not to be subjected to involuntary displacement.<sup>75</sup> The Principle affirms that;

*“Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.”*

This principle ensures respect for relevant rules of International Humanitarian Law in armed conflict settings as well as the imposition of criminal responsibility for arbitrary displacement that amounts to a war crime or crime against humanity. States should also take positive steps to prevent foreseeable

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72. Principle 3 of the Guiding Principles on Internal Displacement

73. Principle 2 of the Guiding Principles on Internal Displacement

74. Walter Kalin, “*Guiding Principles on Internal Displacement – Annotations*”, American Society of International Law, Studies in Transnational Legal Policy, No 32 (1998) at p 9, cited from <http://www.asil.org/study-32.pdf> visited on 23-7-08

75. Principle 6 of the Guiding Principles on Internal Displacement

displacement and mitigate particular populations existing vulnerability to displacement.

The fact is that not all kinds of displacement are prohibited. What is prohibited is arbitrary displacement and *Principle 7* of Guiding Principles provides the guidelines to be adopted for avoiding arbitrary displacement. The Principle provides procedural protections that must be guaranteed, including decision-making and enforcement by appropriate authorities, involvement of and consultation with those who would be affected.

Further *Principle 9* of Guiding Principles, cast an obligation on the State to protect its citizens against arbitrary displacement. The Principle provides that;

*“States are under a particular obligation to protect against the displacement of indigenous people, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.”*

### **c) Rights of Displaced Persons**

Under the Guiding Principles the displaced persons enjoy the full range of rights enjoyed by civilians in Humanitarian law and by every human being in human rights law. These include the right to life, integrity and dignity of the person, non discrimination recognition as a person before the law, freedom from arbitrary detention, liberty of movement, respect for family life, an adequate standard of living (including access to basic humanitarian needs), medical care, access to legal remedies, possession of property, freedom of expression, freedom of religion, participation in public life and education.<sup>76</sup>

In several instances, the Guiding Principles specify how generally expressed rights apply in situations of displacement. These should be of particular

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76. Section III, Principles Relating to Protection during Displacement and Principles 10-23 of the Guiding Principles on Internal Displacement

interest to those designing and assessing domestic policies on internal displacement. The Guiding Principles provide for special consideration of the needs of women and children (as well as for other especially vulnerable groups, such as the elderly and disabled. Section III of the Guiding Principles in fact clarifies the implementation of civil and political rights vis-a-vis economic, social and cultural rights in the case of IDPs.

**d) Rights and Obligations of Humanitarian Organizations:**

The Guiding Principles also lay out a number of rights and obligations of humanitarian organizations.<sup>77</sup> The principles stress the point that the primary duty and responsibility for providing humanitarian assistance to IDPs lies with national authorities. In this regard it is provided that-

*“The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities”.*<sup>78</sup>

Humanitarian aid comes to represent an important means of fulfilling these rights during displacement with the goal of eventually encouraging the assumption or resumption of their self-sufficient exercise. The Organization involved in providing assistance should give due regard to protection of human right of IDPs. In this regard *Principle 27 of the Guiding Principles provides thus;*

- 1) International humanitarian organizations and other appropriate actors when providing assistance should give due regard to the protection needs and human rights of internally displaced person and take appropriate measures in this regard. In so doing, these organizations and actors should respect relevant international standards and codes of conduct.*

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77. Section IV, Principles Relating to Humanitarian Assistance; Principles 24-27 of the Guiding Principles on Internal Displacement

78. Principle 25(1) of the Guiding Principles on Internal Displacement

- 2) *The preceding paragraph is without prejudice to the protection responsibilities of international organizations mandated for this purpose, whose services may be offered or requested by states.*

As of now only two international agencies, the ICRC and UNHCR have the skills and experience to undertake a full range of protection activities for IDPs. NGOs should also be encouraged to provide protection by following the example of the International Rescue Committee, Peace Brigades International and others who have pioneered in this area. The greater engagement of international organization and NGO staff on the ground could create the “critical mass” needed to form protection coalitions and mobile protection teams in addition to creating a protection standby force for emergencies, steps often recommended but not yet implemented.<sup>79</sup>

**e) Resettlement and Reintegration of Internally Displaced Person**

In their final section, the Guiding Principle addresses return resettlement and reintegration and emphasize the rights of IDPs to return voluntarily and safely to their homes or to resettle voluntarily in another part of the country.<sup>80</sup> Principle 28 in this regard affirms the right of IDPS to;

*“...return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavor to facilitate the reintegration of returned or resettled internally displaced persons...”*

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79. Simon Bagshaw and Diane Paul, “*Protect or Neglect: Towards a More Effective United Nations Approach to the Protection of Internally Displaced Persons*”, The Brooking-SAIS Project on Internal Displacement and OCHA, November 2004, at p 10

80. Section V, Principles Relating to Return, Resettlement and Reintegration and Principles 28-30 of the Guiding Principles of Internal Displacement

The right to return or resettle is not expressly stated in any particular human rights instrument, this interpretation is to be taken as a necessary corollary of the right to free movement which is enumerated in other international instruments.

*Principle 29* of the Guiding Principles provides that competent authorities also have “the duty and responsibility to assist returned and/or resettled internally displaced persons to recover, to the extent possible, their property and possession.” This is coupled with another duty that is if such recovery of property is not possible then the competent authorities are to provide appropriate compensation or other form of reparation.

Moreover, although the displaced have the right to return, *Principle 28* of the Guiding Principles carefully specifies that they must not be forced to do so, particularly (but not only) when their safety is imperiled. The issue of the voluntariness of return or resettlement is recurrent in protracted displacement situations around the world. In many places, governments and insurgent groups have ceded to the temptation to use the return or resettlement of displaced persons as a political tool. For e.g. in India there have been instances where Indian officials pressured Muslims displaced after riots in Ahmadabad to return home notwithstanding an ongoing atmosphere of intimidation in the city to foster electoral advantage.<sup>81</sup>

#### **f) Evaluation of Guiding Principles on Internal Displacement**

There is evidence that the Guiding Principles have acquired universal acceptance and probably developed to soft law norms. The UN agencies, regional organizations, NGOs and a growing number of governments have begun to cite them and to use them as the basis for policies, laws, and programs for the IDPs.

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81. David Fisher, “*Epilogue: International Law on the Internally Displaced Persons*” in “*Internal Displacement in South Asia, The Relevance of Guiding Principles*”, Paula Banarjee, Sabyasachi Basu Ray Chaudhury, Samir Kumar Das Edition, Sage Publications, New Delhi 110017, 2005 at p 326.

The Principles have not successfully addressed the plight of IDPs whose number continues to rise. The discussion below discusses the weaknesses of the Principles.

Above all, one of the most significant weaknesses of the Guiding Principles is that it is a non-binding instrument. However, with respect to the actual significance of these principles it is primarily intended to provide guidance to the representative in implementing his mandate, in particular in his dealings with state.

No monitoring and supervising mechanism exists for the Guiding Principles and this presents a huge challenge to the implementation of the Principles. As the Representative of Secretary General commended in 2002, *“while the Guiding Principles have been well received at the rhetorical level, their implementation remain problematic and often rudimentary”*.<sup>82</sup>

The Guiding Principles as mentioned under Section III provide for civil, political and economic rights but as a result of their displacement, IDPs are no longer able to access fundamental, economic and social rights. In some cases, lack of access may result from IDPs remote location or lack of information aid. In armed conflict insecurity and IDPs may be unable to reach delivery points themselves for some reasons.

Although the Guiding Principles address most aspects of the problem of internal displacement, some issues are mentioned too briefly or not at all. For instance “gender” has not been taken into account in setting up system for the provision of humanitarian assistance, such as food, health care and other relief supplies. Further, registration of the displaced for benefits, such as, food, often is done through male heads of household who then are given assistance, goods and

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82. Report of the Representative of the Secretary General Mr. Francis M Deng on Internally Displaced Person, UN. Doc. E/CN.4/2002/95.16 January 2002 Para 98

services on the assumption that they will provide for their families. This means that women heads of households may encounter difficulties receiving assistance; moreover, experience has shown that aid distributed to male household does not always benefit their families.

As mentioned about the universal acceptance of the Guiding Principles, the heads of the State and Government assembled in September 2005 in New York for the World Summit recognized the principles as an “*important international framework for the protection of IDPs*”, an endorsement reiterated by the General Assembly on several occasions.<sup>83</sup> At the regional level, the *Pact on Security, Stability and Development in the Great Lakes Region of Africa 2006* includes a protocol obliging signatory states to enact national legislation to incorporate the Guiding Principles in their legal framework.<sup>84</sup> Other regional organization including the African Union, the Organization of American States and the Council of Europe have called upon their member states to use the Guiding Principles and incorporate them into their domestic laws and policies.<sup>85</sup>

Issues around internal displacement have steadily been incorporated into the International Policy agenda. A growing body of UN resolutions and documents refer to the Principles. These range from reports on the protection of children affected by armed conflict to reports of the Secretary- General on the implementation of the *United Nation Millennium Declaration to the Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance*. The Principles have become the accepted international standard for IDPs.

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83. World Summit Outcome 2005.A/RES/62/153(2007);A/HRC/RES/6/32(2007)

84. International Conference of the Greater Lakes Region, Protocol on Protection and Assistance to Internally Displaced Persons, 30th November 2006 [www.icgir.org](http://www.icgir.org). Visited on 23.7.08

85. In 1999 the Commission of the Organization of African Unity (OAU), now reconstituted as the African Union (AU), formally acknowledged and expressed appreciation for the Guiding Principles. The AU is presently (in 2008) in the process of drafting a binding convention on internal displacement

The Guiding Principles have played a major role in shaping UNHCR's operational responses for IDPs. Their use in programming and advocacy has arguably helped bolster their credibility and influence as a relevant international legal instrument. UNHCR views the Guiding Principles as more than a simple compilation and restatement of legal rules. UNHCR's IDP Policy Framework and Implementation Strategy 2007 affirm their relevance, stating that they will be incorporated into the offices of protection and human rights activities for IDPs.

The Guiding Principles on Internal Displacement has been well received by multilateral organizations at the regional level. They have been welcomed in resolutions, declarations and statements by organs of the Organization of African Unity (OAU) (now known as African Union), Economic Community of Development (IGAD), Organization of American States (OAS), Organization for Security and Cooperation in Europe (CoE) and Commonwealth.

Most importantly the Guiding Principles have started to make its presence felt in National Legislation. A number of Governments, including Angola, Burundi, Colombia and Liberia have incorporated them in their domestic laws and policies on internal displacement. Sri Lanka has relied upon the Principles in the formulation of its National Framework for Relief, Rehabilitation and Reconciliation

The *Oslo Conference* reaffirmed the Guiding Principles as an important framework for upholding the rights of IDPs. The main aim of the conference was to assess the accomplishment and shortcomings of the Guiding Principles on Internal Displacement over the last 10 years, and to chart a way forward for national and international decision-makers. The conference emphasized that increased political and financial commitment is needed to ensure the full protection of IDPs. States are encouraged to develop or strengthen their policies to include:

- *preventive measures to avert displacement*

- *crisis-mitigation procedures, to be activated once displacement has occurred, and*
- *Durable solution frameworks.*

Apart from this the Conference made recommendations which could help in improving the applicability of Guiding Principles<sup>86</sup>.

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86. High Level Conference on “ Ten Years of the Guiding Principles on Internal Displacement-Achievement and future Challenges”; “ Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development”, Report of the Representative of the Secretary – General, Walter Kalin, on Human Rights of Internally Displaced Persons. A/HRC/10/13/Add.3, 11th February 2009. The recommendations of the Conference was-

- 1) *The Guiding Principles should be incorporated into national legislation so as to promote their implementation and accountability for the protection of IDPs. The publication of the Manual for Law and Policymakers on Protecting IDPs will be useful resource to Governments as it provides a guide for policy makers to bring relevant domestic laws in line with the Guiding Principles in a practical way. National authorities not only have a responsibility to develop legislative framework, but also to ensure that laws and policies are implemented.*
- 2) *Effective partnerships are required to meet the twin challenges of preventing displacement and of fending displacement. These partnerships should be developed amongst States; between States and civil society; between States and financial institutions; between States, civil society and international protection and assistance agencies; and between international humanitarian agencies and development agencies.*
- 3) *More efforts need to be made to prevent displacement , through effective disaster – risk reduction and emergency preparedness, and through conflict prevention*
- 4) *Planning for durable solution must start soon after displacement occurs so as to facilitate the transition from humanitarian assistance to development through effective early recovery strategies*
- 5) *Political dialogue, including peace negotiations, needs to ensure that IDPs voices are represented and heard on all issues which affect them. Experience shows that early and sustained dialogue on issues relating to access to land, housing and property is essential to the identification of durable solutions.*
- 6) *In disaster prone countries, the Guiding Principles should be used to build closer partnerships between Governments, aid providers and civil society, as part of the disaster prevention framework. At the onset of a disaster, the Guiding Principles should be used as a checklist to develop a response strategy to ensure that all proper planning and response are carried out.*
- 7) *With an increasing number of IDPs residing in urban centre, States and protection agencies must seek new, appropriate means of providing them with adequate protection and assistance, as their requirements are different from those of people in camp settings or in rural areas.*
- 8) *Finally, it is important to develop mechanisms to ensure the participation of IDPs in political processes, in decisions affecting their lives during displacement, and in developing and implementing solutions to bring an end to their displacement. Their participation is a precondition to the implementation of the Guiding Principles.*

Participants in the conference emphasized that the Guiding Principles have become a key point of reference for the development of normative framework for the protection of IDPs in domestic laws and policies; and the essential role of the judicial system and civil society organizations in promoting the Guiding Principles.

Apart from underlining the achievement the conference highlighted the challenges to the realization of rights of IDPs remain. The number of people who have forcibly displaced from their homes is estimated at 1% of the world population. Moreover, the number of IDPs continues to increase, primarily as a result of the growth in disaster-induced displacement related to climate change but also because of protracted situations of displacement. These usually occur as a result of unresolved conflicts, lack of political will amongst national governments, or insufficient support by international actors. In many countries, significant gaps between policies and practice are observed, especially in relation to durable solution.<sup>87</sup>

It is certainly difficult to assess the direct impact of the Principles on IDPs. It is fairly certain that they have encouraged governments to adopt laws and policies on internal displacement as a tool to advocate for their rights and have provided a legal framework for UN agencies and human rights organizations to promote the human rights of IDPs. What is much less certain is the extent to which the Principles have prevented arbitrary displacement of persons or have contributed to the ability of IDPs to find sustainable solutions to their displacement.

## **6. SUM-UP**

- 1) As discussed, internal displacement has become a monumental crisis in both scope and intensity. Among its causes are internal conflicts, ethnic

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87. *Ibid.* Para. 11 at p. 4

strife, and forced relocation. While the crisis is global, there are significant regional variations.

- 2) In recent year, there has been an increase in the United Nation agencies, special or generalized, to respond to the needs of the internally displaced. The agencies like UNHCR and ICRC have substantially increased their involvement with the displaced population. The collaborative approaches have enhanced assistance for IDPs. However, international efforts are mostly ad-hoc and often do not reach a large number of IDPs at risk.
- 3) Discussion reveals that the challenge for the IDPs is for providing material assistance to the needy and of ensuring their protection and respect for their fundamental human rights. It is also felt that the international agencies' focus is more often on relief than on protection.
- 4) The appointment of RSG introduced a mandate in the U.N. to deal with the problem of internal displacement and to focus on the rights of the IDPs. But it is felt that the capacity of the mandate is restricted. Restricted in the sense that RSG lacks operational authority, has no direct finance and has very limited staff support.
- 5) Strengthening the capacities of Government to deal with the problem of internal displacement could prove an important step towards finding solutions in certain cases. In fact it would be proper if the United Nations development and relief agencies begin to focus on assisting government.
- 6) The Guiding Principles on Internal Displacement clearly spell out the rights of IDPs and also the corresponding obligations of national authorities. These Principles have become the international standards for IDPs. States have incorporated them into national legislations.
- 7) The purpose of the Guiding Principles is to address the specific needs of IDPs worldwide by identifying rights and guarantees relevant to their protection. The principles reflect and are consistent with international human rights law and international humanitarian law. They state the

principle which would be applicable to internally displaced persons at the different phases of displacement, providing protection during displacement and guarantees resettlement and reintegration.

- 8) Discussion reveals that the Guiding Principles should be incorporated into national legislation as to promote their implementation and improve accountability for the protection of IDPs. It is the duty of national authorities to not only develop legislative framework but also to ensure that such laws and policies are implemented.
- 9) What is felt from the discussion is an urgent necessity of having a legal framework more specific to the needs of the IDPs. Apart from the Guiding Principles (which is non-binding) there is, at present, no clear formulation of the legal principles applicable to internally displaced persons and no instrument particularly focused on their particular needs. The formulation of legal principles will be helpful in dialogues and discussions with governments and other actors in the affected countries.
- 10) Questions have been raised with regard to UNHCR's involvement for the protection of IDPs. Some feel that where UNHCR assumes responsibility for protection of IDPs, its involvement is comprehensive, comprising both protection and assistance. As UNHCR has achieved great impetus in situation of internal displacement, its role in the area of protection has also expanded. However, some feel that UNHCR's involvement with IDPs has serious implication. They doubt that its greater involvement with IDPs will change the character of the agency and detract from its primary responsibility of helping refugees.
- 11) There is dispute about whether existing international legal instrument provide sufficient protection for the internally displaced and whether a mere legal prescription or simply a better implementation of existing law is sufficient. It cannot but be said that the problem of IDPs is so severe and particular that they cannot be adequately remedied by the general law

applicable to human rights protection. For e.g. the protection derived from the Geneva Conventions of 12 August 1949 and the additional Protocols concerns persons displaced by armed conflicts and only applies to the contracting state parties.