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# **GAPS IN THE PROTECTION OF INTERNALLY DISPLACED PERSONS:**

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**Assessment of restrictive measures imposed upon internally displaced persons by territorial states concerning their freedoms of movement and to choose their residence in light of article 12(3) of the International Covenant on Civil and Political Rights**



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## CHAPTER I: INTRODUCTION - GENERAL OVERVIEW OF THE IDPS SITUATION AND PROTECTION

Constraining factors, broad and various causes of internal displacement (violence, armed conflicts, natural disasters, development-induced projects, internal strife, etc.)<sup>1</sup>, the submission to human rights abuse following the displacement, the lack of protection available within their own countries<sup>2</sup>, and the restriction of the freedom of movement and freedom to choose their residence<sup>3</sup> have made internally displaced persons (IDPs) a concern of the international law community<sup>4</sup>. Internal displacement is not a concept well-recognized under international law<sup>5</sup> in analogy to the refugee, due to the absence of a legal instrument which specifically deals with the issue<sup>6</sup> of internal displacement. Internally displaced persons are considered as vulnerable groups, together with refugees. They often move to areas where it is difficult to deliver humanitarian assistance and as a result, these people are among the most vulnerable<sup>7</sup> in the world. Forced from their homes, IDPs experience specific forms of deprivation, such as loss of shelter, and often face heightened or particular protection risks. These risks may include armed attack and abuse while fleeing in search of safety; family separation, including an increase in the number of separated and unaccompanied children; heightened risk of sexual and gender-based violence, particularly

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<sup>1</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum 2 Guiding Principles*, E/CN.4/1998/53/Add.2 (1998), para.1

<sup>2</sup> *Ibid.*

<sup>3</sup> *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, E/CN.4/1998/53/Add.1 11 February 1998, para.4

<sup>4</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra note 1 para.3.*

<sup>5</sup> Allehone M. Abebe, *The Emerging Law of Forced Displacement in Africa: Development and implementation of the Kampala Convention on internal displacement*, (2017), p.6.

<sup>6</sup> *Ibid.* See *Compilation and Analysis of Legal Norms*, E/CN.4/1996/52/Add.2 (1995), para. 4: “the former UN Representative of the Secretary General states that “Existing international law as applied to IDPs consists of a highly complex web of norms originating from a variety of legal sources which makes its application in specific situation of internally displaced difficult””.

<sup>7</sup> The vulnerability is engendered from the uprootedness due to armed conflicts, natural disasters, or development projects in their home countries, fear of persecution by losing all properties, families.

affecting women and children; arbitrary deprivation of land, homes and other property; and violation of the right to freedom of movement and to choose their own residence. Internally Displaced Persons are often subject to restrictive measures enacted by territorial States to control their movement and chose their residence. Most of these restrictive measures enacted by territorial States are recognized by human rights bodies as violating the right to freedom of movement of IDPs and to choose their own residence. An example is the *Propiska* in Azerbaijan, which has been found to be not in conformity with paragraph 3 of article 12 of the International Covenant on Civil and Political Rights (ICCPR) by the Human Rights Committee<sup>8</sup>. Despite their vulnerability due to their uprootedness and facts enumerated above, they are subjects of displacement into inhospitable environments, where they suffer stigmas, marginalization, discrimination or harassment, and most often they are forced to live in areas which are not of their choice, in areas or camps remote (where economic opportunities are less) from their home and the cities. Traditionally, displaced persons have been considered to be the responsibility of the government of the country concerned. The prevention of displacement and the protection of IDPs and other affected populations within their own country are the responsibility of national authorities. Particularly in situations of armed conflict, IDPs may find themselves in territories over which State authority is absent or difficult to enforce. In such situations, the prevention of displacement and the protection of IDPs are also the responsibility of non-State actors. As internal displacement often results from repressive government policies, millions of displaced persons are not protected. In recent years, a rising alertness f this humanitarian problem has led to the recognition of the need for more resolute international action in favor of the displaced. At the request of the United Nations Commission on Human Rights, a Special Representative of the Secretary-General responsible for the issue of IDPs, was appointed in 1992<sup>9</sup>. The first representative appointed was of Dr Francis Deng. The efforts of the Representative special focused on four

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<sup>8</sup> UN General Assembly Official Records “Report of the Human Rights Committee” (2009) UN Doc A/64/40, GAOR 64<sup>th</sup> Session Supp 40, 87 para.18.

<sup>9</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra* note 1, para. 2.

main areas: the development of a normative framework; the creation of well-designed institutional frameworks at international, regional and national levels; sending missions to countries; and carrying out ongoing research on specific questions<sup>10</sup>. Arisen issues related to IDPs are multiple and complex and are categorized in practical and legal issues as follows: the causes of displacement, protection and assistance of IDPs, the current absence and possible impact of an internationally binding legal framework for the protection of IDPs similar to the 1951 Geneva Convention related to Refugees<sup>11</sup>, and a lack of legally recognized homogenous definition like the refugee definition contained in the 1951 Geneva Convention related to the refugee status<sup>12</sup>. The porosity of the national laws, the policies, the limited actions of the existing international standards, the large-scale of displacement located in Africa (at the end of 2009, the number of persons internally displaced persons by conflicts stood at approximately 27.1 million, Africa with the highest number of IDPs of 11.6 million<sup>13</sup>) prompted the African Union to develop the African Union Convention on the Protection and Assistance of IDPs (the Kampala Convention), in order to address the causes of displacement and to protect and assist IDPs in Africa<sup>14</sup>.

This thesis encompasses two main parts: the first part examines the restrictive measures enacted in national laws and policies in light of the principle of necessity and proportionality,

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<sup>10</sup> SPECIFIC GROUPS AND INDIVIDUALS: MASS EXODUSES/ AND DISPLACED PERSONS Report of the Representative of the Secretary-General on internally displaced persons, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 2001/54, UN Commission on Human Rights, Internally Displaced Persons, 16 January 2002, E/CN.4/2002/95.

<sup>11</sup> U.N. Doc. A/RES/429 (V) (1950), U.N. Doc. A/RES/2198 (XXI).

<sup>12</sup> *Ibid*, art. 1.

<sup>13</sup> Internal Displacement Monitoring Centre (IDMC), Internal Displacement: Global Overview of Trends and Developments in 2009, Geneva, IDMC, May 2010, 1. See also Allehone Mulugeta Abebe, "THE AFRICAN UNION CONVENTION ON INTERNALLY DISPLACED PERSONS: ITS CODIFICATION BACKGROUND, SCOPE, AND ENFORCEMENT CHALLENGES" Refugee Survey Quarterly, Vol. 29, No. 3 (2010), p. 29.

<sup>14</sup> Allehone Mulugeta Abebe, "THE AFRICAN UNION CONVENTION ON INTERNALLY DISPLACED PERSONS: ITS CODIFICATION BACKGROUND, SCOPE, AND ENFORCEMENT CHALLENGES" Refugee Survey Quarterly, Vol. 29, No. 3 (2010), pp. 29-30.



established in the jurisprudence of the Human Rights Committee (HRC). And that part includes an overview of the situation of the IDPs (definition, causes of displacement), an analysis of the gap within the existing legal standards of international human rights law and humanitarian law, an analysis of the violations of the right to liberty of movement of IDPs and to choose their own residence through restrictive measures enacted in national laws and policies by territorial States. And the second part or solution examines the Kampala convention as a type solution to overcome the lack of legal protection of IDPs, not only in Africa alone, but across the world, as a global legal framework to enhance protection of IDPs.

The present chapter is composed of the scope (1), the description of the structure (2), and the methodology and sources of the thesis (3).

## 1. SCOPE OF THE THESIS

This thesis studies the administrative measures taken by territorial States to restrict the right to liberty of movement of IDPs. These measures face the IDPs in general, those living in camps as well as IDPs obliged to live in a specific area of the country, usually in remote places, as the case of IDPs in Azerbaijan. The right to liberty of movement and the right to choose a residence is the most restricted right that IDPs are confronted to. In the report of the concluding remarks of the Human Rights Committee of Azerbaijan, the Committee “reiterates its concern that the existence of the address registration (*propiska*) system violates the right to freedom of movement and choice of residence under article 12 of the Covenant (arts. 2, 12 and 26)”<sup>15</sup>.

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<sup>15</sup> A/64/40 (Vol. I) United Nations Report of the Human Rights Committee Volume I Ninety-fourth session (13-31 October 2008) Ninety-fifth session (16 March-3 April 2009) Ninety-sixth session (13-31 July 2009)/ General Assembly Official Records Sixty-fourth Session Supplement No. 40 (A/64/40)/ 94. Azerbaijan report. The Committee considered the third periodic report of Azerbaijan (CCPR/C/AZE/3) at its 2638th, 2639th and 2640th meetings (CCPR/C/SR.2638-2640), held on 20 and 21 July 2009, and adopted the following concluding observations at its 2653rd meeting (CCPR/C/SR.2653), held on 30 July 2009.

Concrete cases of restrictive measures taken by territorial States are provided, in this thesis, to show the evidence and facts of the violations of the right of the liberty of movement of the IDPs, as well as how these measures affect the internally displaced persons and what is the gap of protection that needs to be researched and filled by both national and international law.

To evaluate the violation of the right to liberty of movement, in light of the article 12(3) of the ICCPR, contained in these restrictive measures, an assessment is necessary. The goal of the assessment will consist of determining if these restrictive measures enacted are a breach of the art.12(3) through the principle of necessity (Chapter V). The potential solution to fill out the gap is explored throughout the Kampala Convention (Chapter VI).

Examples of restrictive measures are multiple. For the purpose of the present thesis, the studied cases are inter alia the *Propiska*, the Iraqi case, the Nigerian and some other relevant cases to the topic. The studied cases of measures taken by territorial States are chosen on the ground of “restrictive” aspect, in the opinions of the international legal bodies, international human rights agencies, etc.... In other words, measures of territorial States qualified as restrictive measures by UNHRC (United Nations of Human Rights Committee), UNHCR, Reports of the Special Rapporteur on the Human Rights of Internally Displaced Persons, etc....

Protecting, giving assistance and humanitarian aid are usually the themes of research related to IDPs, and recently, research themes related to the African Union Convention for the

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Para18 [The Committee remains concerned that, in spite of the achievements by the State party’s authorities in addressing the problems of the large number of internally displaced persons following the 1991-1994 conflict with Armenia in particular in Nagorny Karabakh, such people continue to face problems in obtaining address registration (*propiska*), which may expose them to corrupt practices, depriving them of a large number of social entitlements and allowances and of the enjoyment of a number of rights, including in the areas of employment and health. In general, the Committee reiterates its concern that the existence of the address registration (*propiska*) system violates the right to freedom of movement and choice of residence under article 12 of the Covenant (arts. 2, 12 and 26).]

Protection and Assistance of Internally Displaced Persons, or Kampala Convention are conducted<sup>16</sup>. Further, there are also articles exploring the practices of Human Rights Courts, through judgements: the article of Améyo Délali KOUASSI is an example. Comprehensive studies about restrictive measures of the right to liberty of movement are inexistant. Thus, the assessment of these restrictive measures is the particular aspect of this thesis. The aim of the current thesis is to give a legal view of the restrictive measures, which are usually seen under the prism of politics. A major source of concern is the manifold legal and bureaucratic barriers affecting the full enjoyment of the rights of the individuals to move freely, to leave a country, including their own, and to take up residence<sup>17</sup>. In fact, the restrictive measures are policies enacted by governments or political bodies, in order to restrict a fundamental right of the citizens. However, policies are usually enacted because of state of emergency, or to preserve peace and security of territory.

## 2. STRUCTURE OF THE THESIS

The thesis, on the one hand, assesses the national measures taken in light of human rights norms and standards regarding the IDPs situation, while on the other hand, the regional human rights norm's standard through the Kampala Convention (formally the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa) is explored as approach solution.

The present thesis is composed of seven chapters and structured as follows: the chapter one is related to the overview of the IDPs situation, the definition of the Internally Displaced

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<sup>16</sup> Mehari Taddele Maru *THE KAMPALA CONVENTION AND ITS CONTRIBUTIONS TO INTERNATIONAL LAW/ LEGAL ANALYSIS AND INTERPRETATIONS OF THE AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE IF INTERNALLY DISPLACED PERSONS*, (2014).

ROMUALD LIKIBI *Les Personnes déplacées internes en Afrique : repères juridiques et réalités Contribution à l'étude de la Convention de Kampala*, (2018). Romola Adeola "The Kampala Convention and the Protection of Persons Internally Displaced by Harmful Practices in Africa", *Journal of African Law*, Vol. 65, No. 1 (2021). Allehone M. Abebe *The Emerging Law of Forced Displacement in Africa: Development and implementation of the Kampala Convention on internal displacement*, (2017).

<sup>17</sup> General Comment No. 27, para. 17, in CCPR/C/21/Rev.1/Add.9 November 2<sup>nd</sup>. 1999.

Person in chapter II, the existing laws in the humanitarian and the human rights laws and the gaps of protection y related are discussed in chapter III, the international concern to assist and protect the internal displaced persons, even though States assume the primary responsibility for providing protection and assistance to their nationals including IDPs is discussed in chapter IV. The chapter V is the main and important research point of this thesis, because containing the argumentation of the violation of the fundamental human right to Freedom of movement in the national laws of territorial States, and the assessment of these restrictive measures as violation of the right to the freedom of mobility. The originality of this thesis is accentuated by the assessment of these national laws considered as restrictive by international legal bodies, such as the Human Rights Committee, the reports of the UN rapporteur on the Human Rights of Internally Displaced Persons, and agencies. How these national laws and policies are restrictive? The assessment process will help us answer this question. However, before the assessment, specifics cases are explored as studied cases.

The African Union Convention on Protection and Assistance of Internally Displaced Persons or Kampala Convention is explored, in the chapter VI, as an approach to solve the gap of the protection of IDPs, in general. The final part or chapter VII is the conclusion and recommendations for the improving the protection and assistance of the IDPs s and how the territorial States should fulfil the state obligations and provide legal support for internally displaced persons without violating their human rights and their right to freedom of movement.

### **3. METHODOLOGY AND MAIN SOURCES**

The present thesis encompasses a method which tend to be descriptive, except for the one related to the assessment, to describe the human rights violations in general and more particularly the right of freedom of movement of IDPs in the selected studied cases.

The data transcribed in this thesis are collected from reports and studies of non-governmental organizations, international organizations, international NGOs, and also

policies documents of governmental institutions. Other sources are from universal and regional treaties, international law, international human rights law, and judgments by international and regional institutions such as the: the Geneva Conventions 1949<sup>18</sup>, International Human rights and Humanitarian Law, Reports of Human Rights Watch, Amnesty International, International Crisis Group, reports of the Representative of the UN General Secretary on internal displacement, the Convention of the African Union for the Protection and Assistance of Internally Displaced Persons<sup>19</sup>, or Kampala Convention, Judgements of the International Court of Justice Judgments (ICJ), Judgments of the European Court on Human Right, Judgement of the American Court on Human Right, reports and judgements of the Human Rights Committee, articles or studies from international law journals.

In the aim to have a complete work, it is necessary to recall the lack of legal and harmonized definition of the IDPs engendering difficulties in the identification of the status of IDPs.

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<sup>18</sup> International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), *United Nations Treaty Series*, Vol. 75, p. 287 (No. 973).

<sup>19</sup> African Union, *African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa ("Kampala Convention")*, 23 October 2009.

## **CHAPTER II: DEFINING INTERNALLY DISPLACED PERSONS**

### **1. INTRODUCTION**

Internal displacement is not a new phenomenon. When the issue of internal displacement emerged on the international agenda in the early 1990s, there was no definition of an IDP. There was also debate over whether the term “Internally Displaced Persons (IDPs)” refers only to people uprooted by conflict, violence and persecution, or whether it encompasses people uprooted by natural disasters and development projects. A definition for internally displaced persons (IDPs) is essential for identifying the populations of concern and compiling data, and framing laws and policies designed to protect and assist them.

The present chapter seeks to examine the critical elements included in the current definition provided by the UN Guiding Principles on Internal Displacement<sup>20</sup>, the problems in defining the IDPs due to the existence of different definitions domestic standards (national law or policy), depending to the specifics aspects of the concerned country, and the vulnerability characteristics of the IDPs.

### **2. WHO IS AN INTERNALLY DISPLACED PERSON?**

Any attempt at defining the term “internally displaced persons” throws up number of complexities, inter-related issues. One of the principal difficulties encountered in establishing a more systematic approach to the plight of internally displaced persons is the debatable nature of the concept itself. More explicitly, the various definitions and the factors identifying the IDPs, such as the causes contained in the national laws and policies<sup>21</sup>, are the

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<sup>20</sup>*Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra note 1.*

<sup>21</sup> For example, the Kenyan legislation includes the effects of large-scale development projects (Article 1(5) LAWS OF KENYA *THE PREVENTION, PROTECTION AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS AND AFFECTED COMMUNITIES* ACT NO. 56 OF 2012/ Published by the National Council for Law Reporting with the Authority of the Attorney-General, while the definition contained in the Russian’s law on IDPs is narrower, because limited to “Russian Citizen” (FEDERAL LAW NO. 202-FZ OF DECEMBER 20, 1995 ON INTRODUCING THE

reason of the difficulties met in the process of protection of the IDPs. In fact, the various definitions on IDPs cause inconsistent practice on IDP identification at the domestic level, which gives rise to serious difficulties in protecting IDPs. The categorization of persons as IDPs may sometimes disregard the diversity of causes and impacts of displacement on IDPs. It can also be based on the experiences, the extreme vulnerability and reduced agency of IDPs.

The aim of this section is to highlight the definitional problem encountered in defining the IDPs, in the subsection 2.1, the vulnerability aspect, in subsection 2.2. The reason why the latter subsection is needed is because the displaced persons are often forced to leave their homes, communities, and familiar ways of life as a result of conflict, violence, human rights abuses, natural disasters, or other crises, and may struggle to find safety, shelter, and other basic necessities. They are often extremely vulnerable<sup>22</sup>, as they may lack access to resources, protection, and support, and may be exposed to further risks and challenges. Internal displacement can have long-term consequences for individuals, families, and communities, and can undermine the social, economic, and political stability of affected countries.

## **2.1. THE DEFINITIONAL PROBLEM OF THE CONCEPT OF “INTERNALLY DISPLACED PERSONS”**

The definitional problem of the IDPs lays on the not easy character of its definition engendering a conceptual matter about the causes and identification of IDPs. Prior the definition given by the United Guiding Principles on Internal Displacement (UNGPID), there was a definition contained in the Analytical Report of the UN Secretary-General on Internally Displaced Persons<sup>23</sup>. A first attempt at a definition was made by the UN Secretary-

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AMENDMENTS AND ADDENDA TO THE LAW OF THE RUSSIAN FEDERATION ON THE FORCED MIGRANTS  
(with the Amendments and Additions of August 7, 2000, December 24, 2002, December 23, 2003)).

<sup>22</sup> Maru, *supra* note 16, p. 50.

<sup>23</sup> *Analytical report of the Secretary-General on internally displaced persons*, (1992), U.N. E/CN.4/1992/23.

General Boutros-Ghali in his Analytical Report in 1992, which defined internally displaced persons as: “Persons who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disasters; and who are within the territory of their own country”<sup>24</sup>. However, these elements “suddenly and unexpectedly large numbers” were partially modified or abandoned because deeper knowledge of past and contemporary internal movements of populations have demonstrated that those elements are not always characteristic of such movements<sup>25</sup>. Research have showed situations were IDPs do not always flee unexpectedly or suddenly, neither in large numbers. In the case of Columbia<sup>26</sup>, for instance, people do not flee “suddenly or unexpectedly”, they may, rather, first flee to a nearby town or village in search of security and still go back to their farms during the day to pursue their normal economic activities<sup>27</sup>. If the degree of violence become higher, people then consider going further and leaving their property for a longer period. Moreover, people tend to flee in small groups in order not to attract attention<sup>28</sup>.

This definition judged too narrow; the challenge was therefore to enhance a definition which is not neither too narrow nor too broad.

The definition in the Guiding Principles on Internal Displacement<sup>29</sup> is now widely used. According to the UNGPID: “Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of

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<sup>24</sup> *Ibid.*, para.17.

<sup>25</sup> Catherine Phuong, *The International Protection of Internally Displaced Persons*, (2004), p. 33.

<sup>26</sup> *Report of the Representative of the Secretary-General*, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95 Addendum of the 3 October 1994, E/CN.4/1995/50/Add.1 (1995)

<sup>27</sup> *Ibid.*, p. 13. See also, Phuong, *supra* note 25.

<sup>28</sup> Phuong, *supra* note 25.

<sup>29</sup> *Report of the Representative of the Secretary General*, Mr. Francis M. Deng, *supra* note 1.



generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”<sup>30</sup>.

This definition is an improvement of the 1992 definition. The above-mentioned elements considered as problematic have been cleared in this definition. According to Roberta Cohen, this definition is the broadest definition in use at the international or regional level<sup>31</sup>. This definition reflects the ‘descriptive and non- legal nature of the term “internally displaced persons”<sup>32</sup>. For Walter Kälin, the fact that the definition is not in the main text, rather in the introduction of the Guiding Principles, makes the definition of the IDPs broad<sup>33</sup>.

The definition contains the two crucial elements of internal displacement, which are coerced movement and remaining within one's national borders. It also includes the major causes of displacement, but its use of the qualifier, “in particular,” makes clear that it does not exclude other causes which might need special attention<sup>34</sup>, for example the development-induced displacement, such as the dam project.

The definition focuses in large part on persons who, if they were to cross a border, would qualify as refugees, both under the OAU Convention<sup>35</sup> and the 1951 Refugee Convention<sup>36</sup> as well. But it also includes persons who would not qualify as refugees, for example those uprooted by natural and human-made disasters. The argument for including the type of displaced from disasters is based essentially on cases where governments respond to such

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<sup>30</sup> *Ibid* para.2.

<sup>31</sup> Roberta Cohen, “The Development of International Standards To Protect Internally Displaced Persons,” in Anne F. Bayefsky and Joan Fidzpatrick eds., *Human Rights and Forced Displacement* (2000), p. 82.

<sup>32</sup> Walter Kälin, “The Guiding Principles on Internal Displacement: Annotations” *The American Society of International Law No. 38 and The Brookings Institution* (2008), pp. 4-5.

<sup>33</sup> *Ibid*. p. 5.

<sup>34</sup> Cohen, *supra* note 31, p. 82.

<sup>35</sup> OAU Governing the Specific Aspects of Refugee Problems in Africa, *United Nations, Treaty series*, Vol. 10001, p. 45 (No. 14691), article 1(1).

<sup>36</sup> U.N. Doc. A/RES/429 (V) (1950), art. 1.

disasters by discriminating against or neglecting certain groups on political or ethnic grounds or by violating their human rights in other ways. Maintaining disasters in the definition, highlights that persons subjected to such disasters may have special protection needs<sup>37</sup>. For example, when drought and famine ravaged Ethiopia in the mid- 1980's, the government forcibly relocated hundreds of thousands of Tigereans it regarded as political opponents, under the pretext of responding to a natural disaster. In other countries, persons have also been displaced because of a combination of natural causes and racial, social or political reasons. Maintaining natural disasters in the text, it is argued, would assure protection for such persons<sup>38</sup>.

The current definition excludes people who migrate for economic reasons, unless they are compelled to leave their homes due to economic injustice and marginalization, which amounts to a systematic violation of their economic rights<sup>39</sup>.

It is crucial to note that economic migrants are not included in the new definition since their protection and support are given by national and international organizations through development programs, and, more importantly, the element of coercion is not so clear<sup>40</sup>. Still according to Cohen, “what distinguishes IDPs and makes them of concern to the international community is the coercion that impels their movement, their subjection to human rights abuse emanating from their displacement, and the lack of protection available within their own countries”<sup>41</sup>. In the same sense, for Cohen, the definition's importance lies in identifying persons who should be of special concern to the international community, raising awareness of their plight, and facilitating the work of governments and private

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<sup>37</sup> Cohen, *supra* note 31, p. 17.

<sup>38</sup> Promod Nair, “Towards A Regime For The Protection Of Internally Displaced Persons”, *ISIL Year Book of International Humanitarian and Refugee Law*, Vol. 1, No 10 (2001), available at <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/10.html>. (accessed date 10/10/2021)

<sup>39</sup> Cohen, *supra* note, 31, p.17.

<sup>40</sup> *Ibid*.

<sup>41</sup> *Ibid*

organizations seeking to increase protection and assistance for IDPs<sup>42</sup>. In order to emphasize on the constraint aspect, Roberta Cohen did not hesitate to use the term “coercion”, to refer to the most common causes of involuntary movements, such as armed conflict, violence, human rights violations and disasters. These causes have in common that they give no choice to people but to leave their homes and deprive them of the most essential protection mechanisms, such as community networks, access to services, livelihoods. Displacement severely affects the physical, socio-economic and legal safety of people and should be systematically regarded as an indicator of potential vulnerability. The word “constraint” to forced displacement, is put forward to help differentiate IDPs to other migrants. In fact, it is not appropriate to compare the situation to the rural exodus, which is entirely voluntary and allows people to move from one specific location in the territory to another with no actual constraints other than the desire to find work in an urban setting. Even if it is not always simple to define forced displacement, our view is one of constraint, that is, forced displacement. And it is with a good reason that Dr Jack Mangala emphasized on the word “forced” which is the origin of the blur between voluntary migration from the involuntary one, as shown below:

“...D’utilisation commode, la notion de déplacement forcé se prête difficilement à une définition théorique. Cette difficulté gît dans le qualificatif “forcé” lequel, s’il se comprend aisément, soulève néanmoins un problème conceptuel majeur lorsqu’il s’agit de distinguer une migration volontaire d’une migration involontaire. D’abord l’élément “contrainte” qui sépare théoriquement celle-ci de celle-là est presque toujours présent, à divers degrés, dans toute migration. Ainsi par exemple, la migration de la main d’œuvre, considérée *prima facie* comme “volontaire” peut être soumise à une autre lecture en partant du fait que la pauvreté constitue souvent la motivation primordiale du départ. Ensuite, l’élément “choix” qui caractérise celle-là par rapport à celle-ci se retrouve, de façon plus ou moins marquée, dans tout mouvement migratoire... Ces deux éléments esquissent les frontières floues du “forcé”

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<sup>42</sup> *Ibid*

et du “volontaire” en matière de déplacement de population. À ce problème conceptuel s’ajoute une difficulté pratique qui tient à ce que les déplacements sont mus par une constellation complexe de facteurs. Déséquilibre dans le domaine du développement, déclin économique, exercice autoritaire du pouvoir d’État, guerres civiles et autres formes de violence génèrent une variété de déplacements de population dans lesquels le facteur déterminant du départ ne se laisse pas toujours facilement isoler »<sup>43</sup>.

It is to say that several elements included in the definition of the IDPs give to that definition a visual of difficulty. For Dr Jack Mangala, all type of displacement, either voluntary or involuntary, are forced displacement<sup>44</sup>. The key difference comes to the element of constraint or the magnitude of the constraint, as some are displaced because trying to escape from poverty while others are displaced because their life is threatened. Thus, the forced or obliged nature of a movement distinguishes persons who have a coercive or otherwise involuntary character of movement from those who move voluntarily from one place to another solely in order to improve their economic circumstances.

In addition, the expressions in the definition of the IDPs which makes the definition, either broad or narrow: “in particular” and “homes or places of habitual residence” are examined as other points of difficult factors defining the IDPs. The expression “in particular” gives a feeling of incompleteness of the causes of internal displacement namely mentioned in the UNGPID (the armed conflict, violence, violations of human rights and disasters<sup>45</sup>), and the

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<sup>43</sup> Jack Mangala Munuma, *Le déplacement forcé de population comme nouvelle dimension de sécurité : rôle et responsabilités de l’OTAN*, (août 2001), pp. 10-11.

<sup>44</sup> *Ibid.*

<sup>45</sup> United Nations Guiding Principles on Internal Displacement, Introduction para2 “For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.”

expression “homes or places of habitual residence”. Indeed, according to the Annotations<sup>46</sup> of Walter Kälin, the causes listed in the Guiding principles are not exhaustive, as the definition includes the wording “in particular”<sup>47</sup>. In that sense, there is a possibility that other factors might be the reasons of uprootedness and involuntary movement within one’s country, and therefore open for definitions with elements are not encompassed in the definition of the UNGPID, especially found in certain standards of Internal Displacement, for example, the Kampala Convention provides that development projects can induce internal displacement<sup>48</sup>. The term “homes or places of habitual residence” does not necessarily refer to a house or a building but can also designate land on which groups traditionally live or depend for their livelihoods, as in the case of nomads or pastoralists.

Further problematic aspects in defining the IDPs come also from the variety of definitions adopted by States in the national laws and policies<sup>49</sup> in accordance with the specific realities of the territorial state. Many instruments either do not define IDPs, or define them in a limited way as either encompassing fewer causes than the definition in the principles or by introducing geographic or temporal limitations, or not taking into account certain types of displaced persons. For geographic or temporal limitations, the case of the Kyrgyz government’s national policy on internal displacement which only applies to citizens whose

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<sup>46</sup> Walter Kälin, The Guiding Principles on Internal Displacement Annotations, *The American Society of International Law No38 and The Brookings Institution* (2008), p.3.

<sup>47</sup> *Ibid*, “This paragraph provides some examples of how internal displacement may be brought about - situations of generalized violence, violations of human rights, or natural or human-made disasters. Victims of disasters are included as experience shows that they also can, as a consequence of their displacement, become victims of human rights violations such as discrimination (e.g., because they have to move to an area where they constitute an ethnic minority), sexual and gender based violence (e.g., in overcrowded camps), or disregard of their property rights. The words “in particular” indicate that the listed examples are not exhaustive. The words “in particular” indicate that the listed examples are not exhaustive.”

<sup>48</sup> Kampala Convention, *supra* note 19, article 10.

<sup>49</sup> Above in the introduction section of the present chapter, it is said that the present chapter seeks to examine the problematic in defining the IDPs due to the existence of different definitions in the domestic standards (national law or policy) depending to the specifics aspects of the concerned country. This is the reason why national laws and policies are mentioned in this point.

homes were destroyed in June 2010 in two areas of the country<sup>50</sup>. Kosovo has adopted the principles' definition but applies it only to persons displaced between January 1998 and the end of March 2004<sup>51</sup>. Bosnia's 1999 law covered only citizens who had fled after April 30, 1991, for reasons similar to the Refugee Convention's nexus clause<sup>52</sup>. Ukraine's first IDP resolution in 2014 required IDPs to be citizens and permanent residents who had come from temporarily occupied territory<sup>53</sup>, thus excluding the foreign citizens and stateless persons are excluded.

## 2.2. THE VULNERABILITY ASPECT OF IDPS

The vulnerabilities and needs of the IDPs are the consequences engendered from the situation of displacement, and it is an important factor of identification of IDPs. In the judgment of *Mapiripan v Columbia*, the Inter-American Court of Human Rights referred to said situation of vulnerability of the displaced population as follows:

“[...] due to the circumstances of internal displacement, those persons [...] who are forced to “abruptly leave their place of residence and their customary economic activities, having to migrate elsewhere within the national territory”<sup>54</sup> to flee the violence stemming from the

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<sup>50</sup> Republic of Kyrgyzstan, *Kyrgyzstan: Resolution on Approval of the Order of Priority of Providing Housing to Kyrgyz Citizens who were Victims of the June 2010 Events in Osh City, and Osh and Jalal-Abad Districts, 2010*, (23 November 2010). The content of the text is only available in its original language as mentioned on the refworld website, <https://www.refworld.org/docid/5a7bff104.html> (accessed 1 December 2022).

See also, Phil Orchard, “*Protecting the Internally Displaced Rhetoric and Reality*” (2019), pp.173-174.

<sup>51</sup> Republic of Kosovo, *STRATEGY FOR COMMUNITIES AND RETURN 2014 – 2018*, (December 2013), p.5. See also, Orchard, *supra* note 50, p. 172.

<sup>52</sup> Republic of Bosnia Herzegovina, *Law of 1999 on Refugees from Bosnia and Herzegovina and Displaced Persons in Bosnia and Herzegovina* (31 December 1999), article 3. See also Orchard, *supra* note 50, p. 225.

<sup>53</sup> Republic of Ukraine, *Resolution No. 509, on registration of internally displaced persons from the temporarily occupied territories of Ukraine and anti-terrorist operation area*, October 2014. The content of the text is only available in its original language on the refworld website <https://www.refworld.org/docid/5b72a7224.html> (accessed 1 December 2022). Phil Orchard, “*Protecting the Internally Displaced Rhetoric and Reality*” (2019), p. 225.

<sup>54</sup> See judgment T-025/04 of January 22, 2004, issued by the Third Appellate Chamber of the Constitutional Court. English version fetched from the book RODOLFO ARANGO RIVADENEIRA “JUDICIAL PROTECTION OF INTERNALLY

domestic armed conflict and due to systematic disregard for human rights or for international humanitarian law, they are subject to a much higher level of vulnerability, which entails a grave, massive and systematic violation of their basic rights and, therefore, the authorities should pay special attention to it: “Persons displaced by violence are in a situation of weakness that merits special treatment by the State.” Along these same lines, the Court has asserted “the need to direct the State’s political agenda toward solving the problem of internal displacement and the duty of giving it a higher priority than many other issues on the public agenda,” given the decisive impact of this phenomenon on national life, due to its scale and its psychological, political and socio-economic consequences<sup>55</sup>.

Further in the same judgement, “The reasons for and expressions of the acute vulnerability of displaced persons have been characterized from various perspectives. Said vulnerability is reinforced by their rural origin and, in general, it especially affects women -who are heads of households and constitute more than half the displaced population-, girls and boys, youths, and elderly persons”<sup>56</sup>. In this paragraph, the rural origin of the displaced persons is added to the list of the causes of their vulnerability.

Although all the affected persons (by conflict, by human rights violations, by natural disasters, by uprootedness by large scale development projects, by violations of international law) suffer, being displaced from their place of residence makes internally displaced persons particularly vulnerable. During the displacement phase, the IDPs face situations that engender their vulnerability. Indeed, internally displaced persons face lack of health inhospitality: they may be moved to areas where people belong to different groups or are inhospitable. The social organization of displaced communities are destroyed or damaged by the act of physical displacement, family groups are separated or disrupted,

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DISPLACED PERSONS: THE COLOMBIAN EXPERIENCE”, THE BROOKINGS INSTITUTION – UNIVERSITY OF BERN PROJECT ON INTERNAL DISPLACEMENT (November 2009).

<sup>55</sup> *Case of the Mapiripán Massacre vs Colombia*, Series C No. 122, Inter-American Court of Human Rights (IACrHR), 15 September 2005.

<sup>56</sup> *Ibid.*

women are forced into non-traditional roles or be exposed to particular vulnerabilities (sexual assault). Also, internally displaced persons, especially groups such as children, the elderly or pregnant women, experience profound psychosocial distress related to their displacement. To that are added, the loss of sources of income and livelihood, the interruption of the education of displaced children and adolescents, the deprivation of the identity documents essential to benefit from aid and legal status (in some cases, internally displaced persons may have disposed of these materials due to fear of persecution). It also happens that internally displaced persons to be denied access to international assistance by their government as internal displacement is often viewed by governments as an internal matter and they refuse any outside interference, under the principle of sovereignty.

The IDPs, in addition to having lost everything because being uprooted and victims of violation of human rights, are consequently exposed to many kinds of vulnerabilities, such as risks of hunger, attack and death. The vulnerability includes threats, increased risks of separation, rape and sexual attacks, violation of property rights, forced recruitment of children, and limited access to basic services, including health and security. However, the vulnerabilities are similar, but the needs are not identical. Vulnerabilities are similar, in the sense that, all IDPs have abruptly leave their place of residence and their custom economic activities, having to migrate elsewhere within the national territory. This applies to all type of displacement, either due to natural disaster, conflict, or violence post electoral. In other words, the vulnerabilities of IDPs are universal, even if the causes of their displacement vary significantly. However, the vulnerabilities are different and not identical in the sense of the types of the magnitude of vulnerability and needs. It is to say that the magnitude is related to the degree or level of vulnerability and depends on the factors causing the uprootedness. It applies the same for the needs too. Indeed, when IDPs are displaced from violence (war, violence post electoral...), their magnitude of vulnerability and needs is higher than those displaced from natural disasters. In the case of *Mapiripan v Columbia*, aforementioned, the American Court of Human Rights stated that to flee the violence stemming from the domestic armed conflict and due to systematic disregard for human



rights or for international humanitarian law, are subject to a much higher level of vulnerability<sup>57</sup>. This statement is acknowledged in the *Ituango massacre v Colombia*<sup>58</sup>.

IDPs in different political, economic and social contexts face different problems but they also share common experiences arising from they have been forcibly uprooted from their homes, communities and livelihoods. Concerning the needs of the IDPs, they are varied as the identification as an IDP is not a universal practice. As in the case of violent conflicts in Africa, internal displacements are unpredictable, protracted, lengthy, and often sporadic. As a result, displacement may take various forms and follow different patterns, inducing different needs. For example, in the Acholi region of Uganda, frequented by the Lord's Resistance Army and the Ugandan army, they would spend their days at work or at school and would then sleep in the camps to avoid attacks IDPs, therefore used camps as makeshift secure sleeping places<sup>59</sup>. The Ashkali and Egyptians in Cairo's outskirts used corrugated containers as makeshift resting places<sup>60</sup>. In Darfur, for many years, IDPs hid in the mountains for fear of being attacked<sup>61</sup>. Although the primary need of the IDPs is security, displaced persons for specific reasons have their special needs depending on regions. In some cases, such as UNHCR refugee camps in Ethiopia, pastoralists stayed in such camps only until the right season for grazing starts<sup>62</sup>. In other cases, they need recognition in order to benefitiate aid and protection. For example, in Ethiopia, the 1984 Great Famine caused massive displacements of people through state forced settlement programs. When the military junta was toppled in 1991, the settlers left the settlement areas and became IDPs. Most of the people moved to government institutions as their livelihoods depended on the government either as students or by being employed as civilian servants, while a few of them

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<sup>57</sup> *Mapiripán Massacre vs Colombia*, Series C No. 122, Inter-American Court of Human Rights (IACrHR), para. 174.

<sup>58</sup> *Case of the Ituango Massacres vs Colombia*, Series C No. 148, Inter-American Court of Human Rights (IACrHR), 1 July 2006, para. 211.

<sup>59</sup> Maru, *supra* note 16, p. 77.

<sup>60</sup> *Ibid.* Roberta Cohen, *Listening to the Voices of the Displaced: Lessons Learned* (2008), p.14.

<sup>61</sup> Monica Juma, *Compendium of Key Documents relating to Peace and Security in Africa*, (2006), pp. 202-203, para.47

<sup>62</sup> Maru, *supra* note 16, section 2.7, pp. 77-78.

were threatened by the rebel groups who controlled those parts of the country<sup>63</sup>. In the early 1990s, when the Ethiopian army left the northern parts of Ethiopia, IDPs moved in large groups to secure government-held towns in the south, finding safety in numbers as well as easier recognition as IDPs. Moving in groups, they attracted the attention of governmental institutions and non-governmental organizations for aid and protection. This situation facilitated recognition of these groups of persons as IDPs<sup>64</sup>. The needs are various, and the priority needs of all IDPs are the protection (including security in the areas of departure) to enable them to return and manage their livelihood, shelter, food security, health, water, hygiene and sanitation. The needs also exist according to the stay areas of the IDPs. In Burkina Faso, for example, since most of the internal displaced persons are pastoralists, whose livelihoods are linked to breeding, one of the specific needs listed is shelter, food, water and health for their animals. Whilst in Colombia, they mostly required security for their person.

This fact generates a definitional issue or problems and identification of IDPs, giving that the IDP definition is a descriptive definition rather than a legal definition. It simply describes the factual situation of a person being uprooted within his/her country of habitual residence. It does not confer a special legal status or rights in the same way that recognition as a refugee does. For example, the national policy for addressing internal displacement in the Republic of Yemen of 2013, is an illustration as follows “... This definition does not confer any legal status to a person whose situation this definition describes; it simply describes the factual situation of being internally displaced.”<sup>65</sup>

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<sup>63</sup> *Ibid*

<sup>64</sup> *Ibid*

<sup>65</sup> Republic of Yemen, “The National Policy for Addressing Internal Displacement in the Republic of Yemen” (2013), p.6.

## **CHAPTER III: EXISTING STANDARDS OF PROTECTION OF IDPs AND GAPS IN THE EXISTING LAWS**

### **1. INTRODUCTION**

There are several existing standards of protection for in IDPs under international human rights and humanitarian law. These standards include the right to non- discrimination, the right to life, liberty, and security of the person, the right to an adequate standard of living, and the right to protection against arbitrary displacement.

One of the key challenges in the existing legal framework for the protection of IDPs is the lack of a comprehensive and legally binding international instrument on the rights of IDPs. While there are several non-binding principles and guidelines on the protection of IDPs, such as the UN Guiding Principles on Internal Displacement, there is no single legally binding treaty that sets out the rights of IDPs and the obligations of states in relation to IDPs. Further gaps occur where a legal norm is not applicable in all circumstances. For example, since human rights law is generally binding only on States, IDPs lack sufficient protection in situations of internal tensions and disturbances where violations are perpetrated by non-state actors. Another gap in the existing legal framework is the lack of effective mechanisms for monitoring and enforcing the rights of IDPs. While international and regional bodies, such as the UN and the African Union, have a role in promoting and protecting the rights of IDPs, there are no dedicated mechanisms or procedures for holding states accountable for violations of the rights of IDPs.

In this chapter, after exploring the existing legal frameworks of protection dedicated to IDPs (2), the present thesis examines the gaps in the existing legal framework (3).

## 2. LEGAL FRAMEWORK OF PROTECTION OF IDPs

The concept of internal displacement needs to be distinguished from the concept of refugeehood<sup>66</sup>. Refugees are protected by a specific convention unlike the IDPs, and because they remain within the border of their country, they cannot benefit from the refugee convention<sup>67</sup>. Although, any international legal instrument does not provide nor specifically mention the term “internally displaced persons”, it does not mean that, internally displaced do not enjoy any legal protection under current international law. Since national authorities have the first responsibility to provide protection and humanitarian assistance to internally displaced persons within their jurisdiction<sup>68</sup>, national laws and policies are enacted in response to the global crisis of IDPs. In addition, the UN Guiding Principles on Internal Displacement are considered as a standard capable of improving the condition of internally displaced individuals, families and communities all over the world<sup>69</sup>.

Internally Displaced Persons are to be in the first place, protected by the territorial State where the displacement occurs, which is usually reluctant to recognize the existence of the IDPs. Despite that, the protection of IDPs has evolved to the international legal protection. The pioneer of the international legal regime of the IDPs is the Guiding Principles on Internal Displacement. While there is no international convention on the rights of internally displaced persons, the non-binding normative framework for their protection, which is the Guiding Principles on Internal Displacement, have gained international recognition as the key international framework for the protection of internally displaced persons. It is in the same sense that Christel Cournil affirms that the UN Guiding Principles can be considered as customary international law « *parce qu'ils reflètent une pratique étatique étendue, représentative, uniforme et acceptée* et que l'invocation desdits Principes par une juridiction

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<sup>66</sup> Phuong, *supra* note 25, p. 39.

<sup>67</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra* note 1, p. 6.

<sup>68</sup> *Ibid.*, principle 3, para 1.

<sup>69</sup> Walter Kälin, *The Guiding Principles on Internal Displacement Annotations, The American Society of International Law No.38 and The Brookings Institution* (2008), page ix.

européenne, notamment par la Cour européenne des droits de l'homme dans l'affaire *Doğan et autres contre Turquie* de 2004<sup>70</sup>, apparaît comme un indice sur leur valeur coutumière »<sup>71</sup>. According to Article 38 of the Statute of the ICJ, custom is “evidence of a general practice accepted as law”<sup>72</sup>. The states’ acts and practices mean the facts that States adopt the Principles into national legislation on internal displacement. Indeed, several governments have indicated support for the Guiding Principles within the ambit of the United Nations. For example, on April 17, 1998, the United Nations Commission on Human Rights approved the Guiding Principles in a Resolution supported by fifty-five nations<sup>73</sup>. The Resolution specifically noted that the United Nations Commission on Human Rights “takes note” of the Guiding Principles. More explicitly, for the first, it would mean that the incorporation of the Principles into the national legislation on internal displacement<sup>74</sup>. In addition, numerous states have expressed their support of the Guiding Principles within the context of the United Nations<sup>75</sup>. Thus, on April 17, 1998, the U.N. Commission on Human Rights adopted a Resolution, approving the Guiding Principles<sup>76</sup>.

Despite being widely recognized as an important reference point for the protection of IDPs, endorsed by a number of international and regional organizations, and used by national

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<sup>70</sup> CEDH, *Doğan et autres c. Turquie*, no. 803/02 (29 juin 2004), para. 154.

<sup>71</sup> Christel Cournil, L'émergence d'un droit pour les personnes déplacées internes, *Revue Québécoise de Droit International*, Vol. 22, No. 1 (2009), p. 11.

<sup>72</sup> Customary international law is recognized as one of the sources of international law, in particular by the statute of the International Court of Justice, see Article 38: "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: [...] b. international custom as evidence of a general practice accepted as law".

<sup>73</sup> U.N. Doc. E/CN.4/1998/50 (1998), pp. 165-168.

<sup>74</sup> Patrick L. Schmidt "The Process and Prospects for the U.N. Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment." *Georgetown Journal of International Law*, Vol. 35, No. 3 (2004).

<sup>75</sup> U.N. Doc. E/CN.4/1998/50 (1998).

<sup>76</sup> Schmidt, *supra* note 74, p. 30. *Ibid*, Simon Bagshaw, "Internally Displaced Persons at the Fifty-Fourth Session of the United Nations Commission on Human Rights, 16March-24 April 1998", *International Journal of Refugee Law Vol. 10 No. 3*, (1998), p. 552: In the foot note 12, he cited the following 55 countries which sponsored the resolution: Afghanistan, Angola, Argentina, Austria, Azerbaijan, Belgium, Bosnia and Herzegovina, Botswana, Bulgaria, Canada, Chile, Colombia, Congo, Costa Rica.

governments and other stakeholders to develop laws and policies to protect IDPs, the UN Guiding Principles on Internal Displacement are non-binding.

Unlike the UN Guiding Principles, which are non-binding, there are additional normative international frameworks at the regional and sub-regional levels that are binding. The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and the IDP Protocol of the Great Lakes Pact on Security, Stability, and Development (the Great Lakes Pact) are both significant steps toward the development of binding international law rules on the protection of IDPs. Furthermore, in the same spirit of developing binding regulations for the protection of IDPs, an increasing number of countries have established domestic laws and policies based on the Guiding Principles. For example, in Nepal<sup>77</sup> and Kenya the Governments have taken the initiative to draft a National Policy on IDPs<sup>78</sup>, Central African Republic<sup>79</sup>, Iraq (adoption of a national policy on displacement)<sup>80</sup>, Turkey (for a National Framework that would allow resolution of the remaining IDP problem in its Integrated Strategy Document)<sup>81</sup>, Yemen (established an executive unit to deal with its IDPs and has asked the international community to lend support)<sup>82</sup>. The national laws and policies for the protection of IDPs often include specific provisions for issues such as housing, education, health care, and access to justice. These provisions may include measures such as the establishment of IDP camps or other temporary housing solutions, the provision of education and health services to IDPs, and the creation of mechanisms for IDPs to seek legal remedies for violations of

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<sup>77</sup> National Legislative Bodies / National Authorities, *Nepal*, “National Policy on Internally Displaced Persons 2063” (2007). See also Phil Orchard, *Protecting the Internally Displaced Rhetoric and Reality*, (2019), p. 208.

<sup>78</sup> Republic of KENYA, “NATIONAL POLICY ON THE PREVENTION OF INTERNAL DISPLACEMENT, PROTECTION AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS (IDPS) IN KENYA (FINAL DRAFT)” (2010). *Ibid*, p. 151.

<sup>79</sup> Central African Republic, “Draft National Law on Internal Displacement” (2014). *Ibid*, p. 205.

<sup>80</sup> Iraq, “National Policy on Displacement” (2008). *Ibid*, p. 200.

<sup>81</sup> Turkey, “Integrated strategy Document” (2005). *Ibid*, p. 178.

<sup>82</sup> Yemen, “National Policy for Addressing Internal Displacement in the Republic of Yemen”, (2013). *Ibid*, p.183.

their rights. Overall, the goal of national laws and policies for the protection of IDPs is to ensure that these individuals are able to live in safety and dignity, with access to the same rights and protections as other members of society. Nonetheless, despite the existence of these national laws and guiding principles, protection for internally displaced persons remains inadequate due to the gaps in these instruments and regulations. IDPs require international assistance. One explanation is that many displaced persons are victims of brutal wars in which the governments of the countries from which they are displaced, who are meant to provide them with critical protection and aid, are involved. As a result, such governments deny that IDPs exist on their territory.

The lack of a globally agreed upon definition of what constitutes an internally displaced person (IDP) makes it difficult to accurately identify who can be an IDP, as national laws and other framework are building the definition in regard of each area's realities and situation. The lack of legal framework for IDPs engenders a lack of clear guidelines for the protection and assistance of these people.

### **3. GAPS IN THE EXISTING LEGAL FRAMEWORKS OF IDPs**

Despite the patchwork of laws that exist in international law related to internal displacement there is a serious vacuum in the international protection of IDPs. This protection gap mainly emanates from the fact that IDPs rights, needs and vulnerabilities are not taken into account in the existing laws. One major gap is the lack of a globally agreed upon definition of what constitutes an IDP. This makes it difficult to accurately identify and count the number of IDPs, and to provide them with the specific protections they need. For example, in the case of the Colombian law 387, persons displaced due to natural disasters are not mentioned as IDPs<sup>83</sup>. Indeed, this law defines the IDPs as “any person who has been forced to migrate within the national territory, abandoning his place of residence or customary economic activities,

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<sup>83</sup> Arena-Peraltas Lauram, “La protection des personnes déplacées à l’intérieur de leur propre pays”, *International Law, Revista Colombiana de Derecho* Vol. 9-58, No. 31 (2017), p43.

because his life, physical integrity, personal freedom or safety have been violated or are directly threatened as a result of any of the following situations: internal armed conflict, civil tension and disturbances, general violence, massive Human Rights violations, infringement of International Humanitarian Law, or other circumstances arising from the foregoing situations that drastically disturb or could drastically disturb the public order.”<sup>84</sup> Colombia's new Internal Displacement legislation strives to guarantee that displaced people have access to all civil rights recognized by international human rights standards, including the right not to be discriminated against and the right to long-term solutions to their displacement<sup>85</sup>. Although prior to the UN Guiding Principles, this legislation is consistent with them in the case of internal conflict; nonetheless, this legislation does not mention of environmentally displaced persons<sup>86</sup>.

Another gap in the legal framework for IDPs is the lack of clear guidelines for the protection and assistance of IDPs. While there are international legal instruments that address the rights of IDPs, such as the Guiding Principles on Internal Displacement, these are not legally binding and do not provide clear guidance on how governments should respond to the needs of IDPs. Further, when it comes to the protection of internally displaced people, international human rights law and humanitarian law have gaps (IDPs), as well as the Refugee Law. These gaps can emerge for a number of reasons, including a lack of a clear legal definition of an IDP, a lack of a specialized legal framework for IDP protection, and a lack of efficient means for implementing IDP rights. IDPs have been excluded despite the fact that international law has made considerable achievements in affording protection to other vulnerable groups facing high dangers to life and livelihood and with particular requirements. Human Rights Law (HRL), under the Convention on the Rights of the Child (CRC), for instance, provides children with comprehensive and enforceable protection in

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<sup>84</sup> Colombia: *Law 387 on Internal Displacement of 1997* (1997), Art. 1. English Version available at: <https://www.refworld.org/docid/5a255b374.html> (accessed 15 December 2022).

<sup>85</sup> *Ibid.*

<sup>86</sup> Lauram, *supra* note 83, p 44;



view of their unique and inherent vulnerability. Through the 1951 Refugee Convention and its 1967 protocol, Refugee Law offers protection for refugees worldwide. In armed situations, International Humanitarian Law also protects people. Unfortunately, neither IHL nor HRL specifically mention IDPs, and RL only relates to external displacement.

The following sentences the gaps in the legal frameworks will be discussed. These gaps of legal framework are reflected in the U.N Guiding Principles on Internal Displacement (3.1), in the international humanitarian law (3.2), and in the human rights law (3.3).

### **3.1. THE GAPS OF THE U.N GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT**

The Guiding Principles on Internal Displacement provide a set of standards for the protection and assistance of internally displaced persons (IDPs). They cover a wide range of rights and seek to ensure that IDPs are protected from violence, discrimination, and exploitation, and have access to basic necessities such as shelter, food, water, and healthcare. However, there are a number of gaps in the protection afforded by the Guiding Principles, which can leave IDPs vulnerable to abuse and exploitation.

Before discussing the gaps in this thesis, it is necessary to quickly examine the origin of the Guiding Principles. In the following sections, we will briefly review the stages that lead to the conclusion of the *Compilation and Analysis of Legal Norms*<sup>87</sup>.

Concerning the genesis, the United Nations Guiding Principles on Internal Displacement (the “Guiding Principles”) were developed by the Representative of the Secretary-General

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<sup>87</sup> Report of the Representative of the Secretary General Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1997/39 Addendum *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary Displacement*, E/CN.4/1998/53/Add.1 (1998).

on the Human Rights of Internally Displaced Persons, Francis M. Deng<sup>88</sup>, and his team of experts in 1998. The Guiding Principles were adopted by the UN Commission on Human Rights in 1998<sup>89</sup> and endorsed by the General Assembly in 2005<sup>90</sup>. In a more detailed two-volume study delivered in 1996 and 1998<sup>91</sup>, the Representative of the Secretary-General Deng determined that current legislation afforded extensive protection for the rights of internally displaced individuals. The first study revealed that while current international law addresses, albeit in a scattered and diffuse way, many issues essential to internally displaced individuals, there are numerous areas in which the law does not provide enough protection due to normative gaps. Following the resolution UN Commission on Human Rights Res. 1992/73 (5 March 1992), “at the request of the Commission on Human Rights, the Secretary-General of the United Nations appointed a Representative on internally displaced persons<sup>92</sup> to study the causes and consequences of internal displacement, the status of the internally displaced in international law, the extent of the coverage accorded them within existing international institutional arrangements and ways in which their protection and assistance could be improved, including through dialogue with Governments and other pertinent actors”<sup>93</sup>. From the Brookings Institution in Washington, D.C., Dr. Deng moved rapidly in assembling a team of legal scholars from Europe and the United States to assist him in preparing the requested an analytical report. In fact, in the paragraph 5 of the UN Commission on Human Rights Res. 1992/73 (5 March 1992), the Commission on Human Rights requests the Secretary-General to submit to the Commission at its forty-eighth session an analytical report on internally displaced persons, taking into account the

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<sup>88</sup> *Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights resolution 1993/95*, U.N. Doc. E/CN.4/1995/50/Add.3 (1995).

<sup>89</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra* note 1.

<sup>90</sup> *Resolution adopted by the General Assembly on 16 September 2005*, U.N. Doc. A/RES/60/1 (2005), para. 132.

<sup>91</sup> *Compilation and Analysis of Legal Norms*, Report of the Representative of the Secretary- General on Internally Displaced Persons, U.N. Doc. E/CN.4/1996/52/Add. 2; *Legal Aspects Relating to Protection Against Arbitrary Displacement*, U.N. Doc. E/CN.4/1998/53/Add.1 (1998).

<sup>92</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra* note 1, para. 2.

<sup>93</sup> *Ibid.*

protection of human rights of internally displaced persons, based on information submitted by Governments, the specialized agencies, relevant United Nations organs, regional and intergovernmental organizations, the International Committee of the Red Cross and non-governmental organizations<sup>94</sup>. In light of the fact that the *Compilation and Analysis of Legal Norms* did not specify the nature of a future international instrument applicable to IDPs, Dr. Deng and his legal team felt that restating and clarifying legal norms in a single coherent document could bolster and strengthen existing protection. Thus, all conclusions of the members of the study corroborate on going towards a comprehensive set of guiding principles, for some reasons including the lack of interest and support by States for a new binding instrument, the slow procedure in the treaty making, arguing that there was an immediate and pressing need to comprehensively address the plight of IDPs.

Consequently, based on the *Compilation and Analysis*<sup>95</sup>, Dr. Deng and his legal team began drafting the *Guiding Principles on Internal Displacement* over a two- year period. This exercise involved broad consultations with representatives of international organizations, specialized agencies and institutions, such as the ICRC and UNHCR, regional bodies from Africa, the Americas and Europe, international legal experts, and NGOs from all regions of the world<sup>96</sup>. The *Guiding Principles*, which were finalized at an expert consultation in Vienna in January 1998<sup>97</sup>, were submitted by the Representative of the Secretary-General to the UN Human Rights Commission several months later<sup>98</sup>.

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<sup>94</sup> *Ibid.*, para. 5.

<sup>95</sup> *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57 Compilation and analysis of legal norms*, 5 December 1995, E/CN.4/1996/52/Add.2 (1995).

<sup>96</sup> Robert K. Goldman, "Internal Displacement, the Guiding Principles on Internal Displacement, the Principles Normative Status, and the Need for their Effective Domestic Implementation in Colombia", *ACDI, Bogotá, ISSN: 2027-1131*, Vol. 2, (2009), p. 66.

<sup>97</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra* note 1, para.15 "15. The Government of Austria hosted an expert consultation in Vienna in January 1998, for the purpose of finalizing the *Guiding Principles*, which is most gratefully acknowledged."

<sup>98</sup> Goldman, *supra* note, p. 96.

Despite these protections, IDPs often face significant challenges in accessing their rights and may be at risk of abuse and exploitation. There are gaps in the protection of IDPs, particularly in situations of armed conflict and occupation where access to justice and accountability may be limited. In addition, IDPs may face challenges in accessing basic services and may be vulnerable to discrimination and marginalization.

The Guiding Principles were developed in response to the increasing number of internal displacement situations around the world and the need for a set of standards to address the protection and assistance needs of internally displaced persons (IDPs)<sup>99</sup>. The Guiding Principles provide a framework for the protection of IDPs and set out the rights and obligations of governments, as well as other actors, in preventing and addressing internal displacement<sup>100</sup>.

Moreover, while the UNGPID are an important framework for the protection of IDPs, they have gaps and limitations that need to be addressed in order to ensure the full realization of the rights of internally displaced persons. What are the gaps in the Guiding principles? There are a number of gaps in the protection afforded by the Guiding Principles, which can leave IDPs vulnerable to abuse and exploitation.

Some of these gaps include, first, the non-legal bindingness character of the guiding principles. The Guiding Principles on Internal Displacement are a set of principles that provide a framework for the protection of internally displaced persons (IDPs and for ensuring their dignity, safety, and rights). The UN guiding principles were adopted by the UN Commission on Human Rights in 1998 and have since been endorsed by the UN General Assembly and other international and regional bodies. Despite their widespread acceptance and endorsement, the Guiding Principles are not legally binding and do not have the force of law. This means that there is no mechanism for holding governments accountable for

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<sup>99</sup> *Report of the Representative of the Secretary General Mr. Francis Deng, Supra* note 87, p. 36, paras. 1 & 2.

<sup>100</sup> *Ibid.*

violating the principles, and there is no legal recourse for IDPs who have been denied their rights under the Principles. The Guiding Principles, as they have been elaborated, are not a legally binding document, “they have not been negotiated by States, but rather prepared by a team of experts in close consultation with the concerned agencies and organizations and then submitted to the Human Rights Commission”<sup>101</sup>, thus, they are not treaties, neither declaration, resolutions, or recommendations. According to Walter Kälin “they do not even constitute typical soft law, i.e., they do not belong to those recommendations that rest on the consensus of states and thereby assume some authority that may be even taken into account in legal proceedings, but whose breach does not constitute a violation of international law in the strict sense, and thus does not entail State responsibility.”<sup>102</sup>

Second, the Guiding Principles are not comprehensive and do not address all aspects of internal displacement. For example, they do not provide guidance on the prevention of internal displacement, nor do they address the specific needs of vulnerable groups such as women, children, and elderly persons.

Third, the GPs do not adequately address the issue of durable solutions for IDPs, such as voluntary repatriation, integration into host communities, or resettlement in third countries. This lack of clarity and guidance on durable solutions can lead to prolonged displacement and a lack of protection for IDPs.

Fourth, the lack of effective implementation, while the Guiding Principles are widely accepted as the international standard for the protection of IDPs, they are not legally binding and are not always effectively implemented. This can lead to a lack of accountability for violations of IDPs' rights and a lack of effective protection for IDPs.

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<sup>101</sup> Walter Kälin “THE GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT AS INTERNATIONAL MINIMUM STANDARD AND PROTECTION TOOL”, *Refugee Survey Quarterly*, Vol. 24, No. 3 (2005), p. 29.

<sup>102</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, supra note 1, p. 38.*

### 3.2. GAPS OF PROTECTING THE INTERNALLY DISPLACED PERSONS IN THE INTERNATIONAL HUMANITARIAN LAW

International Humanitarian Law (IHL), also known as the law of armed conflict or the law of war, is a set of rules that seek to protect individuals who are not participating in hostilities and to limit the means and methods of warfare. The four Geneva Conventions of 1949 and the two Additional Protocols of 1977 form the core of IHL. Under international humanitarian law as well, IDPs are not adequately protected. The most apparent one is that International Humanitarian Law is not designed to address specific needs of IDPs<sup>103</sup>. Rather, IDPs are protected as civilian victims during the armed conflict. IDPs are protected as non-combatants and only when armed conflict happens under IHL, which does not address all internal displacement phases and type. Rather, they apply only during the displacement phase, and only when civilians are uprooted by armed conflict or wars within the meaning of the 1949 Conventions<sup>104</sup>, international armed conflicts within the meaning of Protocol I<sup>105</sup> or non-international armed conflicts as provided for in the Protocol II<sup>106</sup>. The Protocol II expressly stipulates that the Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts<sup>107</sup>. The article stipulates that “This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts”<sup>108</sup>.

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<sup>103</sup> Maru, *supra* note 16, p. 81.

<sup>104</sup> Geneva Convention Relative to the Protection of Civilian Persons in Times of War, *United Nations Treaty Series*, Vol. 75, (p. 287), No 973.

<sup>105</sup> Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (Protocol I), *United Nations Treaty Series*, Vol. 1125, (p. 3), No. 17512.

<sup>106</sup> Protocol additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (Protocol II), *United Nations Treaty Series*, Vol. 1125, (p. 609), No. 17513.

<sup>107</sup> *Ibid.*, Art. 1(2).

<sup>108</sup> *Ibid.*

This article of the Protocol II is an eloquent illustration of the legal protection gap of IDPs by the international humanitarian law. However, this article, by excluding from the scope of the Protocol II, the situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, misses also to protect displaced and displacement happened during peace time, from brutal riots, or political violence. In some part of the world, where the rules of democracy are not well observed and implemented, political violence is the main factor of uprooting the population. For example, in October 2010, events in Siguiiri, Republic of Guinea, triggered violence, resulting in a large number of displaced persons<sup>109</sup>, without any protection or assistance. They lacked protection from violence, leaving them vulnerable to violence and abuse at the hands of state security forces, or other actors, and they may not have had access to justice or effective remedies for such abuses. The existing humanitarian laws do not offer protection to IDPs uprooted during period of peacetime due to political violence or riots. Thus, such displaced persons are excluded under the scope of the Protocol II of the Geneva Convention.

Moreover, IDPs frequently face significant obstacles and protection gaps in practice. Consequently, some of the major protection gaps for IDPs under IHL include:

First, lack of access to humanitarian assistance. IDPs may have limited or no access to essential humanitarian assistance such as food, water, shelter, and medical care due to restrictions on the movement of aid workers or due to the insecurity of the conflict zone. Inadequate housing and shelter as IDPs may be forced to live in overcrowded and unsanitary conditions or may be unable to find adequate housing due to deficient of resources or available housing. Second, the lack of respect for the rights of IDPs: States and other parties may fail to respect the rights of IDPs, such as the right to freedom of movement, the right to

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<sup>109</sup> SAFIATOU DIALLO, “MÉMOIRE COLLECTIVE : UNE HISTOIRE PLURIELLE DES VIOLENCES POLITIQUES EN GUINÉE/POLITIQUE, ETHNICITÉ ET VIOLENCE : LES ÉVÉNEMENTS D’OCTOBRE 2010 À SIGUIRI” in *MÉMOIRE COLLECTIVE : UNE HISTOIRE PLURIELLE DES VIOLENCES POLITIQUES EN GUINÉE*, p. 270, <https://www.memoire-collective-guinee.org/>. (accessed 12/18, 2022).

an adequate standard of living, and the right to participate in decision-making processes that affect their lives.

### **3.3. GAPS FOR PROTECTING THE INTERNALLY DISPLACED PERSONS IN THE INTERNATIONAL HUMAN RIGHTS LAW**

In terms of normative gaps, it was determined that there are various areas where a general norm exists but particular rights relevant to the needs of internally displaced persons do not exist. For example, although there is a general human rights norm guaranteeing freedom of movement, there is no explicit provision giving right to IDPs to find refuge in a safe part of the country. It is on the will of the territorial state<sup>110</sup>. Similarly, although a general norm prohibits cruel, inhuman, or degrading treatment, there is no express norm prohibiting the forcible return of IDPs to dangerous areas within their own country. Another example can be found in non-discrimination, where treaties prohibit discrimination, *inter alia*, on the basis of any “other status”<sup>111</sup> of the person concerned.

The analytical report of the General Secretary found numerous instances where the law is silent. For example, no international instrument contains an express right not to be arbitrarily displaced. The study also identified other legal gaps in the assistance and the protection of IDPs, such as the absence of a right to restitution of property lost (or compensation for its loss) as a consequence of displacement during armed conflict situations, a right to have access to protection and assistance during displacement, and a right to personal documentation, and the right of freedom of movement and chose their residence: In some instances, displaced

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<sup>110</sup> *Analytical Report of the Secretary-General on internally displaced persons*, *supra* note 23, para. 6.

<sup>111</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant, *United Nations Treaty Series*, Vol. 999, p. 171, (No. 14668), Art. 26: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.



persons are not allowed to choose their new place of residence freely, but are assigned to a new place of residence or are obliged to live in a camp. Those obliged to reside in camps also may be prevented from leaving them even temporarily, thus restricting freedom of movement as well as freedom of residence. The freedom of movement of displaced persons who are not confined in camps may also be limited, often by threats to their physical security”<sup>112</sup>.

For Walter Kälin “Another case of insufficient protection occurs in situations that both fall below the threshold of application of humanitarian law and allow for restrictions or even derogations of human rights guarantees: in some situations of tensions and disturbances, or disasters resulting in the displacement of persons, restrictions may limit certain human rights that are critical for the well-being or even survival of the displaced. In the rare instance where a genuine emergency exists that does not reach the level of an armed conflict, internally displaced persons may be left without legal protection because a State may derogate from certain human rights obligations that are key to life-essential protection. In situations of non-international armed conflict, common article 3 or Protocol II sometimes does not afford protection and, at the same time, human rights guarantees are limited or derogated from. Again, internally displaced persons face situation of insufficient protection reflecting the fact that the scope of non-derogable rights in human rights instruments is inadequate to address all the critical needs of the displaced...”<sup>113</sup> Finally, there is a vacuum in legal protection with regard to internally displaced persons in States that have not ratified key human rights treaties. For example, Sudan which a high statistic of IDPs, has not ratified the Kampala Convention.

Human rights are freedoms and entitlements that every individual should enjoy. International human rights law [...] guarantees these rights and obliges states to respect, protect and fulfill the human rights of all persons without discrimination of any kind, such

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<sup>112</sup> *Analytical Report of the Secretary-General on internally displaced persons, supra note 23, para. 65*

<sup>113</sup> Goldman, *supra* note 96, p. 38.

as on the grounds of age, gender, ethnic origin, language, religion, political or other opinion, national or social origin, property, birth or other status, including on the grounds of being or having been internally displaced<sup>114</sup>.

International Human Rights Law, like International Humanitarian Law, does not protect IDPs as a distinct category of people, in analogy of the refugee law and therefore protects the human rights of IDPs, in the same case of other people and citizens. Moreover, during period of state of emergency as well, the Human Rights Law protects specific human rights, such as the right to life, prohibition of torture... A State Party may temporarily suspend the application of some provisions in time of emergency<sup>115</sup>, nonetheless the non-derogability characteristics of *jus cogens*, sometimes confusion takes place with the phenomenon of derogation in the human rights treaties<sup>116</sup>. The treaties that so provide also contain lists of provisions for which derogation is not authorized<sup>117</sup> and include the right to life, prohibition of torture, prohibition of slavery, prohibition of imprisonment due to inability to fulfil contractual obligations, legality in criminal prosecution, equality before the law, freedom of thought, conscience and religion, and the principle of non-discrimination. The ICCPR protects the human rights (right to life, prohibition of torture, prohibition of slavery, prohibition of imprisonment....) of the IDPs, as in the case of other people and citizens during peace time, armed conflicts or state of emergency. Armed conflicts, aggressions, riots, political violent crises, terrorist activities, epidemics could justify a declaration of state of emergency<sup>118</sup> and it is even during those time that protection is needed most. Unfortunately, it is at this moment that the protection of IDPs fail, notably in the non-respect

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<sup>114</sup> Global Protection Cluster (GPC), *Handbook for the Protection of Internally Displaced Persons*, 2010, p. 21 available at <https://www.unhcr.org/protection/idps/4c2355229/handbook> (accessed date, 12/05/2020).

<sup>115</sup> William A. Schabas "The Customary International Law of Human Rights" (2021) Pp 57-58

<sup>116</sup> HUMAN RIGHTS COMMITTEE, STATES OF EMERGENCY, GENERAL COMMENT 29 (ON ARTICLE 4) (24 July 2001) Para 5, 7, 8.

<sup>117</sup> William A. Schabas "The Customary International Law of Human Rights" (2021) Pp 58

<sup>118</sup> Maru, *supra* note 16, p. 26.

of their right of freedom of movement and chose their residence. It is to say that the vulnerability and specific needs of IDPs are not taken into account.

International human rights law, such as the right of the freedom of movement, is highly related to displacement. However, freedom of movement, to which the freedom from displacement is anchored<sup>119</sup>, is considered a derogable right during a period of state of emergency<sup>120</sup>. Thus, while during emergency situation, internal displacement occurs, it is also during such periods that human rights protection is needed most. It is also during such periods that the freedom of movement of population is restricted<sup>121</sup>. Unfortunately, HRL

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<sup>119</sup> Freedom of movement is an indispensable condition for the free development of an individual, said the Human Rights Committee in General Comment 27, Freedom of movement (art. 12), CCPR/ C/ 21/ Rev.1/ Add.9, para.1. See also *Batyrov v. Uzbekistan*, no. 1585/ 207, Views, 30 July 2009, CCPR/ C/ 96/ D/ 1585/ 2007, para. 8.3; *Orazova v. Turkmenistan*, no. 1883/ 2009, Views, 20 March 2012, CCPR/ C/ 104/ D/ 1883/ 2009, para. 7.3; *Sayadi et al. v. Belgium*, no. 1472/ 2006, Views, 29 December 2008, CCPR/ C/ 89/ D/ 1472/ 2006, para. 10.5. The same language was adopted by the Inter-American Court of Human Rights see *Ricardo Canese v. Paraguay*, Judgment (Merits, reparations, and costs), 31 August 2004, Series C, No. 111, para. 115; *Moiwana Community v. Suriname*, Judgment (Preliminary objections, merits, reparations, and costs), 15 June 2005, Series C, No. 124, para. 110. Universal Declaration of Human Rights, A/ RES/ 217 (III), art. 13(2). International Covenant on Civil and Political Rights, (1976) 999 UNTS 171, art. 12. International Convention on the Elimination of All Forms of Racial Discrimination, (1969) 660 UNTS 195, art. 5(2)(i); Convention on the Elimination of All Forms of Discrimination against Women, (1981) 1249 UNTS 13, art. 15(4); International Convention on the Suppression and Punishment of the Crime of Apartheid, (1976) 1015 UNTS 243, art. II(c); Convention on the Rights of the Child, (1990) 1571 UNTS 3, arts. 9, 10; International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, (2003) 2220 UNTS 3, art. 39; Convention on the Rights of Persons with Disabilities, (2008) 2515 UNTS 3, art. 18; Protocol 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, CETS 46, arts. 2, 3, and 4; American Convention on Human Rights, (1978) 1144 UNTS 123, art. 22; African Charter on Human and Peoples' Rights, (1986) 1520 UNTS 271, art. 12(1) and (2); Arab Charter on Human Rights, art. 26; Charter of Fundamental Rights of the European Union, OJ C 326/ 391, art. 45(1).

<sup>120</sup> Maru, *supra* note 16, p. 81.

<sup>121</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 136, para. 134; *ibid.*, Separate Opinion of Judge Higgins, para. 25. Azerbaijan, Concluding Observations, CCPR/ C/ AZE/ CO/ 3, para. 18; Azerbaijan, Concluding Observations, CCPR/ C/ AZE/ CO/ 4, paras. 30– 31; Kazakhstan, Concluding Observations, CCPR/ C/ KAZ/ CO/ 2, paras. 41– 42; Kazakhstan, Concluding Observations, CCPR/ C/ KAZ/ CO/ 1, para. 18; Turkmenistan, Concluding Observations, CCPR/ C/ TKM/ CO/ 2, paras. 28– 29.

fails to protect IDPs during such unstable times, because it is usually at that time freedom of movement, freedom of speech, right to live are violated, therefore rendering HRL ineffective.

#### **4. CONCLUSION**

In sum, it can be concluded that while existing law provides substantial coverage for the internally displaced, there are significant areas in which it fails to provide an adequate basis for their protection and assistance. Existing international legal norms are neither comprehensive enough to cover all phases of displacement, nor sufficiently specific in addressing the unique protection needs of IDPs. Further, the UN Guiding Principles which are the first international standards assigned to address displacement and protect IDPs are not binding on States. More, neither International Humanitarian Law nor Human Right Law addresses the distinct vulnerability and special needs of IDPs as a specific category of persons.

## CHAPTER IV: FACTORS THAT CAUSED IDPS TO BE PROTECTED UNDER INTERNATIONAL LAW

### 1. INTRODUCTION

In the analytical report of the Secretary-General on internally displaced persons, published in 1992, submitted to the Commission on Human Rights at its forty- eighth session, it was stated that 24 million people were estimated to be displaced within the borders of their own countries<sup>122</sup>. Nonetheless, the number of people worldwide living in internal displacement has increased over decades, as mentioned in the 2021 IDMC's report. According to the report, the number has reached a record of fifty-five million (55 million) as of 31 December 2020<sup>123</sup> and fifty-nine point one million (59.1 million) by the end of December 2021<sup>124</sup>. It is to say that the deficient protection of IDPs, all over these decades, is going increasingly. Armed conflict, forced relocation, communal violence, natural and ecological disasters, systematic violations of human rights, as well as traditionally recognized sources of persecution combine to produce these massive involuntary movements within State borders<sup>125</sup>. Internally displaced persons are vulnerable and unable to find safe places, and their basic human rights are frequently violated, while their humanitarian needs go unmet. Furthermore, territorial states are unwilling to protect people who have been internally displaced as a result of conflicts caused by these same states.

What are the factors that lead to international concern? Why is the international community gained interest on the global crisis of the IDPs situation?

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<sup>122</sup> U.N Doc. /CN.4/1992/23, para. 5

<sup>123</sup> IDMC *General Report on Internal Displacement (GRID)* (2021), p. 4. <https://www.internal-displacement.org/global-report/grid2021/> (date of access 12/19/2022).

<sup>124</sup> IDMC *General Report on Internal Displacement (GRID)* (2022), p. 10. <https://www.internal-displacement.org/global-report/grid2022/> (date of access 12/10/2022).

<sup>125</sup> *Analytical Report of the Secretary-General on internally displaced persons*, *supra* note 23, paras. 18-39.

This chapter will identify and discuss the causes or push-factors (2) that led to the interest of the international community towards the crisis of internal displacement, in the next section.

## **2. IDENTIFICATION OF PUSH-FACTORS OF THE INTERNATIONAL CONCERN**

Push factors are the triggers that prompted the international community to address the global crisis of internal displacement. In other words, they are the factors which have induced the international institutions, the international community to orient their sight to the global crisis of IDPs. Unlike the push-factors that force the IDPs to migrate, these push-factors are rather the factors that make other States or institutions to check the situation of IDPs in the territorial State.

The IOM (International Organization of Migration) defines the push-factors as the conditions or circumstances in a country of origin that impel or stimulate emigration<sup>126</sup>. In other words, the negative aspects that make people want to leave their usual living place. However, in addition to the primary push-factor of migration which is linked to economic issues, the push-factors of migration and the push-factors that drive international community to interfere into internal displacement in one country are quite similar. In addition to the primary push-factor, there are several push-factors that have led to the protection of internally displaced persons (IDPs) under international law. The magnitude of internal displacement characterized by the large number of people who have been displaced within their own countries as a result of conflict, violence, and other factors has led to recognition of the need for protection. The vulnerability of IDPs is another push-factor. IDPs are often among the most vulnerable members of society, as they have been forced to flee their homes and often lack access to basic necessities such as food, shelter, and medical care. Another particular aspect of IDPs that might take them to be legally protected in the

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<sup>126</sup> Glossary on Migration, International Organization for Migration (IOM), 2019 p. 164.

international law, is the vulnerability of the IDPs. IDPs have experienced displacement due to Man Induced Displacement or natural disaster. Forced displacement has contributed to create a character of vulnerability that are going through Internally Displacement Persons. The absence and impact of an internationally binding legal regime for the protection of IDPs is apparent.

The recognition of IDPs as a distinct group is also a push-factor of international concern to IDPs. The concept of IDPs as a distinct group with specific needs and rights has been recognized in a number of international instruments, including the Guiding Principles on Internal Displacement and the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa. The impact of internal displacement on regional stability, large-scale internal displacement can have destabilizing effects on countries and regions, leading to the need for international efforts to address the issue. Internal displacement, which refers to the movement of people within the borders of their own country, can have significant impacts on regional stability. Large-scale internal displacement can create challenges for governments and communities and can also lead to conflicts and tensions between displaced populations and host communities.

In addition of push-factor, national governments are unable to protect IDPs. In many cases, national governments have been unable or unwilling to provide protection and assistance to IDPs, leading to the need for international intervention<sup>127</sup>. Internally displaced persons generally receive little or no assistance from their own governments and according to Roberta Cohen, either their own governments do not have the capacity, or it is their own governments that deliberately subject them to starvation, physical attacks and other abuses<sup>128</sup>. The Representative of the UN Secretary-General on Internally Displaced Persons,

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<sup>127</sup> Orchard, *supra* note 50, p. 3. See also Roberta Cohen, “The Global Crisis of Internal Displacement”, *Brookings*, November 11, 1998, available at <https://www.brookings.edu/on-the-record/the-global-crisis-of-internal-displacement-2/> (accessed date 12/20, 2022).

<sup>128</sup> Cohen, *Ibid*

Francis M Deng, goes in the same sense and has pointed out that governments often do not regard the internally displaced as citizens in need of protection [...] In such cases, the government is usually identified with one ethnic group which excludes and marginalizes other groups. The others are seen as “the enemy” and this de-humanization creates a climate in which atrocities committed against them are seen as legitimate<sup>129</sup>. In fact, whereas international law recognizes the sovereign right<sup>130</sup> and responsibility of States to protect citizens within their own borders<sup>131</sup>, political, economic and social realities have inhibited this capability. It happens, in some cases, the ability of a government in power to protect its citizens and exercise sovereign authority across its entire territory, is constrained by political instabilities and, especially, various armed groups that equally control some parts of the territory. Consequently, millions of citizens in some countries have found themselves trapped between rebels or militias and government forces fighting against each other, ultimately depriving civilians, in need of protection, of their safety and well-being. As mentioned above, States have the obligation to protect its citizens without discrimination, and in addition, States are required to extend protection to all vulnerable groups of persons displaced within their countries. This is an obligation that also extends to the protection of

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<sup>129</sup> *Ibid.*

<sup>130</sup> “The concept of sovereignty, first understood as the supreme and absolute autonomy over a particular territory, evolved from being an ‘omnipotent authority’ to a totality of legal powers and competences regulated by contemporary international law” James Crawford, *The Creation of States in International Law* (Oxford University Press, 2<sup>nd</sup> edn, 2006) 103. See also *Foundations of International Migration Law* Cambridge (University Press 2012 Richard Perruchoud, 5. *State sovereignty and freedom of movement*) 123. In the same article, according to Richard Perruchoud, the concept of sovereignty, “as a concept of international law, it comprises three major aspects – external, internal and territorial – each being exercised in accordance with the rules of international law. The *external* aspect of sovereignty concerns the relationship between States: it is the right of a State to determine freely its relations with other States or entities without the restraint or control of another State. This aspect of sovereignty is also known as independence. The *internal* aspect of sovereignty is the State’s right or competence to determine the character of its own institutions, to enact laws of its own choice, and to ensure respect for and adherence to national laws. The *territorial* aspect of sovereignty is the authority that a State exercises over all persons and things found within its territory, as well as over its nationals abroad.”

<sup>131</sup> World Summit Outcome Document, U.N Doc. A/RES/60/1 (2005), para. 138. “Each individual State has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity [...]”



IDPs from human rights violations and atrocities<sup>132</sup>. In spite of being in need of aid and assistance, particularly during an internal crisis, government leaders may have reluctance to accept foreign assistance, citing the concept of sovereign equality of States<sup>133</sup> and the principles of non-intervention<sup>134</sup>. States have obligations towards their populations including that they cannot treat them as they wish in the name of sovereignty.

### 3. CONCLUSION

The cause that drew the international community into a territorial State to safeguard and help IDPS is connected to acts threatening residents' security, resulting in forced and large displacement, discrimination against a specific segment of the population, and abuses of human rights. In fact, in the reports relating to internally displaced persons of the Representative of the General Secretary, the Human Rights committee and the Human Right Council, it shows that provisions of human rights are violated when forced displacement occurs, inter alia, in particular, the fundamental right to freedom of movement and choice of residence. In those reports, the administrative measures taken by territorial States, to refrain internal displacement, are mainly cited.

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<sup>132</sup> Adama Dieng, "Protecting internally displaced persons: The value of the Kampala Convention as a regional example", *International Review of the Red Cross*, Vol. 99, No. 1 (2017), p. 268.

<sup>133</sup> Charter of United Nations, art. 2, para. 1, "...The Organization is based on the principle of the sovereign equality of all its Members."

<sup>134</sup> Charter of United Nations, art. 2, para. 7 "Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII."

## **CHAPTER V: ARE THE ADMINISTRATIVE MEASURES, NATIONAL LAWS, OR POLICIES TAKEN BY TERRITORIAL STATES RELATING TO THE RIGHT TO LIBERTY OF MOVEMENT OF INTERNALLY DISPLACED PERSONS, NECESSARY AND PROPORTIONATE?**

### **1. INTRODUCTION**

Typically, national laws and policies are enacted to protect and assist IDPs. But these same laws, as well as the administrative measures, restrict the freedom of movement and choice of residence of IDPS. These measures are often used to monitor or control movement within a country's borders. These measures are also taken to assign IDPs in camps and restrict their movement out and in of those camps. In some instances, displaced persons are not allowed to choose their new place of residence freely, but are assigned to a new place of residence or are obliged to live in a camp<sup>135</sup>. Those obliged to reside in camps also may be prevented from leaving them even temporarily, thus restricting freedom of movement as well as freedom of residence<sup>136</sup>. For example, the system of pass in Nigeria is taken as a study case to illustrate it. The freedom of movement of displaced persons who are not confined in camps may also be limited, often by threats to their physical security<sup>137</sup>, as in the case of the displaced in Azerbaijan.

Human rights law requires restrictions to be provided for by law, necessary and proportionate to achieve a legitimate aim (such as the protection of national security or public order, health or morals, or the rights or freedoms of others), including after a natural disaster, and non-discriminatory and consistent with other human rights<sup>138</sup>.

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<sup>135</sup> *Analytical Report of the Secretary-General on internally displaced persons*, *supra* note 23, p.17, para. 65.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant, *supra* note 111, art. 12(3),

This chapter is the core part of the present thesis. In this part, the national laws or policies restricting the right to liberty of movement of IDPs are assessed according to their necessity and proportionality. Thus, this chapter is structured as follow: the standards providing the right to liberty of movement in general, and extended to the context of internal displacement, in which the significance of the right of the freedom of movement is discussed (2) followed by the sub-section related to the consequences of the restrictions of the right to the liberty of movement on displaced persons (2.1). The exceptions of the exercise of the right to the liberty of movement in light of the article 12 (3) of the ICCPR is also explored in the section 3. The last section concerns the assessment of the restrictive measures in light of the principle of necessity and proportionality (4).

## **2. STANDARDS PROVIDING THE RIGHT TO LIBERTY OF MOVEMENT EXTENDED TO THE CONTEXT OF INTERNAL DISPLACEMENT.**

In the context of internal displacement, the right to liberty of movement may be restricted or violated due to a variety of factors, including conflict, persecution, natural disasters, or other crises. In situations of displacement, restrictions have sometimes been implemented in an arbitrary or discriminatory manner or been used for unlawful purposes, including to isolate or marginalize the displaced population<sup>139</sup>. Displaced persons may be confined to camps or other restricted areas or may face barriers to movement due to violence or other security concerns<sup>140</sup>. For instance, the general travel restrictions, either legal or administrative, which regulate movement within the country, often disproportionately affect IDPs, owing for instance to a lack or loss of documentation or financial means<sup>141</sup>. These can include curfews, restricted traveling hours or days, or strict travel criteria, such as a need for specific documentation or travel permits. Illegal checkpoints put in place by uncontrolled armed elements or non-State actors also restrict the ability of IDPs to move

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<sup>139</sup> Global Protection Cluster (GPC), *Handbook for the Protection of Internally Displaced Persons*, *supra* note 114, p. 205.

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

freely. Targeted travel restrictions on, for example, movement in and out of camps or settlements for IDPs, are often imposed to deal with perceived or actual security threats but frequently violate the rights of those residing in the area. These can include curfews, restrictive traveling hours or days, restrictions on travel distances criteria, and documentation requirements<sup>142</sup>. Whenever restrictions are imposed by the State, it must ensure that these comply with the criteria mentioned above. As an example, where documentation or travel permission are required, the State should ensure that these can be obtained without delay or hardship and that they are not subject to unreasonable requirements or high fees.

This section discusses the significance of the right of the liberty of movement in light of the article 12 (1) of the ICCPR, as well as other international human rights standards, such as the Universal Declaration of Human Rights<sup>143</sup>. The significance is extended to the right of liberty of movement to IDPs.

The right to liberty of movement is established in several international norms, both obligatory and non-obligatory, including the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights<sup>144</sup>. Article 12(1) of the International Covenant on Civil and Political Rights guarantees the freedom of movement and the right to choose one's place of residence. The Covenant stipulates that “Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence<sup>145</sup>. Let us recall that the ICCPR is a key international human rights treaty, which provides a range of protections for civil and political rights<sup>146</sup>. The

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<sup>142</sup> *Ibid.*

<sup>143</sup> *Universal Declaration of Human Rights*, U.N. Doc. G.A/RES/217 A/ (III) (1948).

<sup>144</sup> *Ibid.*

<sup>145</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant, *supra* note 111, art. 12 (1)

<sup>146</sup> *Ibid.*, preamble, para.2, In the paragraph 2 of the ICCPR’s preamble, it is articulated that countries that have ratified the Treaty, are obligated to protect and preserve basic human rights, such as: the right to life and human dignity; equality before the law; freedom of speech, assembly, and association; religious freedom and privacy; freedom from torture, ill-treatment, and

Covenant obligates governments to adopt administrative, judicial, and legislative steps to preserve the rights embodied in the treaty and to provide an adequate remedy for violations<sup>147</sup>.

To monitor the implementation of the ICCPR, the Covenant established a Human Rights Committee under Article 28<sup>148</sup>. The Human Rights Committee is a body of independent experts that monitors implementation of the International Covenant on Civil and Political Rights by its States parties.

The Human Rights Committee plays a vital role in the promotion and protection of human rights at the international level. The Committee's work promotes the enjoyment of civil and political rights, such as the right to the liberty of movement. Part 4 of the Covenant contains the essential provisions to enhance the enjoyment of civil and political rights in States Parties. The Committee is responsible for interpreting the ICCPR and monitoring the implementation of the treaty by States Parties. Its work helps to ensure that States Parties to the ICCPR fulfill their obligations under the treaty, and that individuals are able to exercise their rights and seek remedies for violations. Further, the Committee's work receives and considers communications from individuals or groups who claim to be victims of a violation of their rights under the ICCPR. It is mentioned in the preamble of the first optional protocol that the Committee is able to receive and consider communications from individuals which claim to be victims of violations of human rights set forth in the covenant. For example, the case of *Ackla v Togo* (505/92)<sup>149</sup> is an illustration of a claim of individual before the Human Rights Committee: In that communication, the author claims to be a victim of violations of

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arbitrary detention; gender equality; the right to a fair trial; right family life and family unity; and minority rights. See also, International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant art. 2(1)(2).

<sup>147</sup> *Ibid*, art. 2(3).

<sup>148</sup> *Ibid*, art. 28 (1) "*There shall be established a Human Rights Committee (hereafter referred to in the present Covenant as the Committee. It shall consist of eighteen members and shall carry out the functions hereinafter provided.*"

<sup>149</sup> Kéténguéré Ackla v. Togo, Communication No. 505/1992, U.N. Doc. CCPR/C/51/D/505/1992 (1996).

several articles<sup>150</sup> including the article 12 paragraph 4 of the ICCPR, the right to liberty of movement and the right to choose his own residence. Similarly, in the case *Mpaka-Nsusu v. Zaire* (157/83) 26 March 1986<sup>151</sup>, the author claims to be a victim of breaches by Zaire of articles 1, 9, 14 and 26 of the International Covenant on Civil and Political Rights. In the case *Mpandanjila v. Zaire*<sup>152</sup> as well, the claims of the author is related to the article 14 (Right to a fair trial), article 19 (freedom of opinion and expression), article 22 (Freedom of association), article 15 (freedom of retroactive criminal law), articles 9 (Rights to liberty and security of the person) and 12 (right to liberty of movement), articles 7 (Freedom from torture, inhuman and degrading treatment, and punishment) and 10 (Right of detained

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<sup>150</sup> See Paragraph 1 *Kéténguéré Ackla v. Togo*, Communication No. 505/1992, U.N. Doc. CCPR/C/51/D/505/1992 (1996) “1. The author of the communication is Kéténguéré Ackla, a Togolese citizen currently residing in Lomé, Togo. He claims to be a victim of violations by Togo of articles 1, paragraphs 1 and 2; 2, paragraph 3 (a), (b) and (c); 7; 9, paragraphs 1, 2, 3 and 5; 10, paragraph 1; 12, paragraph 4; and 17, paragraphs 1 and 2, of the International Covenant on Civil and Political Rights. The Optional Protocol entered into force for Togo on 30 June 1988.”

<sup>151</sup> *Andre Alphonse Mpaka-Nsusu v. Zaire*, Communication No. 157/1983, U.N. Doc.

<sup>152</sup> *Mpandanjila v. Zaire* Communication No. 138/1983

persons to humane treatment)<sup>153</sup>. Other example is the communication *Jalloh v. Netherlands*<sup>154</sup> the author claimed violation under the articles 9 and 24 of the Covenant<sup>155</sup>.

The Committee's decisions and recommendations provide guidance and support to States Parties, and can help to address human rights abuses and improve the protection of human rights in countries around the world. The Committee also publishes its interpretation of the content of human rights provisions, known as general comments under the article 40 (4) of the Covenant, on thematic issues or its methods of work. For example, the General Comment No. 27 of 1999 of the article 12 of the ICCPR, related to the right to liberty of movement. In résumé, the Human Rights Committee performs four essential functions in monitoring the ICCPR: it conducts dialogues and draws conclusions from States 'reports; it issues general Comments which explain the meaning of the ICPR provisions; it hears inter-State complaints under article 41; and it makes decisions.

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<sup>153</sup> Paragraph 2.5 of the Communication: At this stage in the presentation of the communication, the lawyers alleged if the State party had violated a number of articles of the International Covenant on Civil and Political Rights, as follows: Article 14. The Central Committee of MPR, which was not an independent and impartial tribunal, took disciplinary measures of a penal character against the parliamentarians; the State Security Court, which rendered the judgement of 1 July 1982, was also not an independent and impartial tribunal since its judges were members of MPR; the trial was not held in public; no summonses were served on two of the accused) and in three cases the accused were not heard at the pro-trial stage; Article 19. The parliamentarians were punished solely because of their opinions; Article 22. The criminal proceedings before the State Security Court resulted from the defendants' attempts to establish a political party (a right implicit in the right to freedom of association); Article 15. The order, issued by the Central Committee of MPR, to strip the parliamentarians of their parliamentary mandate was based on internal regulations adopted only on 7 January 1981, i.e., after the date of the alleged offence - the sending of the "open letter" - which occurred in 1980; Articles 9 and 12. The measures of arrest, internal exile or house arrest to which the parliamentarians were subjected in December 1980 continued until 4 December 1981, although an amnesty had been decreed on 17 January 1981, and therefore constituted arbitrary arrests and detentions; these measures were also contrary to the provisions of article 12, paragraph 1; Articles 7 and 10. The alleged victims were subjected to ill-treatment in detention.

<sup>154</sup> *Jalloh v. The Netherlands*, Communication No. 794/1998, U.N. Doc. CCPR/C/74/D/794/1998 (2002).

<sup>155</sup> See Paragraph 1 of *Jalloh v. The Netherlands*, "The author of the communication is Mr. Samba Jalloh. He claims to be a victim of a violation by the Netherlands of articles 9 and 24 of the Covenant. The author is represented by counsel."

To the present thesis, the complaints related to the violation of the freedom of movement are more concerned. However, it is necessary first to recall what is the right of the freedom of movement, under the international legal frameworks.

Thus, according to the article 12 (1) (2) (4) of the ICCPR, the right to liberty of movement is stipulated “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 (...) 4. No one shall be arbitrarily deprived of the right to enter his own country.” The right of freedom of movement is closely related to the right to liberty and security of person<sup>156</sup>, which guarantees freedom from arbitrary arrest and detention<sup>157</sup>, and the right to seek asylum in another country<sup>158</sup>. Broadly speaking and taken together, these rights mean that all persons, including internally displaced persons (IDPs), have the right to: take flight and seek safety in another part of the country (of choice)<sup>159</sup>, or leave the country in order to seek asylum in another country<sup>160</sup>; move freely and in safety within the country, including in and out of camps and settlements, regardless of the purpose of the move; voluntarily return to the place of origin or relocate to another part of the country; not be arbitrarily displaced or forced to return or relocate to another part of the country; and not to be arbitrarily arrested or detained<sup>161</sup> or forced to reside in specific camp or settlements.

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<sup>156</sup> See, the communication No. 157/1983, *Mpaka-Nsusu v. Zaire*, paragraph 10, communication Nos. 241/1987 and 242/1987, *Birhashwirwa/Tshisekedi v. Zaire*, paragraph 13. These two communications are an illustration of the closed relation between the article 12 and the article 9 of the ICCPR. In both communications, according to the claims of the authors, they were arrested and detained without trial, before they get deprived of their freedom of movement through decisions of banishment.

<sup>157</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant, *supra* note 111, art.9.

<sup>158</sup> *Handbook for the Protection of Internally Displaced Persons*, *supra* note 114, p. 195.

<sup>159</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant, *supra* note 111 art. 12(1)

<sup>160</sup> *Ibid*, art. 12(2)

<sup>161</sup> *Ibid*, art.9



The right to liberty of movement is not, only, enshrined in the International Covenant of Civilian and Political Rights<sup>162</sup>. The right to liberty of movement and the right to choose the residence is likewise inscribed in several additional legally non-binding international human rights frameworks. For instance, the Universal Declaration of Human Rights is not a treaty, so it does not directly create legal obligations for countries. Eleanor Roosevelt, Chairman of the U.N. Commission on Human Rights during the drafting of the Declaration and a U.S. representative to the General Assembly when the Declaration was adopted, stated: *“In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty; it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its members, and to serve as a common standard of achievement for all peoples of all nations”*<sup>163</sup>. The Universal Declaration of Human Rights (UDHR) is a non-binding resolution adopted by the United Nations General Assembly in 1948<sup>164</sup>. It sets out a broad range of fundamental human rights to be universally protected and sets an international standard for the protection of those rights. Although the UDHR is not a legally binding document, it has become a widely accepted standard of human rights and has inspired a number of legally binding international human rights treaties, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These treaties, which are legally binding on the states that have ratified them, spell out the specific obligations of states to protect and promote the rights set forth in the UDHR. In this way, the UDHR has played a significant role in shaping the international legal framework for the protection of

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<sup>162</sup> According to the Article 12(1)(2) and (4) of the Covenant: *“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. 4. No one shall be arbitrarily deprived of the right to enter his own country”*.

<sup>163</sup> Available at: <https://www.encyclopedia.com/history/legal-and-political-magazines/adoption-declaration-human-rights> (accessed on 12/23/2022).

<sup>164</sup> Universal Declaration of Human Rights, *supra* note 143.

human rights<sup>165</sup>. The adoption of the Declaration was a real turning point which profoundly influenced the development of international human rights law<sup>166</sup>. Drafted by representatives with different legal and cultural backgrounds from all regions of the world, it set out, for the first time, fundamental human rights to be universally protected<sup>167</sup>. As stated above, Article 13 of the UDHR protects the freedom of movement by guaranteeing the right to liberty of movement and the right to choose one's own place of residence: “*Everyone 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*”.<sup>168</sup> The right to freedom of movement is not guaranteed only by legally binding instruments, as in the case of the UDHR. Similarly, principle 14 of the UN Guiding Principles on Internal Displacement supports the right to freedom of movement, stating that “*every internally displaced person has the right to liberty of movement and freedom to choose his or her residence*”<sup>169</sup>. The Guiding Principles, unlike the ICCPR and the UDHR, provided the right to freedom of movement in the context of internal displacement, recognizing specific need of IDPs, such as the ability to travel freely in and out of camps and other settlements<sup>170</sup>.

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<sup>165</sup> *Ibid*

<sup>166</sup> *Ibid*

<sup>167</sup> Available at <https://research.un.org/en/undhr/draftingcommittee>, (accessed 12/23/2022). “In February 1947, in accordance with a decision from the first session of the Commission on Human Rights (E/259), a group consisting of Eleanor Roosevelt, Pen-Chun Chang and Charles Malik, began drafting the International Bill of Human Rights. With assistance of the UN Secretariat, the task of formulating a preliminary draft was given to John Humphrey, Director of the UN Secretariat's Division for Human Rights. Following a letter from the Chairman of the Commission on Human Rights to the President of the Economic and Social Council, dated 27 March 1947, (E/383), this Drafting Committee was enlarged to include representatives of Australia, Chile, France, the Soviet Union and the United Kingdom, in addition to the representatives of China, Lebanon and the United States”.

See also E/CN.4/AC.1/3/Add.1 /11 June 1947 “COMMISSION ON HUMAN RIGHTS DRAFTING COMMITTEE INTERNATIONAL BILL OF RIGHTS”

<sup>168</sup> Universal Declaration of Human Rights, *supra* note 143, art. 13.

<sup>169</sup> *Report of the Representative of the Secretary General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, Addendum 2 Guiding Principles, supra* note 1, principle 14 (1).

<sup>170</sup> *Ibid*, principle 14(2): “*In particular, internally displaced persons have the right to move freely in and out of camps or other settlements*”.

Regarding of considering the specific need of IDPs related to the right to liberty of movement, choice of residence, return home or resettlement, the international law through the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, in short, the Pinheiro Principles<sup>171</sup> provided the right to freedom of movement for IDPs and the right to choose one's residence following displacement<sup>172</sup>. The Pinheiro Principles as well provided the right to a free and informed choice regarding their return to their property and home, or resettlement elsewhere within the country<sup>173</sup>.

The creation of regional legally binding frameworks resulted from the international community's desire to address the causes and effects of internal displacement, which extended to the legal protection and humanitarian support of IDPs. These legal frameworks also granted the right to freedom of movement and the choice of residence, which are among the specific needs of IDPs. Article 7 para 5(d)<sup>174</sup> and article 9 para 2(f)<sup>175</sup> of the African Union Convention for the Protection and Assistance of Internally Displaced Persons provide

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<sup>171</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, E/CN.4/Sub.2/2005/17 (2005).

The Pinheiro principles are designed to provide practical guidance to States, UN agencies and the broader international community on how best to address the complex legal and technical issues surrounding housing, land and property restitution. For the first time, the Principles provide a consolidated and universal approach to dealing effectively with outstanding housing and property restitution claims. They augment the international normative framework in the area of housing and property restitution rights, and are grounded firmly within existing international human rights and humanitarian law.

<sup>172</sup> *Ibid*, Principles 9 (1) “Everyone has the right to freedom of movement and the right to choose his or her residence. No one shall be arbitrarily or unlawfully forced to remain within a certain territory, area or region. Similarly, no one shall be arbitrarily or unlawfully forced to leave a certain territory, area or region.”

<sup>173</sup> *Ibid*, Principle 10 “The right to voluntary return in safety and dignity”

<sup>174</sup> Kampala Convention, *supra* note 19, art. 7(5)(d) (*Protection and Assistance to Internally Displaced Persons in Situations of Armed Conflict*) of the Kampala Convention urges the armed groups to protect IDPs and prohibits the restriction of the freedom of movement, in the paragraph 5(f) which stipulates that: “Restricting the freedom of movement of internally displaced persons within and outside their areas of residence”.

<sup>175</sup> *Ibid*, art. 9(2)(f) (*Obligations of States Parties Relating to Protection and Assistance During Internal Displacement*) of the Kampala Convention urges States Parties to “guarantee the freedom of movement and choice of residence of internally displaced persons, except where restrictions on such movement and residence are necessary, justified and proportionate to the requirements of ensuring security for internally displaced persons or maintaining public security, public order and public health”.

the freedom of movement of IDPs. Similarly, in the regional level, equivalent provisions are also found in the Protocol No. 4 of the European Convention on Human Rights<sup>176</sup> in its article 2. It guarantees the freedom of movement and states that in the paragraph 1 and 2: “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; Everyone shall be free to leave any country, including his own”<sup>177</sup>. The American Convention on Human Rights<sup>178</sup> as well provided the prohibition of the right of the freedom of movement in the article 22<sup>179</sup>.

The right to liberty of movement allows individuals to travel, work, study, and live where they want, and it allows them to pursue their personal and professional goals. It also enables people to seek out new opportunities and experiences, and to be exposed to different cultures and ways of life. The right to freedom of movement is also important for social and economic development. It enables people to access education and employment opportunities, and to participate fully in society. It also promotes trade and cultural exchange, which can lead to increased prosperity and understanding between different communities.

Liberty of movement and the right to leave any country, including one's own<sup>180</sup>, can be considered a fundamental human right, similar to the right to be free from arbitrary interference with a person's “privacy, family, and home” or from attacks on his “honor and reputation”, or “the right to marry and form a family”<sup>181</sup> or the right not to be subjected to discrimination<sup>182</sup>. Emmanuel Decaux is close to the statement related to the importance of the right to the freedom of movement and to choose residence for the mankind. According

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<sup>176</sup> Protocol 4 of the Convention for the Protection of Human Rights and Fundamental Freedom, ETS 46–Human Rights (Protocol No. 4), 16. IX.1963.

<sup>177</sup> *Ibid*, art. 1 and 2.

<sup>178</sup> American Convention on Human Rights, *Treaty Series, No. 36*, Organization of American States, 1969.

<sup>179</sup> *Ibid*, art. 22 (1) and (2).

<sup>180</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant *supra* note 111, art. 12, paras. 1 and 2.

<sup>181</sup> *Ibid*. art. 17.

<sup>182</sup> *Ibid*. art. 26.

to him, the right to liberty of movement is « La liberté de circulation est un droit cardinal car son bon exercice sous-tend la jouissance de nombreux autres droits. »<sup>183</sup>. The Human Right Committee widened its statement in the general comment No.27 as follow: “liberty of movement is an indispensable condition for the free development of a person. The enjoyment of the right of the freedom of movement interacts with several other rights enshrined in the Covenant, as is often shown in the Committee’s practice in considering reports from States parties and communications from individuals”<sup>184</sup>. One of the most significant characteristics of free existence and a vital component of human growth is the ability to move freely and to choose a residence. Indeed, the ability to move freely and in safety within the country is a basic right as well as a pre-condition for the enjoyment of many other rights.

However, the right to freedom of movement is often restricted or violated in various ways, and this can have serious consequences for individuals and communities. For example, individuals may be denied the right to travel due to their nationality, ethnicity, religion, or political beliefs. They may also be subjected to arbitrary detention or deportation or be forced to flee their homes due to persecution or conflict. But the limitations on freedom of movement can have serious consequences for the lives, health and well-being of individuals and communities<sup>185</sup>.

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<sup>183</sup> Emmanuel Decaux, *Le pacte international relatif aux droits civils et politiques : commentaire article par article* (2011), p. 285.

<sup>184</sup> UNHRC, *CCPR General Comment No. 27: Article 12 (Right to liberty of movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para.1, available at: <https://www.refworld.org/docid/45139c394.html> (accessed 24 December 2022).

<sup>185</sup> *Handbook for the Protection of Internally Displaced Persons*, *supra* note 114, Part IV/6 Key Message, p. 195

## 2.1. CONSEQUENCES OF LACK OF THE RIGHT OF FREEDOM OF MOVEMENT

The consequences of the restriction of freedom of movement are immense and can have serious consequences on the lives, health and well-being of displaced individuals<sup>186</sup>, communities, and also individuals. It does not only limit their ability to flee and seek safety from the effects of conflict or serious human rights abuses but furthermore impedes their ability to secure a sustainable livelihood, to access humanitarian assistance and find durable solutions to their displacement. Restrictions on the freedom of movement may have devastating effects on the lives, health, and well-being of people, as well as hinder family life and reunion. Lack of freedom of movement can result in limited access to work, markets, land and basic necessities (food, water, firewood) as well as life-saving public services, such as education and health care. For example, in the case of *Timishev v. Russia*, the applicant submitted that residence registration is the proof of residence in the Russian Federation and its absence had prevented her from exercising many social rights, including access to medical assistance, social security, pension, the right to possess property, to marry, and others<sup>187</sup>.

The lack of freedom of movement may also cause the separation of families and pose obstacles to family reunification<sup>188</sup>. The case of *El Dernawi v the Libyan Arab Jamahiriya*<sup>189</sup> is an illustration. *El Dernawi*, the author, was a member of the Muslim Brotherhood, a

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<sup>186</sup> *Kéténguéré Ackla v. Togo*, Communication No. 505/1992, U.N. Doc. CCPR/C/51/D/505/1992 (1996), para. 3(2), “Mr. Ackla further complains about arbitrary and unlawful interferences with his privacy, family home and correspondence, and about unlawful attacks on his honour and his reputation. Furthermore, the seizure of his home and his unemployment have prevented him from meeting both his own medical expenses and the fees for the education of his children. He adds that he is by now unable to pay for appropriate legal representation.”

<sup>187</sup> *Timishev v. Russia (Applications nos. 55762/00 and 55974/00)*, 13 December 2005, para. 44

<sup>188</sup> In Concluding Observations on Israel, the Human Right Committee (concluding Observations on Israel, 1998, UN doc. CCPR/C/79/Add. 93) stated: Para. 23. In regard to Palestinians who are resident in East Jerusalem, the Committee is concerned that the increasingly restrictive conditions for maintaining the right to permanent residence, the denial of requests for family reunification and the difficulty experiences by the non-Jews in obtaining building permits and accommodation have resulted in increasing numbers being forced to move to the occupied territories.

<sup>189</sup> *El Dernawi v the Libyan Arab Jamahiriya*, Communication No1143/2002; U.N.Doc. CCPR/C/90/D/1143/2002.

political group in Libya. *Mr. Dernawi* discovered that security personnel had been to his home to arrest him while he was out of the country, and so he did not return to Libya, where his wife and children were living<sup>190</sup>. *Mr Dernawi* later successfully claimed asylum in Switzerland, and the Swiss authorities approved the reunification of his family in that country<sup>191</sup>. When *Mr Dernawi's* wife tried to leave Libya to join him, Libyan authorities refused to allow her out of the country and seized the passport that she held jointly with her three youngest children<sup>192</sup>. The author's wife claimed that she made several unsuccessful attempts to reclaim her passport, and was unable to secure the services of a lawyer on the basis of her husband's political activities<sup>193</sup>. The three elder children held their own passports and could have tried to leave the country, but did not want to leave their mother and siblings in Libya<sup>194</sup>. *Mr. Dernawi* alleged violations of his family's freedom of movement and right to respect for their family, and alleged that the State had failed to provide the required protection for the family and special protection for children<sup>195</sup>. The Committee also found that in providing a barrier to the reunification of the family, the State had failed to respect the family rights of the author, his wife and all six children, as well as failing to meet its obligation to respect the rights of the family unit (arts. 17 and 23 of the ICCPR)<sup>196</sup>. The Committee also considered that the State had failed to provide special protection for persons under the age of 18 in separating the children from one of their parents without persuasive countervailing reasons (art. 24 of the ICCPR)<sup>197</sup>. In the case *Vidal Martins v Uruguay*<sup>198</sup>, also, the applicant's mobility has been severely restricted as a consequence of the Uruguayan government's reluctance to prolong the validity of her passport. As a

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<sup>190</sup> *Ibid.*, para. 2.1.

<sup>191</sup> *Ibid.*, para. 2.2

<sup>192</sup> *Ibid.*

<sup>193</sup> *Ibid.*, para. 2.3

<sup>194</sup> *Ibid.*,

<sup>195</sup> *Ibid.* paras. 3.1 and 3.4.

<sup>196</sup> *Ibid.*, paras. 6.3 and 7.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Vital Martins v Uruguay*, Communication No57/1979; U.N.Doc. CCPR/C/15/D/57/1979.

consequence, she and her family have had considerable difficulty<sup>199</sup>. Thus, *Vidal Martins* was unable to settle the question of inheritance between her and her brother following the death of her mother<sup>200</sup>. The consulate of Uruguay in Mexico refuses to certify the signature of the Mexican official, despite her request to terminate the regime of community property between her and her brother by means of a Mexican notary under national law (Act No. 14,534 of 24 June 1976), in accordance with a treaty between Uruguay and Mexico signed in Panama on 29 January 1975 and ratified by the Uruguayan Government Council<sup>201</sup>. That one more refusal makes impossible for them to pursue the separation procedure further. The Human rights Committee, acting under the article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights<sup>202</sup>, “discloses a violation of article 12 (2) of the Covenant, because *Vidal Martins* was refused the issuance of a passport without any justification therefore, thereby preventing her from leaving any country including her own”<sup>203</sup>. Due to the limitation on her freedom of movement, she was unable to enjoy her right to family life<sup>204</sup>, since she was unable to reunite with her brother to resolve a family dispute following their mother's death. Furthermore, the lack of freedom of movement in the context of internal displacement limits IDPs' ability to find durable solutions<sup>205</sup>, since

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<sup>199</sup> *Ibid*, para. 5(1).

<sup>200</sup> *Ibid*.

<sup>201</sup> *Ibid*.

<sup>202</sup> Optional Protocol to the Optional Protocol to the International Covenant on Civil and Political Rights, *United Nations Treaties Serie*, Vol. 999, p. 171, No. 14668, art. 5(4) “*The Committee shall forward its views to the State Party concerned and to the individual*”.

<sup>203</sup> *Ibid.*, para. 9.

<sup>204</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant *Supra* note 111, art.17.

<sup>205</sup> Durable solutions for internally displaced persons (IDPs) refer to long-term, sustainable options that allow IDPs to rebuild their lives and return to their homes or find new places to live in safety and dignity (*Section V. Principles relating to Return, Resettlement and Reintegration, Principles 28, 29, 30*). There are three main types of durable solutions for IDPs:

Return: This involves IDPs returning to their homes or communities of origin. Return is often the preferred solution for IDPs, as it allows them to rebuild their lives in familiar surroundings and reestablish their social, economic, and cultural connections. Integration: This involves IDPs settling in their current location, either permanently or temporarily, and becoming part of the local community. Integration may be a viable option for IDPs who are unable to return to their homes due to ongoing conflict



they may be unable to visit their previous place of residence or travel inside the country to locate another location to settle.

However, the law provided exceptions where that right must be restricted, without being a violation.

### **3. THE EXCEPTIONS OF THE RIGHT TO THE LIBERTY OF MOVEMENT IN LIGHT OF THE ARTICLE 12 PARAGRAPH 3 OF THE ICCPR.**

This section demonstrates that restrictive measures may not necessarily constitute a breach of human rights, particularly when they meet with paragraph 3 of article 12 of the ICCPR. As vital or basic as the right to freedom of movement is, it is subject to limitations stipulated in the legal frameworks for human rights, which are, nonetheless, required by law to ensure national security, public order, and the prevention of crime. In this sense, paragraph 3 of article 12 of the ICCPR stipulates that the right to freedom of movement may only be restricted if the measure is authorized by law, necessary to protect national security, public order (*ordre public*), public health or morals, or the rights and freedoms of others, and consistent with the other rights recognized by the present Covenant. Similarly, paragraphs 3 and 4 of article 2 of Protocol 4 of the ECHR<sup>206</sup> illustrate that the right to freedom of movement is restricted when the decision or measures are not in accordance with law, not necessary in a democratic society in the interests of national security or public safety, for

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or other barriers. Resettlement: This involves IDPs moving to a new location, either within their country or abroad, and starting a new life. Resettlement is typically a last resort and is only pursued when return and integration are not possible.

To be effective, durable solutions for IDPs must be voluntary, safe, and dignified. IDPs should be able to make informed decisions about their future and should not be forced to return or resettle against their will. It is also important that IDPs have access to basic services and support to help them rebuild their lives and establish themselves in their new communities.

<sup>206</sup> Council of Europe, *Protocol 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain Rights and Freedoms other than those already included in the Convention and in the First Protocol thereto*, 16 September 1963, ETS 46, available at <http://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treaty-num=046>, (accessed date 12/26/2022).

the maintenance of *ordre public*, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. In contrast, restrictive measures or decisions violate the right to freedom of movement when they are not in accordance with the law and are not necessary in a democratic society for national security or public safety, for the maintenance of public order, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Despite the fact that this section's title emphasizes the exceptions to the restrictions on the right to freedom of movement provided by article 12 (3), the cases in which restrictive measures are deemed to violate the right to freedom of movement because they are not in compliance with article 12 (3) of the ICCPR will be examined first. In other words, examples of communications in which article 12(1)(2) of the ICCPR has been violated will be shown. Second, cases in which exceptions are established, i.e., decisions in accordance with Article 12.3 will be examined.

Thus, several examples of cases demonstrate the presence of violation on the right to liberty of movement. Individual complaints are submitted before the Human Rights Committee by those who believe their political and civil rights have been violated. For illustration, in the case *Ackla v. Togo*<sup>207</sup>, the Human Rights Committee stated in the paragraph 10 of the communication that the Committee acknowledged that “there is restriction of the author’s freedom of movement and residence in violation of article 12(1) of the Covenant”<sup>208</sup>. The Committee notes that the only admissible issue, which has to be examined on the merits, is the author's uncontested allegation that he is under prohibition of entering the district of La Kozah and his native village which forms part of this district [...] In the absence of any explanation from the State party justifying the restrictions to which the author has been subjected, pursuant to paragraph 3 of article 12, the Committee is of the opinion that the restriction of the author's right of liberty of movement and residence is in violation of article

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<sup>207</sup> *Kéténguéré Ackla v. Togo*, Communication No. 505/1992, U.N. Doc. CCPR/C/51/D/505/1992 (1996).

<sup>208</sup> *Ibid*, para. 10.

12(1) of the Covenant. From that, the Committee acknowledges that there is violation of the freedom of movement. In the same sense, the case *Mpaka-Nsusu v. Zaire*<sup>209</sup>, though the author claims breaches by Zaire of his right of self-determination (article 1), the right to Liberty and Security of the Person (article 9), the right to a fair trial (article 14) and the right to Equality before the Law and the right of Non-Discrimination (article 26) of the International Covenant on Civil and Political Rights, the committee, however discloses violations of the Covenant, Article 12, paragraph 1, because he was banished to his village of origin for an indefinite period<sup>210</sup>. *Mpandanjila v Zaire* (138/1983)<sup>211</sup> is also an illustration about the arbitrary banishment which is established by the Committee as violation of the right to liberty of movement and the right to choose a residence<sup>212</sup>. Further, *Henri Kalenga v Zambia*<sup>213</sup>, the author has seen his passport withdrew and therefore in the Committee's opinion is a violation of the article 12 (1) of the Covenant<sup>214</sup>. the Committee concluded to a violation of the right to the liberty of movement<sup>215</sup>.

In the Dernawi case, above-mentioned, also, the Human Rights Committee found that in withdrawing the passport of Mr. Dernawi's wife and three children without providing a justification based on national security, public order, public health or morals, or the rights

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<sup>209</sup> *Andre Alphonse Mpaka-Nsusu v. Zaire*, Communication No. 157/1983, U.N. A/41/40, at 142 (HRC 1986).

<sup>210</sup> As stated in the paragraph 10 of “*Andre Alphonse Mpaka-Nsusu v. Zaire*, Communication No. 157/1983, U.N. Doc, the decision of the Committee was not only limited to the violation of the article 12 (1). The committee also discloses violation on the following articles the article 9 (1) because Andre Alphonse Mpaka-Nsusu was arbitrarily arrested on 1 July 1979, and detained without trial until 31 January 1981; article 19, because he suffered persecution for his political opinions; article 25, because, notwithstanding the entitlement to stand for the presidency under Zairian law, he was not so permitted.

<sup>211</sup> *Mpandanjila v Zaire* Communication No. 138/1983; U.N. Doc. CCPR/C/27/D/138/1983, U.N. Doc. A/41/40, at 121 (HRC 1986).

<sup>212</sup> *Ibid.*, para. 9. “Article 12, paragraph 1, because they were deprived of their freedom of movement during long periods of administrative banishment”.

<sup>213</sup> *Henry Kalenga v. Zambia*, Communication No. 326/1988, U.N. Doc. CCPR/C/48/D/326/1988 (1993), U.N. Doc. A/48/40, Part II, at 68 (HRC 1993).

<sup>214</sup> *Ibid.*, para. 6.4.

<sup>215</sup> *Ibid.*, para. 7

and freedom of others, the State had violated their right to freedom of movement (art. 12 of the ICCPR)<sup>216</sup>.

The case of *Milen Kostov v. Bulgaria*<sup>217</sup> is an additional example of the violation of the right to the liberty of movement, under the article 2 (3)(4) of Protocol No.4 of the ECHR. In this case, the applicant complained that the restriction on his freedom to leave Bulgaria was not necessary and proportionate. In the Government's view, the travel ban had been imposed on the basis of a thorough assessment of all relevant factors, namely a prior criminal conviction and the absence of rehabilitation of the applicant. The ban had been issued by the competent authorities and in accordance with the law, as well as for the purposes of national security, the protection of the rights of others and the prevention of crime. Given that the applicant had been convicted and not rehabilitated, the ban had been proportionated and justified<sup>218</sup>. However, the Court unanimously holds that there has been a violation of Article 2 of Protocol No.4<sup>219</sup> to the Convention because the Court does not consider that the automatic imposition of a travel ban, without any regard to the individual circumstances of the person concerned can be described as necessary in a democratic society. The same goes to the recent case, *Democracy and Human Rights Resource Centre and Mustafayev*

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<sup>216</sup> Dernawi, *supra* note 189, para. 6.2. "In terms of the claim under article 12, the Committee recalls its jurisprudence that a passport provides a national with the means practicably to exercise the right to freedom of movement, including the right to leave one's own State, conferred by that article (...) The confiscation of the passport of the author's wife, also covering her three youngest children, as well as the failure to restore the document to her, accordingly amount to an interference with the right to freedom of movement which must be justified in terms of the permissible limitations set out in article 12, paragraph 3, concerning national security, public order/ordre public, public health or morals or the rights and freedoms of others. The State party has not sought to advance any such justification, nor is any such basis apparent to the Committee on the basis of the material before it. The Committee accordingly concludes that there has been a violation of article 12, paragraph 2, in respect of the author's wife and three youngest children whom the wife's passport also covered."

<sup>217</sup> EUROPEAN COURT OF HUMAN RIGHTS 4<sup>th</sup> SECTION, *MILEN KOSTOV v. BULGARIA* (Application no. 40026/07) JUDGMENT STRASBOURG 3 September 2013.

<sup>218</sup> *Ibid.*, 212, para. 14.

<sup>219</sup> *Ibid.*, para. 36.

*v. Azerbaijan*<sup>220</sup>. In this case, the applicant was subject of two travel bans, imposed upon him by the prosecuting authorities and by a court for tax debit. In fact, on an unspecified date in Autumn 2014 the applicant learned that his right to leave the country had been restricted and that he was no longer allowed to leave Azerbaijan<sup>221</sup>. According to the applicant, on 13 September 2015 he attempted to take a flight from Baku to Tbilisi in order to attend an event. However, he was orally informed at the Baku airport that there was a travel ban imposed on him by the prosecuting authorities. He was not provided with any written document<sup>222</sup>. For the second travel ban, the applicant had been restricted to leave the country by the Sumgait City Court, following a request submitted by the tax authorities<sup>223</sup>. In the Government views, there was not a travel ban imposed on the applicant by the prosecuting authorities. As regards the travel ban imposed by the court, they submitted that it was in accordance with 355-5.1 of the Code of Civil Procedure<sup>224</sup>, pursued the legitimate aims of maintenance of public order and prevention of crime and was necessary in a democratic society<sup>225</sup>. The Court acknowledges the violation of the article 2. The Court established that the prosecuting authorities acted unlawfully, in violation of Article 2 of Protocol 4 of the Convention, in imposing the first travel ban on the applicant in the absence of any judicial decision, and which the applicant has never been informed, and holds that there has been a violation of

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<sup>220</sup> EUROPEAN COURT OF HUMAN RIGHTS, SECTION V, *Democracy and Human Rights Resource Centre and Mustafayev v. Azerbaijan*, 74288/14 and 64568/16 Judgment (2021).

<sup>221</sup> *Ibid.*, para. 21.

<sup>222</sup> *Ibid.*, para. 22.

<sup>223</sup> *Ibid.*, para. 28.

<sup>224</sup> *Ibid.*, para. 47 “On 20 October 2015 a new chapter (Chapter 40-2) relating to the proceedings on temporary restriction of the right to leave the country of taxpayer physical persons or heads of executive bodies of legal persons was added to the Code of Civil Procedure (“the CCP”). In particular, in accordance with Article 355-5.1 of the CCP, the relevant domestic authority is entitled to apply to the relevant court for temporarily restricting the above-mentioned persons’ right to leave the country in view of ensuring the payment of tax debt.”

<sup>225</sup> *Ibid.*, para. 86.

article 2 of Protocol No.4 to the Convention on account of the travel ban imposed on the applicant by the domestic courts<sup>226</sup>.

In the context of displacement, *Tatishvili v. Russia*<sup>227</sup> is also an illustration of a breach of Article 2 of Protocol 4 of the ECHR's right to the liberty of movement provision. In this case, the Georgian born applicant held former USSR citizenship until 2000, when she became stateless. Subsequently, she applied for residence registration in Moscow but was dismissed at first instance and on following appeals, due to failing to confirm her Georgian citizenship or apply for Russian citizenship. The Court ruled that there had been a violation of Article 2(1) of Protocol No. 4<sup>228</sup>. The prohibition to pass from one area to another lacked a proper legal basis and the refusal to allow the applicant to register her residence at her chosen address was not “in accordance with the law”. In *Timishev v. Russia*, the applicant was not permitted to re-enter the Republic of Kabardino-Balkaria on the basis of instructions not to admit people of Chechen ethnic origin. The ECtHR found a violation of Article 2 of Protocol No. 4 as the restriction on the applicant’s liberty of movement was not considered to be in accordance with the law.

Regarding limits on the right to freedom of movement, they are only permissible if they meet with the exception clause in article 12(3) of the ICCPR, as well as regional frameworks such as the provisions of Article 2(3) and 2(4) of Protocol No. 4 to the European Convention on Human Rights, article 22(3) and (4) of the American Convention of Human Rights, the second sentence of the article 12(2) of the African Charter on Human and Peoples’ Rights. For example, in *Lovelace v Canada (24/77)*<sup>229</sup>, the Committee here indicates that rights of residence can be validly restricted in order to reserve land for special minority groups. Ms.

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<sup>226</sup> *Ibid.*, Para. 127 (5)(6).

<sup>227</sup> EUROPEAN COURT OF HUMAN RIGHTS, 1<sup>st</sup> SECTION, *TATISHVILI v. RUSSIA* (Application no. 1509/02) 22 February 2007, FINAL 09/07/2007.

<sup>228</sup> *Ibid.*, Conclusions para.1. (FOR THESE REASONS, THE COURT UNANIMOUSLY 1. *Holds* that there has been a violation of Article 2 of Protocol No. 4).

<sup>229</sup> *Lovelace v. Canada*, Communication No. 24/1977: Canada 30/07/81, UN Doc. CCPR/C/13/D/24/1977.

Lovelace submitted an application to the Human Rights Committee, claiming that there were violations of Articles 2(1), 3, 23(1) and (4), 26 and 27 of the ICCPR because the Canadian Indian Act only strips Indian women who marry non-Indians of their Indian status<sup>230</sup>. Sandra Lovelace, a Maliseet Indian, lived on the Tobique Reservation with her parents until she married a non-Indian man. The marriage ended, and Ms. Lovelace returned to the reservation to live with her parents, however, she could not purchase a home on the reserve because the council prioritized housing for members of the group. The Canadian Indian Act stated that an Indian woman who married a non-Indian man loses her Indian status<sup>231</sup> which also means a loss of access to federal programs for Indians in education, housing and social assistance, as well as losing the right to own a home or live on a reserve, cultural benefits that come with living among family and friends on the reserve. However, the Committee decided that denying Ms. Lovelace access to live on the reserve was neither reasonable nor necessary to preserve the group's identity, therefore, stripping her of Indian status denied her rights and was a violation of the article 27 of the ICCPR. The Committee also found that Ms. Lovelace's right to enjoy her culture was interfered with because there are no communities outside of the reserve that share the same language and culture. For this case, the Committee went on to make its decision that there is a violation under article 27 of the Covenant (the minority rights provision), rather than the freedom of movement and choose her residence provided under the article 12 of the Covenant<sup>232</sup>.

Furthermore, the restriction of the freedom of movement and to choose residence of the population or parts thereof, or individual shall not be ordered unless their safety or imperative security reasons demand so, as in the case of *Karker v. France*<sup>233</sup>, the State Party mentioned that the restriction of freedom of movement of Mr Karker was partially related

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<sup>230</sup> *Ibid.* para. 1.

<sup>231</sup> *Ibid.*, para. 1, it is stated that she was born and registered as "Maliseet Indian" but has lost her rights and status as an Indian in accordance with section 12 (1) (b) of the Indian Act, after having married a non-Indian on 23 May 1970.

<sup>232</sup> SARAH JOSEPH and MELISSA CASTAN, *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS Cases, Materials, and Commentary* Third Edition (2013), p. 395-396.

<sup>233</sup> *Karker v. France*, Communication No 833/1998, U.N. Doc. CCPR/C/70/D/833/1998 (2000).

to its own interest to safeguard his political refugee, since he was predictable to be expelled from France<sup>234</sup>. If the decision of the State Party is provided by law and necessary for the protection of national security, public order, the restrictiveness of the right of the freedom of movement is permissible in accordance with the article 12(3). Similarly, to the *Lovelace case* above mentioned, in the case *Karker v France (833/98)*, the Committee do not disclose a violation of any of the articles of the International Covenant on Civil and Political Rights<sup>235</sup>. The Committee notes that Mr. Karker's expulsion was ordered in October 1993, but that his expulsion could not be enforced, following which his residence in France was subjected to restrictions of his freedom of movement. The State party has argued that the restrictions to which the author is subjected are necessary for reasons of national security. In this respect, the State party produced evidence to the domestic courts that Mr. Karker was an active supporter of a movement which advocates violent action. It should also be noted that the restrictions of movement on Mr. Karker allowed him to reside in a comparatively wide area. Moreover, the restrictions on Mr. Karker's freedom of movement were examined by the domestic courts which, after reviewing all the evidence, held them to be necessary for reasons of national security. Mr. Karker has only challenged the courts' original decision on this question and chose not to challenge the necessity of subsequent restriction orders before the domestic courts<sup>236</sup>

Therefore, in the two above mentioned cases, regarding *Karker*, and the one of *Lovelace*, there are no breaches of the right of the freedom of movement and to choose its own residence enshrined in the article 12 (1) of the ICCPR. In those cases, all ground to make the restrictive measures taken by States, admissible are me<sup>237</sup>. In the *Karker* case for instance, regarding the necessity of this decision, “the State party acknowledges that the compulsory

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<sup>234</sup> *Ibid*, para. 4(5).

<sup>235</sup> *Ibid*, para. 10.

<sup>236</sup> *Ibid*, para. 9.2.

<sup>237</sup> International Covenant on Civil and Political Rights/Optional Protocol to the above-mentioned Covenant, *supra* note art. 12(3).



residence order limits Mr. Karker's freedom of movement within the meaning of article 12 of the Covenant, for the reasons of national security recalling that Mr. Karker was an active supporter of a movement which advocates violent action. As if the decision is provided by law, the State party argues that these restrictions are permissible under paragraph 3 of article 12, since they are provided by law through the article 28 of the decree of 2 November 1945 as amended. The State party refers to the decision by the Administrative Tribunal of Paris that the Minister of the Interior could have concluded lawfully that Mr. Karker's expulsion was imperative for reasons of public security. Since the expulsion order could not be carried out because of Mr. Karker's refugee status, a certain measure of monitoring his activities had to be imposed. The State party concludes that the measures restricting Mr. Karker's freedom of movement have thus been imposed in his own interest, in order to safeguard his rights as political refugee”<sup>238</sup>. Accordingly, the State Party acknowledged that the restriction of the freedom of movement of Mr Karker is provided by law in necessary for the protection of public order, in accordance with the paragraph 3 of the article 12 of the ICCPR.

Whilst, in the Ackla case, not only the State Party does not give any reply on the allegations related to the restrictive measure of the freedom of movement made by the HRC, but also the State Party had not contested that the prohibition pronounced against the author to enter the La Kozah district and to visit his native village was still in force<sup>239</sup>. Therefore, the Committee concluded the measure as restrictive.

States take legal and necessary measures to restrict freedom of movement inside their borders and for all individuals subject to their authority<sup>240</sup>. In general, when taking these

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<sup>238</sup> *Ibid.*, 230.

<sup>239</sup> Ackla, *supra* note, 207, para. 6(6).

<sup>240</sup> According to the article 2(1) of the ICCPR States Parties are required by article 2, paragraph 1, to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State Party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. For example, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS *Cases, Materials, and Commentary* Third Edition published in 2013 SARAH JOSEPH

measures, states must ensure that they comply with the exceptions provided in legal standards, such as article 12(3) of the ICCPR, the provisions of Article 2(3) and 2(4) of Protocol No. 4 to the European Convention on Human Rights, article 22(3) and (4) of the American Convention on Human Rights, and the second sentence of article 12(2) of the African Charter on Human and Peoples' Rights. Meaning that, they must be provided by law and in concordance with the protection of national security, public order, public health. Thus, some measures taken are very important to ensure the national security and public health. For example, in the event of a continuing epidemic, State-level measures to halt its spread are both necessary and proportional<sup>241</sup>.

But the important question to ask is: “are the measures necessary and proportionate, especially in the context of internal displacement?”

For the purpose of the present thesis, the freedom of movement in the context of internal displacement is the principal topic. The ability to move freely and in safety is the particular importance and concern for IDPs, who often live in or near areas of conflict and need to

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and MELISSA CASTAN pages 97-98, section 4.14, in the case of *MONTERO v URUGUAY (106/81)*, the petitioner's Uruguayan passport was confiscated by the Uruguayan consulate in Germany, in breach, he argued, of article 12 which guarantees freedom of movement, similarly to the case of *Vidal Martins v Uruguay (57/79)*. Despite the fact that the confiscation took place in Germany the HRC held that the impugned act was within the jurisdiction of Uruguay. [...] The issue of a passport to a Uruguayan citizen is clearly a matter within the jurisdiction of the Uruguayan authorities and he is 'subject to the jurisdiction' of Uruguay for that purpose. Moreover, a passport is a means of enabling him 'to leave any country including his own', as required by article 12(2) of the Covenant. Consequently, the Committee found that it followed from the very nature of that right that, in the case of a citizen resident abroad, it imposed obligations both on the State of residence and on the State of nationality and that, therefore, article 2(1) of the Covenant could not be interpreted as limiting the obligations of Uruguay under article 12(2) to citizens within its own territory.

<sup>241</sup> COVID 19 Corona Virus Disease of 2019. However, the Zero-Covid Strategy adopted by China is a measure restricting and violating the right of freedom of movement of China's inhabitants. The media BBC shared the following article “China: Why is the WHO concerned about its zero-Covid strategy?” (<https://www.bbc.com/news/59882774>). The draconian measures taken by the Government of China are seen by the WHO as restrictive and unnecessary pointing out that points out that the current Omicron variant spreading across China transmits more easily than other variants. Thus, the WHO recommended to change the behaviour as the Omicron, although is more contagious, it comes with a slightly lower risk of hospitalization compared with the Delta variant, dominant since early 2021.

access vital humanitarian assistance or reside in camps and settlements where access to sustainable livelihoods and humanitarian assistance is limited and threats to life, safety and security are frequent. In the same sense various obstacles may limit their freedom of movement, including inter alia, practical barriers, legal or administrative restrictions, forced encampment, forced population movement, and arbitrary arrest and detention.

The concern in relation with the thesis is the legal or administrative restrictions issued by territorial States.

#### **4. ASSESSMENT OF THE RESTRICTIVE TERRITORIAL STATES MEASURES AS BREACH OF THE RIGHT OF THE FREEDOM OF MOVEMENT OF IDPS**

In this section, some measures recognized as restrictive and in violation of the right of the liberty of movement, by international human rights organizations, are highlighted to show the lack of protection of the IDPs by the territorial governments. Some restrictive measures are taken to impeach IDPs to move from camps to camps as the case of thousands of displaced persons confined in camps in Syria<sup>242</sup>, while others are impeached or chased from their homes such the Palestinian case in Israel, violating the right of freedom to choose one's residence<sup>243</sup>.

The aim of this point is to advance to an examination of these restrictive measures by human rights organizations, including the Human Rights Committee, as breaching the right of the liberty of movement. This assessment procedure will determine the violation of the right to the freedom of movement of these restrictive measures. Thus, they must be provided for by law, be considered necessary and proportionate to achieve a legitimate aim (such as the protection of national security or ordre public, health or morals, or the rights or freedoms of others), including in the aftermath of a natural disaster, and they must be non-

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<sup>242</sup> Human Rights watch "Syria: Thousands of displaced confined to camps" (August 1, 2018).

<sup>243</sup> Concluding observations on Israel, (1998) UN doc. CCPR/C/79/Add. 93.

discriminatory and consistent with other human rights. This statement is in accord with the article 12 (3) of the ICCPR.

The restrictive measures refer to documents issued to reduce the freedom of movement of internally displaced persons. These documents can be obligatory passport or specific ID card to be able to move within the country or get some benefits, there are also the unreasonable conditions such as the requirement of return to the usual place of residence in order to obtain these documents, imposed by the territorial States. Simply speaking, in situations of displacement, restrictions have sometimes been implemented in an arbitrary or discriminatory manner or been used for unlawful purposes, one of the most eloquent examples of the restrictive measures, is the *propiska*<sup>244</sup>.

International organizations, human rights associations, or NGOs state about these measures just as restrictive and violating the right to the liberty of movement, but never go beyond by showing or proving that how these restrictive measures are violating that right. Therefore, this thesis is to fill this lack, by assessing the restrictive measures, in order to establish the violation of the right to the liberty of movement. The assessment will be on the grounds of the legality, necessity and proportionality of the measures, in accordance with the paragraph 3 of the article 12 of the ICCPR. In that context, after examining the restrictive measures of the above-mentioned territorial States, from one State to other, we will proceed the assessment in a global manner. In doing so, the assessment proves that the measures are not in compliance with the sus-mentioned provision.

For the purpose of this thesis, the identification of the restrictive measures is recognized according to the acknowledgement of the International Organizations (Example: UNHCR), the United Nations of the Human Rights Committee (UNHRC). The fact that the Covenant expressly allows for restrictions to be enacted by States Parties on the exercise of the right to the liberty of movement and choice of residence, home and property does not mean that

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<sup>244</sup> See section 4.1.1. of the present thesis.

State's power to restrict these rights is unlimited. As mentioned above, this point aims to assess restrictive measures to determine their character as human rights violations, through the principle of proportionality. Assessment of the measures on the ground of legality, necessity and proportionality is important in order to determine the violation of the freedom of movement by the restrictive measures.

However, the *propiska* is not the only example of the restrictive measures of the right to the liberty of movement taken by territorial States, in light of the article 12(1) of the ICCPR. In the following lines, after identifying some measures, we will process to the assessment. Thus, in the context of Internal Displacement, are the *propiska* in Azerbaijan, the pass system in Nigeria, the registration system in Myanmar, and any restrictive measures imposed by territorial States legal, necessary, and proportionate?

To assess the legality, the necessity and the proportionality, we will use the principle of necessity generated by Human Rights Committee through its jurisprudence. In relation to the limitation clause on freedom of movement, the HRC, in its General Comment No.27, expressly endorsed the necessity test as part of proportionality analysis. The extensive German experience in applying the principle of proportionality has influenced the jurisprudence of the European Court of Justice (ECJ), the European Court of Human Rights (ECtHR), and other human rights tribunals<sup>245</sup>. Preceding to the assessment point, the identification of the restrictive measures and the description of the restrictiveness of this measures is necessary in 4.1. The factual problems encountered by the IDPs due to the restrictions of their rights to the freedom of movement in the 4.2, and the assessment in the 4.3.

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<sup>245</sup> Yutaka Arai-Takahashi, *Proportionality*, Oxford Handbook of International Human Rights Law (2014), available at <http://opil.ouplaw.com>, accessed date 07 November 2020.

## **4.1. RESTRICTIVE MEASURES IDENTIFIED IN THE THESIS**

What restrictive measures is this thesis about? The restrictive measures which have been qualified as violation of the right of the freedom of movement of Internally Displaced Persons and mentioned in reports of human rights bodies, and by the special rapporteur, are described in this thesis.

Whilst the 4.1.1 will discuss about the *propiska*, in Azerbaijan, the point 4.1.2 concerned the Nigerian pass controlling the movement in some camp in the north- east part of Nigeria.

### **4.1.1. PROPISKA IN AZERBAIJAN**

#### **a. Overview of the Propiska**

The *propiska* is considered as restrictive measure by international organizations, Human rights bodies such as the UN Human Right Committee. It is an obligation for all person located in the territory of Azerbaijan to register their address residence.

The Nagorno-Karabakh war resulted in the deaths of soldiers and civilians and the displacement of multitude others. In view of building a new state after the collapse of the Soviet Union, war-torn Azerbaijan had to deal with the results of the conflict. Along with the economic crisis, the war generated an IDP crisis in Azerbaijan. The conflict produced around 700,000 internally displaced persons (IDPs) in Azerbaijan and some 250,000 ethnic Azerbaijanis, who had fled from Armenia, were recognized as refugees in 1992 and naturalized in 1999. At the same time, 335,000 Armenian refugees from Azerbaijan and 78,000 IDPs from regions in Armenia bordering Azerbaijan have been registered within Armenia<sup>246</sup>. More recently, the Internal Displacement Monitoring Centre (IDMC) estimates

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<sup>246</sup> EUROPEAN COURT OF HUMAN RIGHTS *Chiragov and Others v. Armenia*, application no. 13216/05, Grand Chamber judgment of 16 June 2015, para. 25.

for its part the total number of IDPs in Azerbaijan at around 344,000 people<sup>247</sup>. Due to the large number of IDPs, the government was unable to fulfil a primary task of providing them with food and shelter. At this point, the Azerbaijani government started receiving assistance from the international community. Turkey had helped set up camps, while Iran, in order to keep from being deluged by Azerbaijani refugees, built a series of giant tent cities that housed lots of displaced just across the border with Azerbaijan<sup>248</sup>.

To control the flux of the Internally Displaced Persons, the Azerbaijani Government integrated the *propiska* system inherited by Azerbaijan and other post-Soviet states from prior. The *propiska* consisted of a certification in the internal passport of the holder's obligation to reside in a given location. It was a system designed to control internal population movements, and prevent unauthorized migration, by tying individuals, and their access to social services, to a fixed abode<sup>249</sup>.

The *propiska* fulfilled the role of a residency permit, required to access health care, employment, housing and many other basic social services<sup>250</sup>. Changing one's *propiska* without the authorities' permission was illegal and the failure to register was punishable by law. While some post-Soviet States have completely abolished the system, others have retained aspects of the system, sometimes unconstitutionally<sup>251</sup>. Although formally

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<sup>247</sup> IDMC, Global Report on Internal Displacement 2019, p.46 available at <https://www.internal-displacement.org/sites/default/files/publications/documents/2019-IDMC-GRID.pdf>, accessed date December 27, 2022.

<sup>248</sup> "Internally Displaced Persons: The case of Azerbaijan", Caucasus Edition Journal of Conflict Transformation, 10 November 2010, p.1. available at: <https://caucasusedition.net/internally-displaced-persons-the-case-of-azerbaijan/>. (accessed date 26 December 2022).

<sup>249</sup> Amnesty International, *Azerbaijan: Displaced Then Discriminated Against - the Plight of the Internally Displaced Population*, EUR 55/010/2007, 28 June 2007, p. 25 available at: <https://www.refworld.org/docid/468cb5952.html> (accessed 26 December 2022).

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

abolished from the Azerbaijani Constitution, the *propiska* system is still referred to in some laws and citizens of Azerbaijan are still required to register their residence<sup>252</sup>.

The main characteristics of the Propiska are as follow:<sup>253</sup>

- All persons located on the territory of Azerbaijan must be registered at their place of residence,
- IDPs are permanently registered at their original place of residence and temporarily registered at their place of settlement,
- IDPs who move out of their settlements are not being registered in new areas,
- This prevents them from accessing official employment, social services and gaining ownership of their dwelling in the new area.

The Human Rights Watch, the Amnesty International<sup>254</sup>, human rights bodies such as the UNHRC acknowledge the restricting character of the limiting of freedom of movement of IDPs, in Azerbaijan through the *propiska*<sup>255</sup>, as well as International Organization, through the assertion of the Representative of the UN Secretary General<sup>256</sup>.

#### **b. The *Propiska* and the restriction of the freedom of movement**

The retention of the *propiska* system has particularly negative implications for internally displaced persons, since it restricts them to freedom of movement and the right to choose a place of residence and their eligibility to receive aid and social services to a fixed

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<sup>252</sup> *Ibid.*

<sup>253</sup> *Ibid.*

<sup>254</sup> *Ibid.*, pp. 26-27.

<sup>255</sup> *Report of the Human Rights Committee*, U.N. Doc. A/64/40, Vol. I, (2009), p. 87, para.1.

<sup>256</sup> *Report of the Representative of the Secretary-General, Mr. Francis. M. Deng, submitted pursuant to Commission on Human Rights resolution 1998/50 Addendum Profiles in displacement: Azerbaijan*, 25 January 1999, E/CN.4/1999/79/Add.1 para. 45.



residence<sup>257</sup>, besides it also impedes with the fulfilment of many other rights. The *propiska*, in the form of a stamp in internal passports, restricted individuals to one legal place of residence and, on that basis, regulated any aspects of daily life as it was required in order to work, attend school, get married and engage in other important civic activities<sup>258</sup>.

The new residences following the displacement are chosen by the authorities and are often in economically depressed regions added to the remotely area, in central Azerbaijan. With the authorities willing to stem rural to urban migration, residence permits for large cities, above all the capital Baku, are notoriously difficult to obtain. Many internally displaced households are caught in a protection trap: tied to their registered residence in order to receive food aid and other assistance, but unable to move in search of employment opportunities elsewhere. As a result, many internally displaced families have been broken up as husbands move without a *propiska* to Baku to work, while other family members remain behind in the place where they are registered. In these cases, Internally Displaced Persons working in major cities must return monthly to the place they are registered in order to receive their food packages. The internally displaced are further obliged to circumvent the law in order to receive health care or to work in locations for which they do not have a *propiska*. Changing one's *propiska*, and in particular re-registering in order to move to the capital Baku, is a cumbersome process surrounded in corruption. In addition to the authorities' reluctance to see further population growth in major cities, reregistration is also made difficult for internally displaced people as applicants for a *propiska* in a given location must show that they have secured a contract for housing available in their new location. Without homes to sell to secure the necessary capital to purchase housing elsewhere, the internally displaced are less able to secure contracts on new housing. Movement from Baku to rural regions also appears to be a complicated process. The resulting restrictions on freedom of movement place particularly undue hardships on the displaced by limiting their

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<sup>257</sup> Amnesty International, Azerbaijan, *supra* note 249.

<sup>258</sup> Report of the Representative of the Secretary-General, Mr. Francis. *supra* note 256, para. 45.

ability officially to establish residence in areas, other than those to which they were initially assigned, where they may wish to migrate in search of better economic opportunities.

In summary, the system of registration or *propiska* restricts individuals to one legal place of residence, thereby restricting freedom of movement, and impeding in other rights such as the right to work, to education and to other civic activities.

#### **4.1.2. SYSTEM PASS IN THE NORTH-EAST OF NIGERIA**

According to the report of ICRC following surveys, assessment and observations conducted in the Northeastern region of Nigeria, the *pass system* implemented to control the movement in and out of the Internally Displaced persons through of the camps, is qualified as a restriction of the freedom of movement.

##### **a. Situation of IDPs in the North-East of Nigeria**

In the report of the ICRC published in 2016<sup>259</sup>, related to the situation of the Internally Displaced Persons in the Northeastern part of Nigeria, more than 1.76 million people are internally displaced in the Northeastern region of Nigeria<sup>260</sup>. This situation of displacement is a result of the non-international armed conflict between the Nigerian Government and the armed opposition (*Jama'atu Ahlu s- Sunnati lil-Da'wa wal-Jihad / Islamic State West Africa Province group*, commonly known as *Boko Haram*), the total number of internally displaced persons (IDPs) in North-East and North Central Nigeria is estimated at over 3 million people, making Nigeria host to the seven largest IDP population in the world<sup>261</sup>. Borno, Adamawa and Yobe States currently have the largest number of IDPs, with approximately 1.68 million persons who have been displaced as a result of the conflict,

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<sup>259</sup> ICRC, *INTERNAL DISPLACEMENT IN NORTH-EAST NIGERIA: Operationalizing the Kampala Convention in Borno, Adamawa and Yobe States*, (2016).

<sup>260</sup> *Ibid*, p. 7.

<sup>261</sup> IDMC, *supra* note 124, fig. 3.

including approximately 528,000 IDPs in Maiduguri Metropolis, Borno State<sup>262</sup>. Given the large scale of the displacement, and the ongoing instability in many Local Government Areas (LGAs) in the North-East of Nigeria, the Federal and State Governments have been facing, and continue to face, a critical humanitarian situation<sup>263</sup>. The number of internal displacements in Nigeria increased more than two-fold in 2021 to reach 376,000, mostly the result of major attacks by NSAGs (Non-States Armed Groups) in the north-eastern states of Adamawa, Borno and Yobe<sup>264</sup>. The most significant events were two consecutive attacks in Yobe in April, which triggered 190,000 displacements<sup>265</sup>. The violence also led to the closure of several humanitarian operations, as in the Damasak and Dikwa local government areas of Borno in March and April<sup>266</sup>. Many people across all three states were forced to flee their homes various times, including some who had recently returned after the government's closure of displacement camps<sup>267</sup>.

To control the IDPs within the camps, a system of pass has been implemented in the camps.

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<sup>262</sup> IOM, *DTM Round XI Report*, August 2016, p. 3.

<sup>263</sup> *Ibid.*, p. 9.

<sup>264</sup> *Ibid.*, p. 20.

<sup>265</sup> *Ibid.*

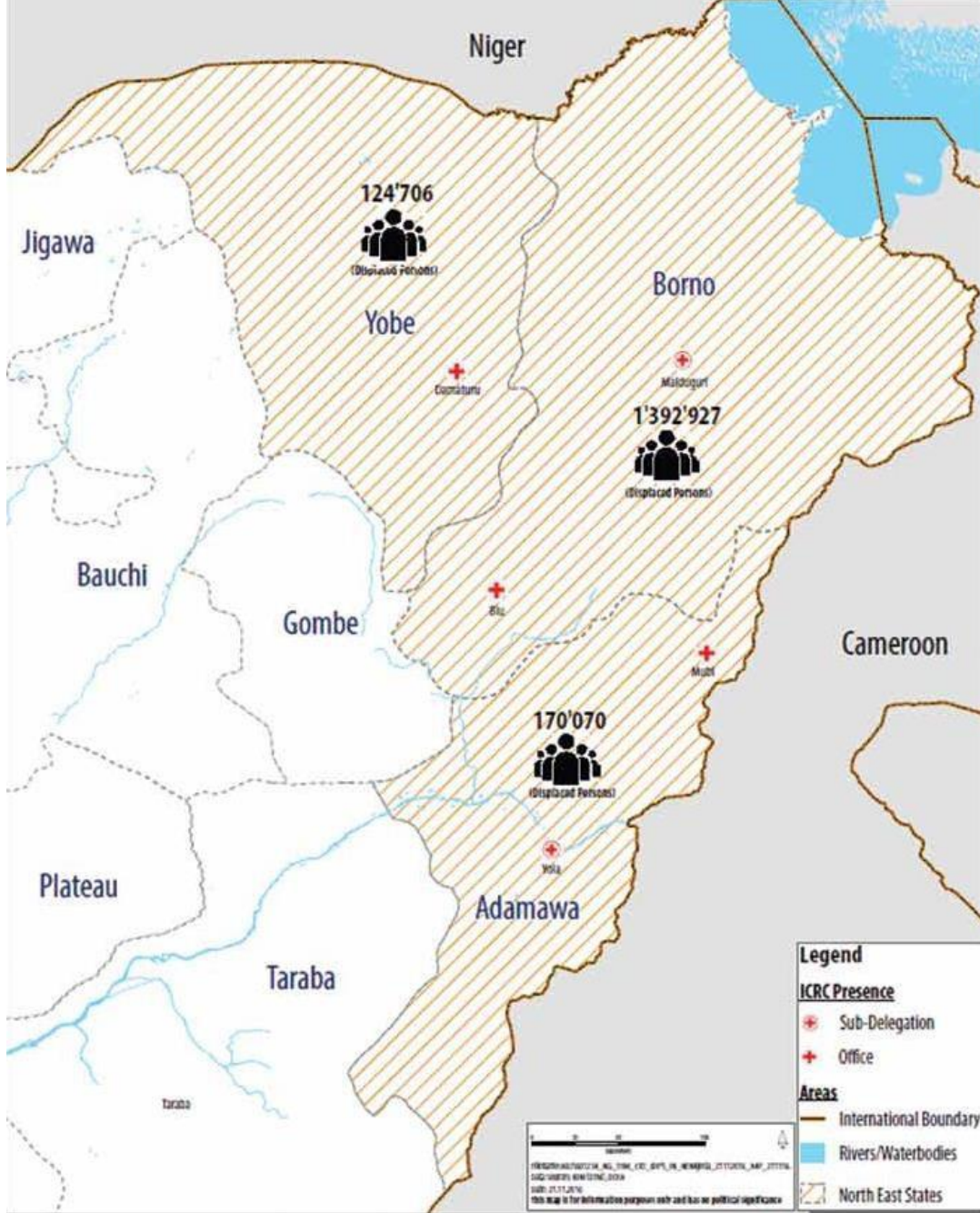
<sup>266</sup> *Ibid.*, p. 20.

<sup>267</sup> *Ibid.*

# Internally Displaced Persons in North East Nigeria, Oct 2016



ICRC



## **b. The *pass system* and restriction of movement**

Unlikely the *propiska* discussed above which is a measure extended in the whole country and to all residents in Azerbaijan, the pass system in the North-East in Nigeria is found in north-east IDPs camps, according to the report above mentioned<sup>268</sup>. Still according to the same report indicates that IDPs residing outside of official IDP camps enjoy greater freedom of movement than IDPs residing in camps<sup>269</sup>. In Maiduguri city, for example, IDPs accommodated in host communities are not subjected to additional restrictions on movement, except enlarged measures to all residents of the city, for security reasons. In contrast, IDPs residing in camps have faced varying restrictions throughout 2015 and 2016 in moving in and out of the camps, through the pass system implemented<sup>270</sup>.

The restriction of the freedom of movement of IDPs, due to the *pass system* is illustrated on the figures of the permissible daily outing from the camps. Concerning official IDP camps in Maiduguri, Borno State, at the time of the ICRC's assessment in October/November 2015, pass systems implemented by the camp authorities existed in six out of fourteen IDP camps<sup>271</sup>. At that time, the systems differed from camp to camp, including the number of passes issued per day and the number and identity of IDPs who were not required to have a pass<sup>272</sup>. For example, in Teachers Village IDP camp, only 20 out of 8,000 IDPs were able to leave the camp each day<sup>273</sup>. In other camps, such as Gubio IDP camp, only 4 or 5 traders (out of 11,000 IDPs) could leave the camp per day. In FTC (Federal Training Camps) camp, Maiduguri, Borno State, IDPs also reported that out of 18,000 IDPs, only community leaders and some traders were allowed, to leave the camp; in one IDP camp in Yola, Adamawa State,

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<sup>268</sup> ICRC, *supra* note 259, p. 35, "Concerning official IDP camps in Maiduguri, Borno State, at the time of the ICRC's assessment in October/November 2015, pass systems implemented by the camp authorities existed in six out of 14 IDP camps."

<sup>269</sup> *Ibid.*

<sup>270</sup> *Ibid.*

<sup>271</sup> *Ibid.*

<sup>272</sup> *Ibid.*

<sup>273</sup> *Ibid.*

camp authorities indicated that up to 350 people could leave the camp each day, whereas the Camp Commander indicated that the limit is between 20 and 30 (these different figures implies the existence of conflicting information in the camps)<sup>274</sup>. Although there are some improvements in the restrictions of movement due to the pass, the restriction still exists. For instance, as of September 2016, the daily number of IDPs who could leave Gubio IDP Camp had increased to 200 per day<sup>275</sup>. In contrast, the daily limit in other camps, including Damare and Fufore IDP Camps in Yola, was 30-50 IDPs per day. In general, IDPs are allowed to leave the camp from morning until 5 or 6pm; usually men leave the camp for business related reasons while women go out for activities related to farming or search for firewood<sup>276</sup>.

Although, restrictions on movement appear to have been softened in the majority of IDP camps in Maiduguri and Yola, movements continue to be regulated though the *pass system* implemented by the camp authorities in the majority of the camp. Thus, most of residents in camps indicated that restrictions on movement were still happening, according to at least one Camp Commander, restrictions on movement continue to create challenges since many more people would like to go out of the camp on a daily basis. In this regard, 40% of IDPs surveyed in September 2016 indicated that restrictions on movement impact on income generating activities<sup>277</sup>. It should also be noted that conflicting information regarding the daily limits in some IDP camps, indicates that the limit may remain quite low in some camps<sup>278</sup>.

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<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*

<sup>276</sup> *Ibid.*

<sup>277</sup> *Ibid.*

<sup>278</sup> *Ibid.*

The National Emergency Management Agency (NEMA)<sup>279</sup> authorities are usually involved in allocating passes at the camps, but the military retains control over the daily limit and any additional restrictions on movement<sup>280</sup>. In that context, decisions relating to movement of IDPs in and out of camps are the responsibility of the Armed Forces; for example, in Maiduguri, all decisions concerning access in and out of IDP camps lie with the garrison commander<sup>281</sup>.

#### **4.2. FACTUAL PROBLEMS ENCOUNTERED BY THE IDPS DUE TO THE RESTRICTION OF THE FREEDOM OF MOVEMENT, UNDER THE ARTICLE 12 OF THE ICCPR**

The problems encountered by the IDPs are usually in regard of their freedom of movement and their right to choose their own resident. In that sense, for when internal displacement occurs, the authorities of the territorial State, in order to ensure the public order, the national health and security (art 12(3)), take some measures, to regulate the movements. Unfortunately, many regulatory frameworks can directly or indirectly restrict freedom of movement and related rights despite constitutional guarantees and other measures designed to protect these freedoms. In the case of Azerbaijan, where the Constitution has officially abolished the *propiska* system a variety of laws have continued to refer to it.

As a consequence of Azerbaijan's inheritance of the Propiska regime from the U.S.S.R., the system and the limits and sufferings it might promote remain in existence. Other post-Soviet nations that inherited the propiska face same circumstances. In Azerbaijan, for instance, internally displaced persons (IDPs) continue to face difficulties in obtaining address

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<sup>279</sup> *Notional Emergency Management Agency (Establishment fc.) 1999* No. 12. The National Emergency Management Agency of Nigeria was established via Act 12 as amended by Act 50 of 1999, to manage disasters in Nigeria by formulating policies relating to disaster management in Nigeria. Therefore, from inception, NEMA has been tackling disaster related issues through the establishment of concrete structures and measures.

<sup>280</sup> ICRC, *Supra* note 259, p. 36.

<sup>281</sup> *Ibid.*

registration (propiska), which may expose them to corrupt practices, depriving them of a large number of social entitlements and allowances and the enjoyment of a number of rights, including in the areas of employment, health, education, family reunification<sup>282</sup>.

Concretely, this systematic registration limits freedom of movement, as stated above, and it impedes the enjoyment of other rights including the rights to health care, housing and work... The restriction of freedom of movement so hinders the realization of other rights<sup>283</sup>. Thus, firstly, IDPs did not initially choose the location of their settlement. Secondly, they cannot move because they are obligated to reside where they have been registered in order to benefit from assistance. Thirdly, the settlements are often located in remote areas, where the economy is far from prosperous and where opportunities for economic and social development are limited because there are no jobs and very little farmable land<sup>284</sup>. Families are obliged to split up. Often one parent moves to an urban area where he or she engages in work to be able to provide additional means for the family, rendering his/her lieu of residence illegal<sup>285</sup>. According to Amnesty International in their report of 28 June 2007, "the displaced are also penalized by the maintenance of an internal registration system that ties certain rights and benefits to a fixed residence<sup>286</sup>. As the internal registration is notoriously difficult to change, many displaced persons are forced to move in search of employment without a legal residence permit"<sup>287</sup>. Consequently, many displaced families

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<sup>282</sup> Amnesty International, *Azerbaijan*, *supra* note 249.

<sup>283</sup> According to the UN HRC, 15 April 2008, "Vulnerable groups such as the elderly, female headed households, traumatized and mentally ill persons are disproportionately represented among the inhabitants of collective accommodation facilities and new settlements, whereas young males had reportedly often moved to the cities or emigrated to seek better employment opportunities."

<sup>284</sup> Dunja Milatovic, COMMISSIONER FOR HUMAN RIGHTS OF THE COUNCIL OF EUROPE REPORT/ FOLLOWING HER VISIT TO AZERBAIJAN FROM 8 TO 12 JULY 2019, (2019), p. 27, para. 117

<sup>285</sup> *Ibid.*

<sup>286</sup> Amnesty International, *Azerbaijan*, *supra* note 249, p. 3.

<sup>287</sup> *Ibid.*



are broken, as husbands and sons move to urban centres while wives and children remain at the household's registered residence<sup>288</sup>.

Although the migration of IDPs to other districts and cities of the Republic from the districts where they are registered is not a basis for losing their IDP status, fear of losing assistance means that many IDPs will move but remain registered in their former place of residence<sup>289</sup>. In many cases the result is the disruption of family unity, as one family member - usually a male head of household - will move to another district in search of employment without de-registering in his/her original place of residence, while the rest of the family remains behind in order not to forfeit government assistance. Households, who move to urban centres and seek registration for the first time, are often unable to do so. This results in problems obtaining related documentation. According to the current regulations, the concessions on the payment of utilities made by the Government to IDPs are based on their actual place of residence. However, if IDPs are not temporarily or permanently registered, they do not receive any concessions based on actual residence. Therefore, for IDPs who have been registered in a rural area, re-registration in another district does not automatically translate into difficulties obtaining documentation, as long as IDPs are self-sufficient and not dependent on government assistance. IDP certificates are re-issued with a new place of residence such as Baku or Sumgayit in the rare cases that their move to urban centres is approved, or if IDPs can make a convincing case that they will not need government assistance or benefits such as exemptions from the payment of utilities. Only a minority of IDPs meet these criteria. The construction of new IDP settlements by the Government has compelled many IDPs to move to settlements located near to the frontline. This is

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<sup>288</sup> *Ibid.*

<sup>289</sup> Azerbaijan: Analysis of Gaps in the Protection of Internally Displaced Persons, *European Commission- UNHCR*, 2009, p. 28.

problematic in some newly constructed IDPs' settlements as their proximity to the frontline impacts on the physical safety of IDPs<sup>290</sup>.

Briefly, the IDPs face the issue of losing their documents, including the residence registration when fleeing. Due to the overnumbered of IDPs, government and the aid are not sufficient for all, and the choice of residence for resettled internally displaced persons is restricted in practice. Without the *propiska*, accessing the basics services from the government (employment, housing, medical services...) are difficult and sometimes IDPs are required to pay bribes to get those services. Internally displaced people also consistently report being compelled to pay bribes to state officials for services that by law they are entitled to receive without charge. For example, many reported having to pay 'processing fees' they are obliged to pay for basic and essential services, such as the receipt of identity documents, from state officials<sup>291</sup>.

In the same context, the IDPs from Angola, in terms of problems encountered, have some similarities, for the reasons that, the problems are related to the lack of documentation, which therefore restrict the freedom of movement of the concerned IDPs. In the Human Rights Watch Background Briefing Paper<sup>292</sup>, it is mentioned that many of the displaced lack identity documentation, facilitating harassment by the authorities, especially the national police. Arbitrary beatings and arrests occur when the displaced are unable to present personal identification documents to the police and are unable to bribe their way out<sup>293</sup>. Additionally, without documentation, the displaced, and especially children, are unable to access social services<sup>294</sup>. The *sobas* (traditional authorities) routinely demand bribes to

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<sup>291</sup> Amnesty International, *Azerbaijan*, *supra* note 249, p. 19.

<sup>292</sup> A Human Rights Watch Background Briefing Paper, *The War is Over: The Crisis of Angola's Internally Displaced Continues*, (2002), <https://www.hrw.org/legacy/backgrounder/africa/angola/2002/angola-idps.pdf>.

<sup>293</sup> *Ibid*, p. 6.

<sup>294</sup> *Ibid*.

include people on lists to receive assistance<sup>295</sup>. Local landowners regularly exploit the internally displaced as a source of cheap labor for cultivation; those that manage to find work as agricultural laborers are regularly subject to extortion at military and police checkpoints when they return from the fields<sup>296</sup>. Soldiers that guard access to the camps also “tax” the residents and steal food and non- food relief items<sup>297</sup>.

In the Palestinian case for example, according to the reports pertaining on the issue, throughout the occupied Palestinian territory, in the Gaza Strip as well as in the West Bank, Palestinians continuously face hardship<sup>298</sup>. Israeli policy of closures and the severe restrictions, including curfews and the permit regime, continue to be imposed on the movement of Palestinians<sup>299</sup>. As results, the denial of passage or delays at checkpoints, including curfews, has significantly affected the access of civilians, particularly children, to medical care and services, causing serious threat to their physical health<sup>300</sup>. The movement of the Palestinians in the West Bank is restricted by a series of physical obstacles such as checkpoints, roadblocks, trenches, etc. that severely restrict Palestinians’ freedom of movement. In 2007, there was monthly average of 552/561 such obstacles, in addition to monthly average of 113 flying/random checkpoints - an increase of 49.2% since 2005<sup>301</sup>. In the same context that the UN Special Rapporteur on the situation of human rights in the Occupied Palestinian Territories, on the 21 January 2008<sup>302</sup>, pointed out in detail “checkpoints and roadblocks seriously obstruct the freedom of movement of Palestinians in the West Bank, with disastrous consequences for both personal life and the economy. There

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<sup>295</sup> *Ibid.*

<sup>296</sup> *Ibid.*

<sup>297</sup> *Ibid.*

<sup>298</sup> IDMC, *OCCUPIED PALESTINIAN TERRITORY: Gaza offensive adds to scale of displacement A profile of the internal displacement situation*, (2009), p. 132.

<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*

<sup>301</sup> *Ibid.*

<sup>302</sup> *Report of the UN Special Rapporteur on the situation of human rights in the Palestinian territories occupied since 1967*, U.N Doc. A/HRC/7/17 (2008)

are 561 such obstacles to freedom of movement, comprising over 80 manned checkpoints and some 476 unmanned locked gates, earth mounds, concrete blocks and ditches. In addition, thousands of temporary checkpoints, known as flying checkpoints, are set up every year by Israeli army patrols on roads throughout the West Bank for limited periods, ranging from half an hour to several hours. In November 2007 there were 429 flying checkpoints. Palestinians are subjected to numerous prohibitions on travel and to requirements for permits for travel within the West Bank and to East Jerusalem. Checkpoints ensure compliance with the permit regime. These restrictions violate article 12 of the International Covenant on Civil and Political Rights which has been held to be binding on Israel in the OPT by the International Court of Justice in its Advisory Opinion on the construction of the wall.”<sup>303</sup>

In view of the above, it is legitimate to ask if these restrictions are complying with the provisions of International Human Rights Law such as the paragraph 3 of the Article 12 of the International Covenant of Civilian and Political Rights (ICCPR). In other words, are these above explained measures in compliance with the exceptions of the freedom of movement. Despite the acknowledgement of human rights bodies or courts, it is necessary to assess the measures on the ground of their necessity and proportionality, and if provided by law.

### **4.3. ASSESSMENT OF THE RESTRICTIVE MEASURES**

The objective of this part is to assess the violation of the freedom of movement occurred through the restrictive measures. The assessment approach used is the Human Rights Committee's case law-based legal, need, and proportionality procedure. While certain restrictions on freedom of movement are allowed under international law, including for

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<sup>303</sup> *Ibid.*, para. 34.

reasons of security, they must be provided by law, necessary for that purpose, proportionate and non-discriminatory pursuant to Art 12(3) ICCPR. In its General Comment No. 27, the Human Rights Committee observed that “Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. Measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected”<sup>304</sup>.

Thus, in this section, the acknowledgement of the restrictive measures as a violation of the right to the liberty of movement by legal bodies will be discussed in the 4.3.1, followed by the response of the territorial States in 4.3.2. The subsection 4.3.3 will assess, the restrictive measures in light of the principle of necessity.

#### **4.3.1. THE ACKNOWLEDGEMENT OF THE VIOLATION OF THE RIGHT TO THE LIBERTY OF MOVEMENT OF THE RESTRICTIVE MEASURES, BY THE LEGAL BODIES**

Regarding the acknowledgement, the UN Human Rights Committee acknowledge that the *Propiska* violates the freedom of movement of IDPs in Azerbaijan. In the same sense, the ICJ, in the *Advisory Opinion on Legal Consequences of the construction of the wall In the Occupied Palestinian Territory*<sup>305</sup>, is in the opinion that the construction of the wall and its associated regime impede the liberty of movement of the inhabitants of the Occupied Palestinian Territory (with the exception of Israeli citizens and those assimilated thereto) as

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<sup>304</sup> CCPR General Comment No.27, *Supra* note 17, para. 14.

<sup>305</sup> *I. C. J. Reports*, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, (2004).

guaranteed under Article 12, paragraph 1, of the International Covenant on Civil and Political Rights<sup>306</sup>.

#### 4.3.2. TERRITORIAL STATES RESPONSES

The territorial States responses are in relation with the sentence “must be based on clear legal grounds”<sup>307</sup>. That is why, for example, in the caselaw of the Human Rights Committee, the submission of the State Party related to the legal reasons or justification of the interferences restricting the freedom of the movement of the applicant is requested. The same applies to the European Court of Human Rights. The European Convention on Human Rights provides that interferences with most of the Convention rights are acceptable as long as a reasonable justification can be provided. Best known in this respect are the justification clauses of Articles 8, 9, 10, 11 of the Convention, and the Article 2(3) of the Protocol 4 of the same Convention, which stipulate that, limitations on the rights contained in these Articles are justifiable if they are “necessary in a democratic society” for the protection of one of the enumerated public policy interests. Based on that and for this thesis, the “territorial State response” refers to the legal causes invoked by the territorial States, on which the restriction measure is founded. For example, in the case of Azerbaijan, the Azerbaijani government made a response on the issue raised by Human Rights Committee in the previous recommendation report<sup>308</sup>, related to the *propiska* at the paragraph 19 in the “List of issues in relation to the fourth periodic report of Azerbaijan”<sup>309</sup>. In that list, the Human Rights Committee raised the issue about the compulsory registration address system, and “whether the system of address registration (*propiska*) has been fully abolished, and comment on reports according to which it continues to exist in practice”<sup>310</sup>. According to

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<sup>306</sup> *Ibid.*, para. 134.

<sup>307</sup> CCPR General Comment No. 27 *Supra* note 17, para. 16.

<sup>308</sup> *Concluding observations of the Human Rights Committee AZERBAIJAN 13-31 July 2009*, CCPR/C/AZE/CO/3 (2009), para. 18,

<sup>309</sup> United Nations CCPR /C/AZE/Q/4/ “*List of issues in relation to the fourth periodic report of Azerbaijan*” 26 April 2016.

<sup>310</sup> “*List of issues in relation to the fourth periodic report of Azerbaijan/ Addendum/ Replies of Azerbaijan to the list of issues*”.

Article 1 of the Law of the Republic of Azerbaijan on Registration in the place of residence and place of registration<sup>311</sup>, the purpose of registration of the place of residence and place of registration is to register the persons living in the Republic of Azerbaijan, to execute their duties before other persons, State and the society, and to create necessary conditions for implementation of human and citizen rights and freedoms (social protection, pension provision, call to the military service, execution of court decisions and etc.). In this regard, the citizens of the country are registered by submitting one of the documents providing grounds for registration on the place of residence reflected in Article 5 of the Law and they receive the ID cards<sup>312</sup>.

However, what are we going to retain from this answer given by the Azerbaijani Government? Referring to the response given by the Azerbaijani government, the concerned government did not give a clear response about issue. It just limited by describing the existing law related to the registration system, in general, without mentioning about the IDP which are more concerned about the restriction of the freedom of displacement. Thus, although the answer might lay in the article 1 of the Azerbaijani Law above mentioned, the Government failed to answer the question raised by the Committee, to clarify the abolishment of the *propiska* in the legislation and its existence in practice according to reports of human rights NGOs and institutions. And it is right that the Committee, in its concluding observations to Azerbaijan's third periodic report, still remains concerned about the residence registration system, including for internally displaced persons, is a precondition for the full enjoyment of certain rights (employment, social security and education), and the choice of residence for resettled internally displaced persons is restricted in practice<sup>313</sup>. For the reason that Azerbaijani officials could not give a response based on

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U.N. Doc. CCPR /C/AZE/Q/4/add, (2016), 9 August 2016, para. 19.

<sup>311</sup> Heydar Aliyev, The president of Azerbaijan Republic *LAW OF AZERBAIJAN REPUBLIC On registration according to the place of residence and sojourn*, 55-I Q, (April 4, 1996), art. 1.

<sup>312</sup> United Nations CCPR /C/AZE/Q/4/Add.1/9 August 2016.

<sup>313</sup> U.N CCPR /C/AZE/CO/4/ 16 November 2016 para.30.

legal grounds, it can be sustained that the Committee still holds that the Azerbaijani government through the *Propiska* is violating the right of the freedom of movement of IDPs<sup>314</sup>.

In addition, in the reports pertaining, Government officials do not disguise the fact that they are keen to stem migration of the internally displaced to Baku. For instance, Amnesty International was told by representatives of international organizations that government plans to move internally displaced communities out of Baku to new purpose-built settlements in Sabirabad and Saatli<sup>315</sup>. Government officials explained this policy to Amnesty International by referring to the explosive growth in Baku's population and resulting strains on the city's infrastructure and resources<sup>316</sup>. They also emphasize that the internally displaced population is easier to count and provide for when they are settled compactly in purpose-built settlements, whereas in Baku or Sumqayit internally displaced people "disappear and run their own businesses and livelihoods"<sup>317</sup>.

Concerning the restriction of the freedom of movement of Palestinians in the Gaza strip and the West Bank, Israel's argument is that the restrictions detailed above<sup>318</sup> are justified as security measure<sup>319</sup>. Written Statement, although limited to issues of jurisdiction and judicial propriety, contained observations on other matters, including Israel's concerns in terms of security<sup>320</sup>. Israel maintained onerous restrictions on the movement of Palestinians in the

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<sup>314</sup> *Ibid.*

<sup>315</sup> Amnesty International: Azerbaijan, *supra* note 249, p. 26.

<sup>316</sup> *Ibid.*

<sup>317</sup> *Ibid.*

<sup>318</sup> See subsection 5.2, p. 98.

<sup>319</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004*, p. 162, para. 57.

<sup>320</sup> *Ibid.*



West Bank, including checkpoints and the separation barrier, a combination of wall and fence in the West Bank that Israel said it built for security reason<sup>321</sup>.

In general, it remains that the territorial States always invoke the maintain of the national security, as reasons of restrictions. However, are those measures meeting the test of necessity or proportionality, under the prism of the general comment No. 27 of the HRC on the ICCPR, inter alia?

#### **4.3.3. THE FAILURE OF MEETING THE TEST OF NECESSITY**

This sub-section intends to prove that the restrictive measures mentioned in this thesis have failed to meet the test of the necessity, that are going to be discussed below. Thus, the substance of the necessity test (a), and the assessment of the measures restricting the measures (b) are discussed in this subsection.

##### **a. Content or substance of the necessity test**

Under international human rights law, the concept of necessity refers to the idea that certain actions or measures may be justified on the grounds that they are necessary to protect a fundamental human right or to prevent a greater harm. This concept is recognized in a number of international human rights instruments, including the International Covenant on Civil and Political Rights (ICCPR), and the European Convention on Human Rights (ECHR)<sup>322</sup>.

The test of necessity under human rights law is typically applied in situations where a government or other authority is considering taking a measure that may interfere with the exercise of a human right, such as the right to the liberty of movement. In such cases, the government or authority must demonstrate that the measure is necessary to achieve a

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<sup>321</sup> Human Rights Watch World Report 2018, p. 297, available at [https://www.hrw.org/sites/default/files/world\\_report\\_download/201801world\\_report\\_web.pdf](https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf), (accessed date 12/28/2022).

<sup>322</sup> ECHR, *supra* note 206.

legitimate aim, such as the protection of national security or the prevention of crime, and that there are no less restrictive alternatives available. The test of necessity is not an absolute defense, and any measure taken in the name of necessity must still be proportional to the aim being pursued. This means that the measure must be the least intrusive option available and must not go beyond what is necessary to achieve the legitimate aim.

In general, the test of necessity involves the following elements:

- Legitimate aim: The measure being evaluated must be taken in pursuit of a legitimate aim, such as the protection of national security or the prevention of crime.
- Necessity: The measure must be necessary to achieve the legitimate aim. This means that there must be a direct and close connection between the measure and the aim being pursued, and that the measure must be the least intrusive option available.
- Proportionality: The measure must be proportionate to the aim being pursued. This means that the measure must be the least intrusive option available and must not go beyond what is necessary to achieve the legitimate aim.
- Lack of alternative: There must be no less restrictive alternative available that would achieve the same aim.

In some legal contexts, the test of necessity may also require that the measure be the only reasonable means of achieving the legitimate aim, or that the measure be reasonably expected to achieve the aim in question.

However, it is important to note that the concept of necessity is not limited to situations where a government or authority is seeking to justify an interference with a human right. It can also be invoked by individuals or groups seeking to defend their actions on the grounds that they were necessary to protect a fundamental human right or to prevent a greater harm.

**b. Assessment of measures restricting the movement of individuals in light of the necessity and proportionality test**

Regarding the restrictive measures restricting the freedom of movement, such as the *propiska*, the *pass system* in Nigeria, the construction of the wall in Palestine by Israel, restricting the right of mobility of Palestinian surrounding the gaza strip, are they meeting the criteria of the test of necessity and proportionality?

Measures that restrict the movement of persons, such as travel bans, quarantine requirements, or border controls, may be evaluated in light of the necessity test under human rights law. This means that the government or other authority imposing such measures must demonstrate that they are necessary to achieve a legitimate aim and that there are no less restrictive alternatives available. The test of necessity also includes the fact that the restrictive measures must be the least intrusive instrument amongst those which might achieve the desired result<sup>323</sup>. The necessity test serves as a safeguard against the abuse of power by governments or authorities, as it requires them to demonstrate that any measures taken are necessary to achieve a legitimate aim and that there are no less restrictive alternatives available. Thus, in order for the measures restricting the movement of persons to fit in the test of necessity, they are evaluated as follow: First, there is the legitimate aim criteria, which means that the measure being evaluated must be taken in pursuit of a legitimate aim, such as the protection of national security or the prevention of crime. For example, if a government imposes a travel ban or quarantine requirement in response to a public health crisis, it must be able to show that these measures are necessary to protect, security, public health and prevent the spread of the disease. Second, the measures must be necessary to achieve the legitimate aim. In other words, the necessity of the measure enacted should be proved. Third, measure must be proportionate to the aim being pursued. Fourth, the lack of alternatives, which means that the measure must be the least intrusive option available and must not go beyond what is necessary to achieve the legitimate aim.

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<sup>323</sup> CCPR/C/21/Rev.1/Add.9, General Comment No. 27. Para. 13.

Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they were predicated<sup>324</sup>.

The government must also be able to demonstrate that there are no less restrictive alternatives available, such as less extensive travel restrictions or less stringent quarantine measures. The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity...<sup>325</sup>. The general Comment No. 27 of the Human Right Committee<sup>326</sup> has, from its paragraph 11 to paragraph 18, detailed the “exceptional circumstances in which rights under paragraphs 1 and 2 may be restricted”<sup>327</sup>. However, as it is mentioned in the paragraph 16 of the general comment, States has often failed to show that the application of their laws restricting the rights enshrined in art 12, paragraphs 1 and 2 are in conformity with all requirements referred to in article 12. For example, the case of *Ackla v Togo (505/92)*, the State party failed to show any explanation justifying the restrictions, to which the author has been subjected, pursuant to paragraph 3 of article 12<sup>328</sup>.

It is important to note that measures that restrict the movement of persons may still be subject to other human rights protections, such as the right to privacy and the prohibition on discrimination. The government or authority imposing such measures must ensure that they are not applied in a discriminatory manner and that they respect the privacy and other rights of those affected by the restrictions.

The following point stands to prove that these restrictive measures enacted are not meeting the criterion of proportionality. The criterion of proportionality is fully ingrained in the textual structure of some salient provisions of the ICCPR, including the limitations

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<sup>324</sup> *Kusaite v. Lithuania*, CCPR/C/126/D/2716/2016 (HRC, Jul. 24, 2019), para 8.3.

<sup>325</sup> CCPR/C/21/Rev.1/Add.9, *General Comment No. 27*. Para. 16.

<sup>326</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9.

<sup>327</sup> UN Human Rights Committee (HRC), *CCPR General Comment No. 27: Article 12 (Freedom of Movement)*, 2 November 1999, CCPR/C/21/Rev.1/Add.9, para.11.

<sup>328</sup> *Ackla v Togo (505/92)* para.10.

clauses<sup>329</sup>. The measure must be proportionate to the aim being pursued. This means that the measure must be the least intrusive option available and must not go beyond what is required to achieve the legitimate goal. The proportionality restricts the authorities of the territorial States in the exercise of their powers by requiring them to strike a balance between the means used and the intended aim. In other words, there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized by any measure depriving a person of his freedom. Once the interpreter has defined the end that the legislator aimed for and the means that the legislator has designed to obtain such end, then the interpreter must verify if the means are capable of achieving such end<sup>330</sup>.

Concerning the *propiska*, the impact of the system is apparently negative on IDPs, given that the mean employed has gone beyond the requirement to achieve the legitimate goal. Regarding the consequences arisen from the *propiska*, the failure of the proportionality criterion can be ascertained. The purpose of the registration system according to the place of residence and sojourn is the record keeping of the persons who live in Azerbaijan Republic and to provide the proper conditions for the fulfillment of their duties before other persons, the state and society (social protection, pension, challenge to the military service, execution of the court decisions and so on. Thus, either named registration or *propiska*, both consist of a certification of the holder's right to reside in a given location, to control, internal population movement, and prevent unauthorized migration (by tying individuals), and their access to social services. Above all, the main function of the *propiska* is to restrict migration to large cities<sup>331</sup>, therefore the residency is given by the authorities. Consequently, the system has particularly negative implications for internally displaced persons, since it

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<sup>329</sup> See e.g., Arts 12(3) (freedom of movement); 19(3) (freedom of expression); 21 (freedom of peaceful assembly); 22(2) (freedom of association).

<sup>330</sup> Juan Cianciardo "The Principle of Proportionality: The Challenges of Human Rights," *Journal of Civil Law Studies*, Vol. 3, No. 1 (2010) page 179

<sup>331</sup> Amnesty International, *Azerbaijan*, *supra* note 249.

restricts them and their eligibility to receive aid and social services to a fixed residence<sup>332</sup>. As discussed above, the consequences of the *propiska* on IDPs is very hard on IDPs.

To summarize, the *propiska* is a form of internal passport designed to control internal population movements, and prevent unauthorized migration. It fulfilled the role of a residency permit, required to access health care, employment, housing, and many other basic social services. An important function of it was to restrict migration to large cities; *propiska* for large cities were historically difficult to obtain. Retaining the Propiska system has especially detrimental effects for internally displaced people, since it confines their eligibility for assistance and social services to a permanent domicile. Their new or re-registration procedure takes place in new locations, which are frequently in economically depressed parts of central Azerbaijan. As a result, internally displaced people must also break the law in order to receive medical care or work in locations where they do not have a *propiska*. As stated above, the *propiska* main function is to restrict the migration to large cities. But in regard to the previous, this function is not achieved as people are still migrating to big cities. And this disorderly movement is having negative impact on IDPs resettlement process. And above all, the corruption facts arising from the payments of bribes in order to get re-registered is another factor that is impeding and restricting IDPs freedom of movement. Also, in the paragraph 34 of the separate opinion, for the judge Kooijmans in the advisory opinion of the ICJ related to the legal consequences of the construction of the wall in the Occupied Palestinian Territories, in addition that the measures taken by Israel cannot be justified by military exigencies or by requirements of national security or public order<sup>333</sup>, these measures should have been put to the proportionality test. And in his view, it is of decisive importance that, even if the construction of the wall and its associated régime could be justified as measures necessary to protect the legitimate rights of Israeli citizens, these measures would not pass the proportionality test, for the reason that “the route chosen

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<sup>332</sup> *Ibid.*

<sup>333</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, Supra* note 121, paras. 135-137.

for the construction of the wall and the ensuing disturbing consequences for the inhabitants of the Occupied Palestinian Territory are manifestly disproportionate to interests which Israel seeks to protect, as seems to be recognized also in recent decisions of the Israeli Supreme Court<sup>334</sup>. According to the judge, Israel failed to meet test of proportionality.

Regarding the criterion related to lack of alternative, there must be no less restrictive alternative available that would achieve the same aim. In the Concluding Observations on Israel, for instance, the Human Rights Committee expressed concern over restrictions on the right to freedom of movement that had been imposed as a response to terrorist threats from the Occupied Territories<sup>335</sup>. The Human Rights Committee stated as follow: *“While again acknowledging the seriousness of the State party’s security concerns that prompted recent restrictions on the right to freedom of movement, for example through imposition of curfews or establishment of an inordinate number of roadblocks, the Committee is concerned that the construction of the ‘Seam Zone’, by means of a fence and, in part, of a wall, beyond the Green Line, imposes additional and unjustifiably severe restrictions on the right to freedom of movement of, in particular, Palestinians within the Occupied Territories. The ‘Seam Zone’ has adverse repercussions on nearly all walks of Palestinian life; in particular, the wide- ranging restrictions on freedom of movement disrupt access to health care, including emergency medical services, and access to water. The Committee considers that these restrictions are incompatible with article 12 of the Covenant”*<sup>336</sup>.

The argumentation of this part is based on the concluding observation of the Committee about the construction of the “Seam Zone” which imposes additional and unjustifiably

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<sup>334</sup> SEPARATE OPINION OF JUDGE KOOIJMANS in the Advisory Opinion of 9 July 2004, regarding the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, para. 34, available at <https://www.icj-cij.org/public/files/case-related/116/116-20051219-JUD-01-03-EN>. (accessed date 12/31/2022).

<sup>335</sup> UN doc CCPR/CO/78/ISR (2003).

<sup>336</sup> U.N/ Doc. CCPR/CO/78/ISR (2003) para.19.

severe restrictions on the right to freedom of movement of, in particular, Palestinians within the Occupied Territories.

The argumentation is also based on the International Court of Justice statement. For the Court, the wall, along the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order<sup>337</sup>. These unjustified severe restrictions are illustrated by the imposition of curfews or establishment of an inordinate number of roadblocks. Despite of the reasons invoked by the Government of Israel, on the necessity ground, under the article 4(1) to maintain the State of Emergency for the defense of the State, and the article 9<sup>338</sup> for the protection of life and property, including the exercise of powers of arrest and detention, “the Court from the material available to it, is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives”<sup>339</sup>.

The following scheme is an illustration of the objective of this part.

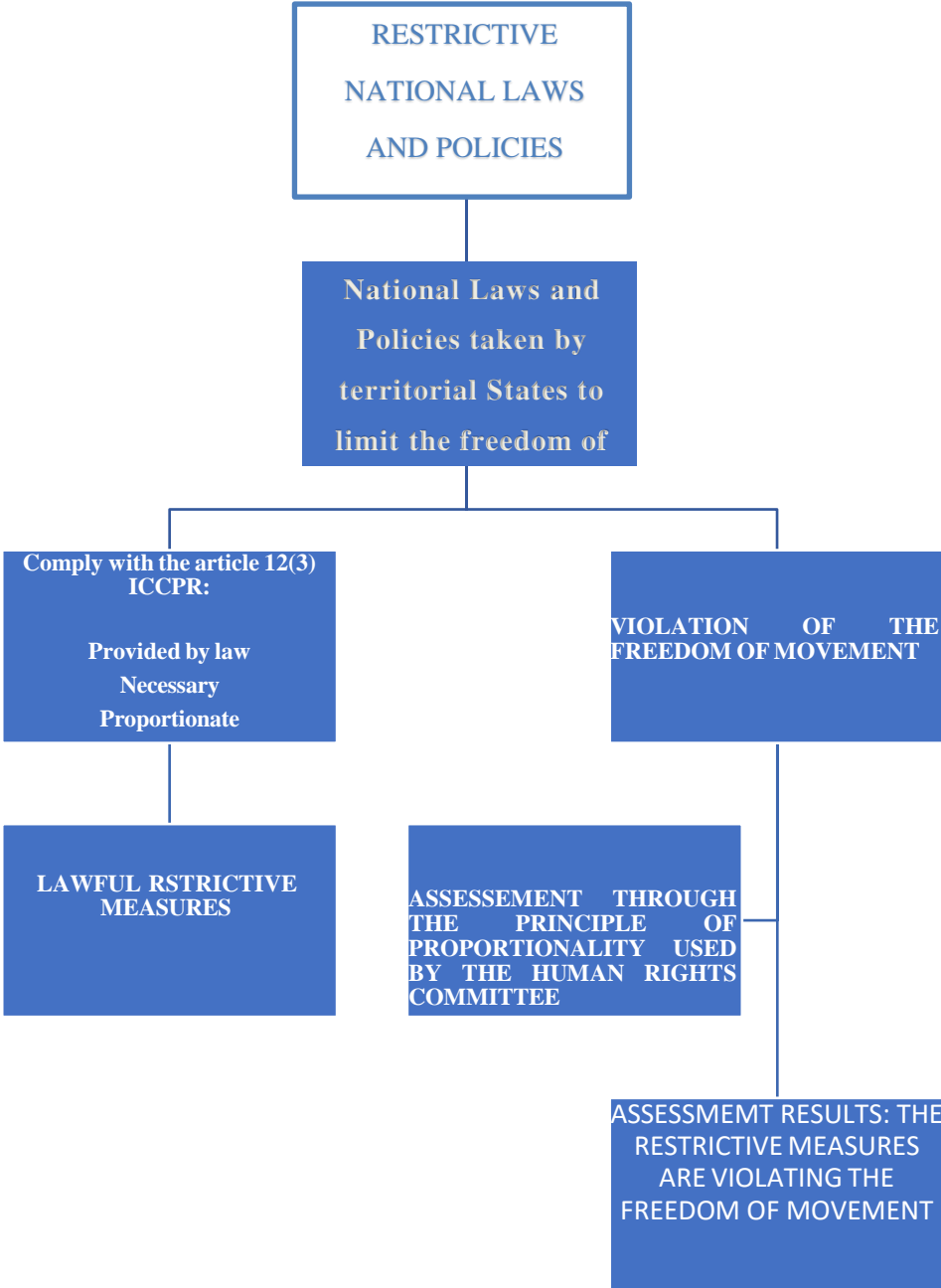
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<sup>337</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004, Supra* note 121, para.137

<sup>338</sup> *Ibid.*, para.137.

<sup>339</sup> *Ibid.*, para. 127.





## 5. CONCLUSION

In this chapter, some restrictive measures, for example, the *propiska*, the “*Seam- Zone*”, the “*Pass-system*” have been studied as examples.

Further, these restrictive measures are evaluated based on the criteria of the necessity test outlined in the Human Rights Committee's General Comment No. 27 on Article 12(3) of the ICCPR at Paragraph 16. The result of the assessment of these measures is that they are violating the right of the freedom of movement of the IDPs due to the fact that conditions set out in the qualifying clauses in the applicable human rights conventions have not been met. The Human Rights Committee acknowledges the fact that freedom of movement of IDPs is particularly restricted by the *propiska* regime, and the Committee had mentioned it in the volume 1 of its report *A/64/40 (Vol. I)*. The acknowledgment of the Committee about the violation of freedom of movement is not only mentioned in reports of international organizations or institutions, but also in legal cases. For illustration, the Committee concluded to a violation of the article 12(1) in the case of *Henry Kalenga v. Zambia*<sup>340</sup>, for the reason that the applicant got his passport withdrew. The same applies in the case of *Denizci and others v. Cyprus*<sup>341</sup>, the Turkish Cypriot applicants were expelled to the northern part of Cyprus and when within the territory of the Republic of Cyprus were subjected to police surveillance, intimidation and restrictions to their movements. Because restrictions to the applicants' movements constituted an interference with the freedom of movement protected by Article 2 of Protocol No. 4<sup>342</sup>, Cyprus was found to have violated Article 2 of Protocol No. 4 of the European Convention on Human Rights<sup>343</sup>. According to Emmanuel Decaux, the withdrawal or refusal to issue a passport has also been interpreted by the Committee as a measure which could impede a person's freedom of movement. While

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<sup>340</sup> HRC, Communication N° 326/1988, aff. *Kalenga v. Zambia*, 27 July 1993.

<sup>341</sup> *Denizci and Others v. Cyprus*, Nos. 25316-25321/94 & 27207/95, 22/05/2001.

<sup>342</sup> *Ibid.*, para. 404.

<sup>343</sup> *Ibid.*, conclusion, para. 8.

these measures deprive the person of the right guaranteed in Article 12 (2) [...], they also constitute an infringement of the freedom of movement protected by Article 12 (1) because their essential purpose is to limit the capacity for movement. If these criteria are not met, the restrictive measures are considered as violating the right of freedom of movement. Therefore, the Human Rights Committee explicitly endorses the elements necessity and proportionality, as elements meeting the lawful restrictive measures. Article 12, paragraph 3, clearly indicates that it is not sufficient that the restrictions serve the permissible purposes; they must also be necessary to protect them. In order not to violate the right of freedom of movement, the restrictive measures must conform to the principle of proportionality; they must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve the desired result; and they must be proportionate to the interest to be protected.

For the next chapter, the African Convention on the Protection and Assistance of IDPs is explored as a potential solution, in one hand. In the other hand, it is to highlight the effort deployed by the African continent to provide a legal and binding framework in order to improve the protection of IDPs.

## **CHAPTER VI: THE KAMPALA CONVENTION AS A POTENTIAL SOLUTION OF FILLING THE NORMATIVE GAP OF IDPs PROTECTION ?**

### **1. INTRODUCTION**

The purpose of this chapter, in addition of discussing some of the main provisions of the Kampala Convention, analyses through the different provisions reflecting the contributions brought by the Convention in the legal protection and assistance to IDPs, whether this regional could be a potential solution to fill the normative gaps of the protection of IDPs in the existing frameworks related to IDPs. One such gap is the lack of a comprehensive international legal framework specifically designed to protect the rights of IDPs. While IDPs are protected by various international human rights instruments and refugee law, these instruments do not provide a comprehensive and specialized set of legal protections specifically tailored to the needs of IDPs. Another normative gap in the protection of IDPs is the lack of effective mechanisms for ensuring the implementation and enforcement of their rights. IDPs often face significant barriers to accessing justice and seeking remedies for violations of their rights, and there is often a lack of accountability for those who violate their rights.

The reasons to propose the Kampala Convention as potential solution are diverse, inter-alia: the absence of a globally binding legal instrument for the protection of IDPs underlines the importance of the Kampala Convention and the possible contribution it can make to global and regional efforts to create a binding legal framework for the protection of IDP. Other reason is that the Convention addresses all stages of internal displacement and supplies a framework for coordinating activities by governments and humanitarian actors aimed at preventing and addressing internal displacement<sup>344</sup>. The Kampala Convention is also the

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<sup>344</sup> JO Moses Okello “In Lieu of a *Travaux Préparatoires*: A Commentary on the Kampala Convention for IDPs” *International Journal of Refugee Law* (2019), Vol. 31, No 2/3, p. 349.

first regional treaty to comprehensively address the issue of internal displacement. The Kampala Convention goes beyond the traditional causes of displacement such as armed conflicts and human rights violations by recognizing other causes of displacement, such as climate change and project-induced displacement<sup>345</sup>.

Despite that the *UN Guiding Principles on Internal Displacement* are not legally binding, their authority has been recognized globally, particularly as they draw from international humanitarian and human rights law<sup>346</sup>. However, to compensate for the lack of legal character of the UN Guiding Principles on Internal Displaced Persons, the African Union has incorporated those principles into the Convention for the Protection and Assistance of Internally Displaced Persons in Africa<sup>347</sup>. In other words, the Convention builds on the 1998 Guiding Principles on Internal Displacement, integrating international human rights and humanitarian law norms as they relate to internal displacement. While rooted in these standards, the Convention also reflects recent developments and the evolution of best practice regarding IDP's protection. In so doing, the Convention advances the normative standard on internal displacement in a number of important areas, including in terms of the prohibition on arbitrary displacement, the responsibilities of international and regional organizations, internal displacement linked to the effects of climate change, and remedies for those affected by displacement. By reinforcing these norms and bringing them together into one instrument, it offers a unique legal framework to address the specificities of internal displacement on the African continent and provides a clearer and stronger legal basis for IDPs' protection.

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<sup>345</sup> Kampala Convention, *supra* note 19, art. 5(4), 10.

<sup>346</sup> *Introductory note to the Guiding Principles, Report of the Representative of the Secretary General, Mr. Francis* *supra* note 1, p. 3 para. 9 / [...The Principles reflect and are consistent with international human rights law and international humanitarian law...]. See also in the same report above mentioned, in its "*Annex / GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT INTRODUCTION: SCOPE AND PURPOSE*" p. 5 para.3.

<sup>347</sup> Kampala Convention, *supra* note 19.

In the next sections, after a brief overview of the Convention (2), the development leading to the adoption of the Convention (3) recalling of the preparatory works and codification (2.1), the porosity of the IDPs national laws and policies (3.2) the limits of the subregional frameworks such as the Pact of the Great Lakes Region (3.3). The provisions of the Convention through which the contributions are reflected, will be highlighted as specificities of the Kampala Convention (4).

## 2. OVERVIEW OF THE KAMPALA CONVENTION

The Kampala Convention is the first binding multilateral legal instrument specifically governing protection and assistance for IDP<sup>348</sup>. It is also, the first regional convention comprehensively to address internal displacement, including prevention, response and durable solutions. It explicitly protects the rights of persons displaced by natural disasters, armed conflict, generalized violence, human rights violations, and development projects<sup>349</sup>. It reiterates existing international and AU law, including human rights and international humanitarian law standards<sup>350</sup>. Although the Kampala Convention is the only legally binding document dedicated to assistance and protection of IDPs, many of the rules derive from existing legal obligations under both international humanitarian law (IHL) and international human rights law (IHRL). In particular, the Convention draws upon the rules and standards set out in the United Nations *Guiding Principles on Internal Displacement*, adopted by the United Nations General Assembly in 1998, as well as the *African Charter on Human and People's Rights* of 1985, the *Four Geneva Conventions of 1949* and their *Additional Protocols of 1977*<sup>351</sup>. In this way, the Kampala Convention reinforces existing legal obligations and rights in one single treaty that addresses the needs of IDPs in Africa.

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<sup>348</sup> Kampala Convention, *supra* note 19, preamble, para. 4

<sup>349</sup> *Ibid.*, para. 5.

<sup>350</sup> *Ibid.*, para. 8.

<sup>351</sup> For details about the Kampala Convention, see section 3 of the present chapter.

The Convention was adopted by African Heads of States on 22 October 2009 at a Special Summit of the African Union in Kampala, Uganda<sup>352</sup>. The Convention came into force on 6 December 2012, upon ratification by 15 States Parties, the 15<sup>th</sup> instrument of ratification was deposited by the Kingdom of Swaziland (Kingdom of Eswatini), enabling the Convention to enter into force, according to the article 17 (1) of the Convention<sup>353</sup>. Since then, the Convention's coming into force has been celebrated on 6 December. Technically, however, it came into force thirty (30) days later on 4 January 2013, in accordance with article 17(1) of the Convention<sup>354</sup>. This relatively quick process of ratification can be attributed, at least in part, to the Convention's relatively unobjectionable and inclusive nature<sup>355</sup>.

Since the entry into force, on fifty-five (55), a total of Forty (40) African States have signed the Convention, while thirty-one (31) have also ratified (or acceded to) the Convention (as for April 27, 2022<sup>356</sup>), and are therefore legally bound by its provisions. At the Special

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<sup>352</sup> It is very interesting to follow the genesis of the Special Summit of the AU which ended to the adoption of the Convention. The detailed article of JO Moses Okello mentioned above in the footnote 214, explained the process of the adoption of the Convention, from page 354 to page 355.

<sup>353</sup> Kampala Convention, *supra* note 19, art. 17 (1) “*This Convention shall enter into force thirty (30) days after the deposit of the instruments of ratification or accession by fifteen (15) Member States.*”

<sup>354</sup> Okello, *supra* note 344, p. 366. “*Article 1(r): ‘States parties’ Article 1(r) of the Kampala Convention, which defines ‘States Parties’ as ‘African States which have ratified or acceded to this Convention’, is highlighted here only to record that on 6 December 2012, the 15th instrument of ratification was deposited by the Kingdom of Swaziland (now known as the Kingdom of Eswatini), enabling the Convention to come into force. To mark the occasion, a ceremony was held at the AU Commission that day.<sup>132</sup> Since then, the Convention’s coming into force has been celebrated on 6 December. Technically, however, it came into force 30 days later on 4 January 2013, in accordance with article 17(1) of the Convention.*”

<sup>355</sup> *Ibid.* See also UN Human Rights Council, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, UN doc A/HRC/13/21 (5 January 2010) para 13 “*In October 2009, the African Union (AU) Special Summit of Heads of State and Governments adopted the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), the first internal displacement-specific convention covering an entire region. This historic document, to the development of which the Representative contributed, sets out obligations for States parties, the AU and humanitarian agencies in relation to all phases of displacement and had already been signed by 17 States when this report was finalized.*”

<sup>356</sup> LIST OF COUNTRIES WHICH HAVE SIGNED, RATIFIED/ACCEDED TO THE AFRICAN UNION CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA (KAMPALA

Summit of the AU in Kampala in October 2009, the AU not only adopted the Kampala Convention but also the Kampala Declaration and a set of Recommendations<sup>357</sup>. It is important to precise that neither the Declaration nor the Recommendations are legally binding on states; nevertheless, they are important documents, as they are indicative of states' official position on issues related to internal displacement. They thus provide an important framework to guide their actions in relation to issues of internal displacement, and therefore urge Member States to ratify and implement it as soon as possible<sup>358</sup>.

Regarding the scope of the Kampala Convention, it is provided that the Convention's objectives, among others, includes preventing internal displacement by addressing its root causes; establishing a legal framework applicable to all stages of displacement; and outlining the obligations and responsibilities of State and non-state actors<sup>359</sup>. Its scope is also comprehensive as it touches upon all stages of displacement, namely, prevention of displacement, protection and assistance during displacement, and ensuring durable solutions. It also covers internal displacement caused by a wide variety of non-exhaustive factors including armed conflicts, generalized violence, violations of human rights, consequences of large development projects, and harmful practices. Some of its provisions are related to the protection and assistance of those who are hosting IDPs; it also provides, in much more detail, the obligations and responsibilities of not only States but also armed groups, non-state actors, the AU, and international organizations. The Convention is both a human rights and humanitarian law instrument. It thus provides norms applicable to both protection issues and assistance. Several of its provisions reaffirm the rights of IDPs and their protection from discriminatory practices. Its provisions dealing with early warning systems

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*CONVENTION*), available at: <https://au.int/en/treaties/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> Status list (EN) (accessed date 07/10/2022).

<sup>357</sup> African Union, *Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa*, 23 October 2009, Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1, available at: <https://www.refworld.org/docid/4af0623d2.html> (accessed date 07/10/2022).

<sup>358</sup> Ibid. para. 28.

<sup>359</sup> Kampala Convention, *supra* note 19, art. 2.



and risk reduction are relevant for creating better and effective prevention. As expected, a number of provisions of the Convention show its attempt to create a balance between the sovereignty of the State and the State's responsibility, for example the article 7 (2)<sup>360</sup>.

Regarding the nature of the substantive provisions, they include many obligations which seek to ensure the safety and dignity of IDPs, as well as the obligation to provide adequate assistance to IDPs, without discrimination and with the least possible delay<sup>361</sup>. Thus, States bear the primary<sup>362</sup> duty and responsibility for providing IDPs with protection and adequate assistance during internal displacement<sup>363</sup>. Additionally, States Parties have obligations relating to the phases prior to and after internal displacement. For example, the Convention reinforces the prohibition of forced displacement by parties to an armed conflict, as well as the obligation for States Parties to strengthen the domestic legal and policy frameworks regulating protection and assistance for IDPs. Recognizing, that internal displacement is a temporary situation, the Convention also obliges States Parties to support IDPs in finding durable solutions to their displacement, including voluntary return, relocation and local integration. Acknowledging that States experiencing crisis may sometimes require support and resources from other actors, the Convention outlines the obligations of other

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<sup>360</sup> Kampala Convention, *supra* note 19, Art.7(2) "Protection and Assistance to Internally Displaced Persons in Situations of Armed Conflict. 2. "Nothing in this Convention shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the Government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.""

<sup>361</sup> *Ibid.*, Art.5 "Obligations of States Parties relating to Protection and Assistance".

<sup>362</sup> Okello, *supra* note 344, p. 370, "During debate, some States sought clarity on the word 'primary', as they were concerned about the role of non-State actors in this regard. However, the resource persons' explanation that humanitarian agencies had the 'other' responsibility allayed these concerns."

<sup>363</sup> Kampala Convention, *supra* note 19., Art.5 (1).

stakeholders<sup>364</sup>, such as the African Union and humanitarian organizations<sup>365</sup>, including the obligation to operate in accordance with the principles of humanity, neutrality, impartiality and independence<sup>366</sup>. In particular, the Convention recognizes the specific mandate of the ICRC to protect and assist persons affected by armed conflict and other situations of violence, as well as the specific roles of international organizations and agencies, including the protection expertise of the United Nations High Commissioner for Refugees (UNHCR)<sup>367</sup>. In addressing the roles and obligations of other stakeholders, the Convention also imposes obligations on non-state armed groups. Article 7 addresses the protection and assistance of IDPs in situations of armed conflict, and in particular, prohibits armed groups from engaging in activities likely to result in harm to IDPs<sup>368</sup>.

The Kampala Convention, which is regional convention, proposes ambitious obligations and establishes monitoring of the implementation of the obligations. The monitoring will be organized by a conference of States Parties to monitor and review the implementation of the objectives of the Convention, as well as the production of a report by each State Party. Accordingly, to the article 14 (1) of the Convention<sup>369</sup>, the First Conference of States Parties for the Convention were held from 3<sup>rd</sup> to 5<sup>th</sup> April 2017 in Harare (Zimbabwe)<sup>370</sup>.

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<sup>364</sup> As mentioned in the footnote 360, the humanitarian agencies have the “other responsibility”. The art. 5(6) of the Convention provided that of the Convention provided that “States Parties shall provide sufficient protection and assistance to internally displaced persons, and where available resources are inadequate to enable them to do so, they shall cooperate in seeking the assistance of international organizations and humanitarian agencies, civil society organizations and other relevant actors. Such organizations may offer their services to all those in need.”

<sup>365</sup> Kampala Convention, *supra* note 19, art. 6(2).

<sup>366</sup> *Ibid.*, art. 6(3).

<sup>367</sup> *Ibid.*, preamble para. 12.

<sup>368</sup> *Ibid.*, art. 7.

<sup>369</sup> Kampala Convention, *supra* note 19, art 14 “*Monitoring Compliance I. States Parties agree to establish a Conference of States Parties to this Convention to monitor and review the implementation of the objectives of this Convention*”.

<sup>370</sup> AFRICAN UNION Press Release “*Plan of Action for the implementation of the Kampala Convention adopted by conference of states parties*” No. 051 (2017). The outcome of the Conference, the Harare Plan of Action, sets priorities for facilitating the implementation of the Kampala Convention. It aims to strengthen regional and national measures for preventing displacement

The Kampala Convention on the protection and assistance of internally displaced persons in Africa was adopted by the African Union (AU) in October 2009. The convention is the first legally binding instrument specifically designed to protect the rights of IDPs at a regional level. It reflects the growing recognition of the need for improved legal protections for this vulnerable population.

### 3. DEVELOPMENTS LEADING UP TO THE KAMPALA CONVENTION

A major point to highlight is that, despite the importance of the Kampala Convention, no detailed records were kept of its drafting. However, it is necessary to highlight that it is difficult to find preparatory works of African regional legal instrument. And according to Abebe, “one hardly finds any travaux préparatoires for African regional legal instruments. No specific organ had been tasked with the responsibility of the codification of regional treaties and legal instruments<sup>371</sup>, as for example, the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa does not have a systematic *travaux préparatoires* compared to the 1951 Convention Relating the Status of Refugees which has comprehensive *travaux préparatoires*<sup>372</sup>. The Kampala Convention does not derogate from that public view of scholars<sup>373</sup>. It is in that sense that Abebe observes: “No minutes of preparatory draft meetings were taken [...] Only reports were prepared. The absence of a systematic drafting process of the Convention poses some problems which we will be discussed below in the present thesis. The Kampala Convention lacks formal records of its drafting and negotiating, there is no formal *travaux préparatoires* of the Kampala

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and ensuring durable solutions, while promoting the fulfilment of the obligations of State Parties, non-State armed groups, and the role that international organizations, national human rights institutions and civil society can play.

<sup>371</sup> Abebe, *supra* note 5, p. 31.

<sup>372</sup> G. Okoth-Obbo, “Thirty Years On: A Legal Review of the 1969 OAU Refugee Convention”, *African Yearbook of International Law*, Vol.8, No. 1, (2000) p. 9.

<sup>373</sup> Abebe, *supra* note 5, p. 31. See also, Okello, *supra* note 344, p. 350.

Convention. The drafting of the Kampala Convention was not preceded by any preliminary study whether on procedural or substantive issues<sup>374</sup>.

To compensate, the articles published by some diplomats or expert, such as JO Moses Okello<sup>375</sup>, Abebe, had considerable input for one researching on the developments leading up the adoption of the African Union Convention on the Assistance and Protection of Internally Displaced Persons in Africa.

Due to armed conflict, brutality, human rights violations, and natural catastrophes, the number of internally displaced persons (IDPs) in Africa has grown dramatically over the past few decades. This growth in internally displaced persons has led to a greater awareness of the need for enhanced protection and aid for this community. While IDPs are covered by many international human rights treaties and refugee law, there was a lack of a comprehensive and specialized legal framework designed to defend the rights of IDPs.

In other to demonstrate how the Kampala Convention is important to the protection of the IDPs, we will explore the path to the adoption of the African Union Convention on the Assistance and Protection of Internally Displaced Persons in Africa, in the present thesis. That includes the preparatory work and codification (3.1), the permeability or porosity of national laws and policies (3.2) and the limits of the Pact on Security, Stability, and Development in the Great Lakes Region (3.3).

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<sup>374</sup> Chaloka Beyani, "Recent Developments: The Elaboration of a Legal Framework for the Protection of Internally Displaced Persons in Africa" *Journal of African Law*, Vol. 50, No. 2, (2006), p. 99.

<sup>375</sup> Okello, *supra* note 344, p. 349, "A career diplomat, lawyer, and former senior official of the United Nations, the author participated in the drafting of the Kampala Convention and was Senior Coordinator for the African Union Special Summit that adopted it. He expresses his sincere thanks to the anonymous reviewers for their helpful comments, and to Tamara Wood for her assistance in preparing the manuscript for publication."

### 3.1. PREPARATORY WORK AND CODIFICATION

This subsection discusses the legislative history of the African Union Convention on the Protection and Assistance of IDPs (the Kampala Convention).

International initiatives towards improving the welfare of internally displaced persons appeared to stagnate in the late 1990s, after the appointment of the Special Representative of the Secretary General on Internally Displaced Persons, the formulation of the Guiding Principles on Internal Displacement in 1998, and the consequent establishment of the Inter-Agency Standing Committee on Internally Displaced Persons<sup>376</sup>. The drafting history of the Convention can be traced back to the early period of the AU when the Executive Council asked “the Commission to finalize the review of all OAU Treaties and Conventions, to determine their relevance to the African Union, and to convene a Meeting of Experts, [ . . . ], to consider the review<sup>377</sup>. The committee recommended the drafting of new treaties including one on internal displacement. In 2004, the AU’s Executive Council requested that the secretariat develops a legal instrument that provided adequate protection of IDPs<sup>378</sup>. The 5th Ordinary Session of the Executive Council endorsed this recommendation and decided that, “the specific needs of internally displaced persons (IDPs) such as protection and assistance should be addressed through a separate legal instrument”<sup>379</sup>.

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<sup>376</sup> Chaloka Beyani, “Recent Developments: The Elaboration of a Legal Framework for the Protection of Internally Displaced Persons in Africa” *Journal of African Law*, Vol. 50, No. 2, (2006), p. 187.

<sup>377</sup> AU Executive Council, *Decision on the Status of Signature and Ratification of AU Treaties*, DOC. EX/CL/ 36 (III), 4–8 Jul. 2003 “para.3 REQUESTS the Commission to finalize the review of all OAU Treaties and Conventions, to determine their relevance to the African Union, and to convene a Meeting of Experts, (in the latter part of the year), to consider the review”.

<sup>378</sup> AU Executive Council, *Decision on the Situation of Refugees, Returnees and Displaced Persons*, AU Doc. EX.CL/Dec.127 (V), 30 Jun.–3 Jul. 2004, para. 8. The Executive Council of the African Union adopted a landmark decision in 2004 requesting the “the Commission to collaborate with relevant cooperating partners and other stakeholders to ensure that internally displaced persons are provided with an appropriate legal framework to ensure their adequate protection and assistance”.

<sup>379</sup> AU Executive Council, *Decision on the Meeting of Experts on the Review of OAU/AU Treaties*, AU Doc. EX.CL/Dec.129 (V), 30 Jun.–3 Jul. 2004, para.4(i)

Despite the absence of any formal treaty-making procedure at the level of the African Union, the formulation of the draft Convention was undertaken on the basis of “procedures” that had been traditionally followed by the Commission of the African Union. Following the decision by the Executive Council to adopt a separate regional Convention on internal displacement and its specific request to the African Union’s Commission to convene consultative and negotiation meetings among member states and other stakeholders, the African Union Commission convened a series of legal experts which allowed member states to negotiate on a draft prepared by an independent consultant and further improved through consultation with a group of African legal experts, UN partners, the UN RSG on human rights of IDPs and others<sup>380</sup>. Thus, the AU Commission engaged an independent consultant, Dr. Chaloka Beyani (Senior Lecturer in International Law, London School of Economics and Political Science) to develop the Annotated Outline which was then commented upon by a group of independent legal experts which involved the former SRG, representatives of organizations ..., and a member of civil society organizations ...<sup>381</sup> The Annotated outline, upon which independent legal experts reviewed (in three different legal experts meetings discussed below in this section), was presented as the first legal draft and approved in the ministerial conference held in Ouagadougou from May 29 to June 2, 2006. In fact, during this meeting, it was recommended that a draft Convention on the Protection and Assistance of Internally Displaced Persons be prepared and presented for consideration and adoption by African heads of states in January 2007<sup>382</sup>. The first draft endorsed a comprehensive approach: it adopted a broader definition of IDPs by including displacements caused by large development projects and a lack of development. It envisaged a situation whereby the

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<sup>380</sup> Abebe, *supra* note 5, p. 148.

<sup>381</sup> *Ibid.*, p. 263.

<sup>382</sup> Beyani, *supra* note 374, p. 194.

AU is called upon to intervene in the territory of a Member State to contain a grave and serious situation of internal displacement<sup>383</sup>.

The Annotated Outline indicated that some general sources of law may be taken into account while codifying the Convention<sup>384</sup>. Thus, some of the cited instruments include, first African regional human rights instruments, and decisions of the African Union; second, the United Nations Charter<sup>385</sup>, international human rights instruments including relevant decisions of the Security Council; third, international humanitarian law; and last, but not the least the United Nations Guiding Principles. Regional engagements on the problem of forced displacement in Africa, have a long history. In fact, the OAU/AU held a series of ministerial meetings on refugees, returnees and displaced persons which served as important platforms for dialogue and policy making on forced displacement. In 1998, the first ministerial conference was conducted in Khartoum, Sudan, and a significant conclusion was adopted<sup>386</sup>. In 2004, the Executive Council adopted a decision requesting “the Commission to collaborate with cooperating partners and other stakeholders to ensure that internally displaced persons are provided with an appropriate legal framework to ensure their adequate protection and assistance”<sup>387</sup>. The second ministerial meeting was held in 2006 in Burkina Faso which discussed the elaboration of a legal framework on the protection and assistance on IDPs<sup>388</sup>. The AU’s Second Ministerial meeting on Refugees,

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<sup>383</sup> Abebe, *supra* note 5, p. 116, “IDPs were defined as: Persons or group of persons who are inside internationally recognized state borders of their country but who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid (i) the effects of armed conflict, situations of generalized violence, violations of human rights and/or natural or human made disasters, and (ii) the effects of large scale development projects or lack of development.”, Art 1(1) I, Draft AU Convention for the Protection and Assistance of Internally Displaced Persons (August 2007).

<sup>384</sup> Abebe, *supra* note 5, p. 145.

<sup>385</sup> Kampala Convention, *supra* note 19, Preamble, para.6

<sup>386</sup> Abebe, *supra* note 5, pp. 30 and 97.

<sup>387</sup> Decision on Refugees, Returnees and Displaced Persons, EX.CL. Dec 127(V), adopted during the 5th Ordinary Session of the Executive Council of the African Union, 30 June-3 July 2004, Addis Ababa, Ethiopia, para. 8.

<sup>388</sup> Report of the Ministerial Conference on Refugees, Returnees and Displaced Persons in Africa, 1–2 June 2006, AU/MIN/HARDP/Rpt.

Returnees and IDPs in Africa recommended to the Executive Council that a special summit at the level of the heads of State and Government be held “to address the issue of forced population displacement in Africa and to allow the opportunity for Member States to tackle the root causes with a view to eradicating this phenomenon<sup>389</sup>. It was indeed remarkable that states were ready to accept a decision to grant the African Union the authority to stir a process for the development of a legal framework on IDP, when it was recalled that, during the first ministerial meeting on forced displacement in Khartoum, some delegates held the view that the meeting should not discuss issues relating to internal displacement since, it was argued, that internal displacement involves matters representing internal affairs of the state concerned<sup>390</sup>. In this first meeting, number of States’ representatives challenged the legitimacy of Professor Deng’s work and resisted an attempt to recognize the UN Guiding Principles in the Ministerial Declaration. Led by Sudan, they argued that the Guiding Principles had been the work of the UN Secretariat and had included insufficient involvement by State<sup>391</sup>. Africa overwhelmingly endorsed the Principles at an OAU Meeting of Experts in Conakry, Guinea<sup>392</sup>, and States were encouraged to apply them. Subsequently, sub-regional initiatives, such as the Great Lakes Protocol on IDPs, were undertaken<sup>393</sup>. A Consultative Group, consisting of the AU’s partner organizations (UN agencies, international organizations), also had a chance to review the draft by providing written submissions. That a series of meetings of legal experts were held in addition to a meeting of experts and ministers in charge of forced displacement issues had indeed been

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<sup>389</sup> Report of the Ministerial Conference on Refugees, Returnees and Displaced Persons in Africa, 29-30 May 2006, Ouagadougou, Burkina Faso AU/MIN/HARDP/Dec. I para.3 page 3 “*Call for a Special Summit of Heads of States and Government to be convened mid-2008 to address forced displacement issues on the continent and allow an opportunity for consideration for Member States to tackle the root causes of the problem of forced displacement in order to eradicate this phenomenon;*”

<sup>390</sup> Abebe, *supra* note 5, p. 97.

<sup>391</sup> Okello, *supra* note 344, p. 352.

<sup>392</sup> *Ibid.*, pp. 352-353.

<sup>393</sup> *Ibid.*, p. 353.



of a considerable significance to the drafting process<sup>394</sup>. Thus, three (3) meetings were called in all: first from 15 to 17 December 2007, second from 2 to 6 June 2008, and third on 9 November 2009, respectively<sup>395</sup>. The meetings of legal experts represented perhaps the most important forum wherein states reviewed and negotiated the Convention<sup>396</sup>.

During the first conference of legal experts, the following drafting steps were taken: The African Union was instrumental in providing the necessary technical and secretariat assistance to the drafting of the Convention on Internally Displaced Persons (IDPs). The draft Convention at this stage possessed the structure and substance of a formal treaty with an elaborate preamble. It embraced a comprehensive definition of IDPs<sup>397</sup> and affirmed the responsibility of states to “respect, protect and fulfill the human rights” of IDPs. The draft Convention on Internally Displaced Persons (IDPs) is intended to provide a framework for providing rapid and unimpeded access to IDPs, promote durable solutions (Article 12), and provide compensation and reparation for victims of internal displacement (Article 13). The draft Convention also provided for rules governing the actions of private institutions. It obliged state parties to ensure that not only public and government institutions refrain from causing the displacement of people, but also guarantee the protection of “the social and cultural rights” of IDPs displaced by “lack of development” (Article 10). The document went beyond the scope of the provision of the Constitutive Act and provided for a wide range of rights for internally displaced persons (IDPs). It recognized the right of African

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<sup>394</sup> Abebe, *supra* note 5, p. 115.

<sup>395</sup> *Ibid.*, p. 116.

<sup>396</sup> *Ibid.*

<sup>397</sup> *Ibid.*, Art 1(1) I, Draft AU Convention for the Protection and Assistance of Internally Displaced Persons (August 2007) defines the IDPs as follow: “Persons or group of persons who are inside internationally recognized state borders of their country but who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid (i) the effects of armed conflict, situations of generalized violence, violations of human rights and/or natural or human made disasters, and (ii) the effects of large scale development projects or lack of development.”

states to seek protection under regional human rights mechanisms (Article 13) and asylum (Article 16)<sup>398</sup>.

African Union Executive Council held its twelfth meeting held in January 2008 and requested the African Union Commission to finalize the draft Convention before the special summit in 2008. Second meeting of legal experts was held from 2 to 6 June 2008 which was attended by the RSG, ACHPR Special Rapporteur, representative of UN Offices and the ICRC. They looked at issues such as the definition of IDPs, the cessation clause and the role of non-state actors. They also looked at the relationship between the sovereignty of states and the intervention of international organizations and NGOs. The draft Convention for Internally Displaced Persons (IDPs) should provide a link between durable solution and post-conflict and reconstruction, according to proponents of this proposal. It sought to address the particular challenge faced in many African countries where resources and capacity to implement a monumental task under complex emergencies is often strained. Armed groups' responsibility for the protection and assistance of internally displaced persons (IDPs) was discussed at a meeting of the UN Human Rights Council in Geneva. It was agreed to include a paragraph constraining the legal status of armed groups and incorporating the principle of criminal responsibility for crimes committed by these groups. No reference was made with respect to "criminal responsibility" for breaches committed by states. Some experts argue that the most reasonable course of action to be taken is to strengthen existing mechanisms of the African Union. The meeting also debated the draft resolution on development-induced displacement (Article 9) and what was termed "displacement induced by lack of development" (Article 10). Delegates discussed the financial implications of creating a new AU institution on top of existing hugely underfunded institutional mechanisms within the AU. The Convention on the Rights of Internally Displaced Persons (IDPs) sought to expand the application of "obligations" ascribed to states under international humanitarian and human rights law to include those

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<sup>398</sup> *Ibid.*, p. 116.

of armed groups and other relevant actors. “Displacement generated by lack of development” was not included in the initial draft of the African Union's (AU) Kampala Convention. Many delegations argued that the concept was extremely vague, ambiguous and “is incapable of legal definition”. It was also argued that it would introduce concepts that were not included neither in the UN Guiding Principles nor in the Great Lakes Protocols<sup>399</sup>.

The third and last meeting of legal experts was held on 9 November 2009 to continue negotiation on the provisions of the draft Convention and adopt it. It took place within a framework of an expert and ministerial meeting held in November 2008 to discuss the problem of forced displacement generally. The major highlight of this meeting was the discussion and finalization of the Draft Convention. Experts disagreed on the need to mention the participation and role of civil society organizations. It was also suggested that a reference to the devastating impact of man-made and natural disasters should be included. The draft Convention had expanded the definition of internal displacement by including the concept of “lack of development as a cause for displacement”<sup>400</sup>.

No specific organ had been tasked with the responsibility of codification of regional treaties and legal instruments, neither during the adoption and coming into force of the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, nor the Kampala Convention. Many researchers agreed that there were no travaux préparatoires for African regional legal instruments. At that time, the AU Commission on International Law (AUCIL) had not been operationalized<sup>401</sup>. It was only during its 12th Ordinary Session in

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<sup>399</sup> *Ibid.*, pp. 118-124.

<sup>400</sup> *Ibid.*, pp. 128-130.

<sup>401</sup> Regarding the evolution preceding the establishment of the AUCIL, an African Commission on International Law was initially proposed in May 2004 by a meeting of experts reviewing OAU/AU treaties. In July 2004, the AU Executive Council requested the Chairperson of the Commission to elaborate detailed proposals on the mandate, structure and financial implications of the proposal (EX.CL/Dec.129(V)). The Assembly reaffirmed this in January 2005 as part of its decision on the African Union Non-Aggression and Common Defence Pact (Assembly/AU/Dec.71(IV)). Article 14 of the Pact undertook to establish an African Union Commission on International Law. The AUCIL was formally established in February 2009 when its Statute was adopted by the AU Assembly's 12th Ordinary Session (Assembly/AU/Dec.209(XII)). The Assembly appointed

January 2008 that the Executive Council requested that the AU: [. . .] undertake activities relating to the codification and progressive development of international law in the African continent with particular attention to the laws of the Union as embodied in the treaties of the Union, in the decisions of the policy organs of the Union and in the African customary international law arising from the practice of Member States<sup>402</sup>. The Special Summit, which is a corner stone of the adoption of the Convention, and corresponding to the adoption of the Convention, finally, took place on 22-23 October 2009, in Kampala (Capital of Uganda) initially scheduled for August 2008 and postponed several times<sup>403</sup>.

The Convention was born within the framework of the continent's overarching quest for solutions to the challenges of forced displacement<sup>404</sup>. The AU Executive Council set out in July 2004 to develop a legal framework for the protection of the rights of IDPs in Africa. Two years later a draft outline for an IDP convention was endorsed at a ministerial conference in Ouagadougou. After a series of states' meetings, consultations with African civil society and international partners, the draft convention on IDPs was adopted at a ministerial meeting in November 2008. The draft was discussed at a meeting of the AU and

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members in July 2009 (Assembly/AU/Dec.249(XIII)), following election and recommendation by the Executive Council. The AUCIL became operational in 2010.

<sup>402</sup> Allehone Mulugeta Abebe, "*African Union Convention on Internally Displaced Persons: Its Codification Background, Scope, and Enforcement Challenges*" (2010)/ *Refugee Survey Quarterly*, Vol. 29, No. 3 \_ UNHCR [2010] page 32. See also the AU Executive Council Fourteenth Ordinary Session 26 - 30 January 2009 Addis Ababa, ETHIOPIA/ *STATUTE OF THE AFRICAN UNION COMMISSION ON INTERNATIONAL LAW* (EX.CL/478 (XIV) articles 2,4(a),5.

<sup>403</sup> Okello, *supra* note 344, p. 355.

<sup>404</sup> Kampala Convention, *supra* note 19, preamble, para.14, "REAFFIRMING the historical commitment of the AU Member States to the protection of and assistance to refugees and displaced persons and, in particular, the implementation of Executive Council Decisions EX.CL/Dec.129 (V) and EX.CL/127 (V) of July 2004 in Addis Ababa, to the effect that that the specific needs of internally displaced persons (IDPs) such as protection and assistance should be addressed through a separate legal instrument, and to collaborate with relevant cooperating partners and other stakeholders to ensure that internally displaced persons are provided with an appropriate legal framework to ensure their adequate protection and assistance as well as with durable solutions, respectively;"

CSOs, and the following week, the final text of the Kampala Convention was adopted at a special summit held in Kampala on 22-23 October 2009.

This analyses national approaches, such as domestic laws and policies (discussed in section 3.2), the limits of the subregional frameworks such as the Pact on Security, Stability, and Development in the Great Lakes Region (section 3.3).

### **3.2. THE POROSITY OF THE IDPs NATIONAL LAWS AND POLICIES**

The objective of this subsection is to show that despite the existence of a variety of national laws and policies, there is an inadequacy in the protection of internally displaced persons. In fact, the porosity of the national laws and policies had been on of factors which has led the adoption of the Kampala Convention.

The primary duty for providing protection and humanitarian assistance to IDPs lies with states. The development of national laws, policies and strategies is an essential process by which states can ensure that they meet their obligations under international law. National legislation and policy can in turn provide a powerful basis for CSOs and IDPs to advocate for the protection of IDPs' full spectrum of rights – economic, social, cultural, civil and political. Between 1993 and 2017, forty states adopted laws and policies directly related to internal displacement<sup>405</sup>, the vast majority since the adoption of the Guiding Principles<sup>406</sup>. However, as their name suggests, the Guiding Principles were developed as abstract

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<sup>405</sup> Dr. Phil Orchard “*The Role of National Legislation and Policies in Protecting Internally Displaced Persons*” Submission to the UN Secretary General's High-Level Panel on Internal Displacement (2020), p. 2, available at: [published\\_phil\\_orchard\\_submission.pdf \(un.org\)](#) (accessed date 1/2/2023).

Phil Orchard, “*IMPROVING THE IMPLEMENTATION OF NATIONAL INTERNALLY DISPLACED PERSONS LAWS AND POLICIES*” p. 7, and *Appendix: Domestic IDP Policies or Legislation* pages 10-15, available at: <https://www.unhcr.org/en-us/5a86d0497.pdf>, (accessed date: 1/2/2023).

<sup>406</sup> Susan Carr, “From Theory to Practice: National and Regional Application of the Guiding Principles”, *International Journal of Refugee Law*, Vol. 21, No. 1 (2009), p. 35.

principles to guide the development of national policies<sup>407</sup>. The fact of adopting laws and policies related to internal displacement has been encouraged by the United Nations General Assembly since 2008<sup>408</sup>, and UNHCR has also noted that as part of its specific commitment to IDPs, it supports “States’ efforts to adopt, update, or prepare national policies on IDPs”<sup>409</sup>. However, there is a clear acceptance within the set of domestic laws and policies that IDPs require some form of international protection, as well as a comprehensive law covering all aspects of internal displacement. In other words, the porosity of the national laws and policies on internal displacement could be the reason of the need of international protection and law covering all aspects of displacement. The porosity is characterized by the shortcomings and limits of some national laws and policies in their regulations, as well as in the implementation of these national laws and policies. For example, some national laws tend to be restrictive in the definition of the IDPs, either do not define IDPs, or define them in a limited way as either encompassing fewer causes than the principles’ definition. Additional issue is that while many laws and policies have some focus on durable solutions, they have a tendency to prioritize returns over other forms of solutions. To give a few examples, while Angola<sup>410</sup>, was the first country to bring the Guiding Principles into domestic law, in practice there was widespread forced return of IDPs following the end of the war in 2002 and little support provided on a long-term basis for returnee<sup>411</sup>. Liberia’s policy<sup>412</sup> similarly focused on returns, and only provided return assistance to IDPs who had been registered in camps by the WFP for food distribution purposes. Despite these

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<sup>407</sup> The Brookings Institution, *Addressing Internal Displacement: A Framework for National Responsibility* (2005), p. 3, <https://www.refworld.org/docid/4d357f4f2.html> (accessed 2 January 2023).

<sup>408</sup> *Protection of and assistance to internally displaced persons* (2008) U.N Doc. A/RES/62/153, para. 4.

<sup>409</sup> UNHCR, "Global Report 2013," (Geneva: UNHCR, 2014), 72.

<sup>410</sup> In the *Laws 2001 Council of Ministers Decree No. 1/01-Norms on the Resettlement of Internally Displaced Populations and 2002 Council of Ministers Decree No. 79/02*, although the government is not fully committed in the protection of the IDPs, but we can see that widespread returns has occurred.

<sup>411</sup> Orchard, *supra* note 405, p. 2. [published phil orchard submission.pdf \(un.org\)](https://www.refworld.org/docid/5b3f39124.html) (accessed date 1/2/2023)

<sup>412</sup> National Authorities, *Liberia: Declaration of the Rights and Protections of Liberian Internally Displaced Persons (IDPs)* (2002), 26 September 2002, available at: <https://www.refworld.org/docid/5b3f39124.html> (accessed 3 January 2023), “

widespread returns prioritized by the national laws up mentioned, there was lack of funding for reconstruction, financial issues to recover property and minority returnees often faced discriminatory laws and reprisal.

Further issue is related to the implementation of the national laws. According to Phil Orchard, “the record is problematic, with many laws and policies not receiving full implementation”<sup>413</sup>.

### 3.2.1. IMPLEMENTATION ISSUES OF NATIONAL LAWS AND POLICIES

The existing models of laws and policies on internal displacement reveals that there are four principal models: a brief instrument (national law policy) adopting the Guiding Principles; a law or policy developed to address a specific cause or stage of displacement; a law or policy developed to protect a specific right of the internally displaced; and a comprehensive law or policy addressing all causes and stages of internal displacement<sup>414</sup> (as the Uganda’s National Policy for Internally Displaced Person<sup>415</sup>).

The Guiding Principles set out norms, but they do not set out the implementation and dissemination aspects necessary for the rules to be applied<sup>416</sup>, unlike the Kampala Convention which provided in its article 14(1), “a conference aux States Parties... to monitor and review the implementations of the objectives of the Convention<sup>417</sup>. Indeed, the Guiding Principles are an excellent tool for the development of national laws and policies on internal displacement, but do not provide any mechanism of effective implementation and

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<sup>413</sup> Orchard, *supra* note 405, p. 7, and *Appendix: Domestic IDP Policies or Legislation* pages 10-15, available at: <https://www.unhcr.org/en-us/5a86d0497.pdf> (accessed date: 1/2/2023).

<sup>414</sup> Jessica Wyndman “A Developing Trend: Laws and Policies on Internal Displacement” (2006), p. 8, available at: <https://www.brookings.edu/articles/a-developing-trend...> (accessed date 1/3/2023).

<sup>415</sup> National Authorities, *Uganda: National Policy for Internally Displaced Persons, 2004*, 1 August 2004, available at: <https://www.refworld.org/docid/5a7af0854.html> (accessed date 3 January 2023)

<sup>416</sup> Carr, *supra* note 406, p. 36.

<sup>417</sup> Kampala Convention, *supra* note 19, para.14 (1).

dissemination. Consequently, some States have either fully or partially adopted the Guiding Principles into their national laws and policies, such as Liberia. And this shortness is bringing implementation issues, categorized from strong to not implementation at all.

The national laws and policies which the governments had clearly committed to their own laws and policies, and which generally fully or partially reflect the Guiding Principles, are respectively strong and progressing implementation<sup>418</sup>. In general, those types of national laws and policies do not have implementation issues<sup>419</sup>. Strong implementation reflects not only that the State has clearly committed to implementing legislation or policies with explicit reference to the Guiding Principles and other applicable international and humanitarian standards, but that there is clear evidence of ongoing support for the law or policy, including identified organizational support and significant financial contributions by the government<sup>420</sup>. In contrast, cases of problematic implementation of policies are also occurring. Thus, progressing implementation occurs where the State has clearly committed to implementing legislation or policies, but where these either are not fully in accord with the Guiding Principles or reflect either a limited IDP definition or limited provision of durable solutions (such as a focus on return rather than other forms). There is also clear evidence of organizational support, but capacity may be limited. Limited implementation occurs where the State has made clear commitments to implementing legislation or policies, but that actual practice has been limited with no clear IDP definition, limited support for a range of durable solutions, or lack of ongoing support for IDPs. Problematic implementation occurs where the State has introduced legislation or policies, but where implementation has generally not occurred either due to a lack of capacity or political will, or where the law or policy is being widely ignored by State officials. No implementation reflects cases where a policy or law may exist but is only in a draft stage or the government undertaken no action to implement it. The draft stage is included here because in several

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<sup>418</sup> Phil Orchard, *Protecting the Internally Displaced: Rhetoric and Reality* (2019), p. 168.

<sup>419</sup> *Ibid.*

<sup>420</sup> Orchard, *supra* note 405, p.7 [published\\_phil\\_orchard\\_submission.pdf \(un.org\)](#)



cases processes have stalled out at this stage<sup>421</sup>. In many of these situations, the policies and laws were either problematic in their form or unevenly applied. With respect to form, many of these laws and policies are narrower than the Guiding Principles in terms of either their IDP's definition or how they describe durable solutions, as mentioned up. Ongoing conflicts can also impede implementation. In Somalia, the Federal Government has drafted a strong policy, as have Puntland and Somaliland, but federal efforts remain limited due to a lack of capacity, access, and resources<sup>422</sup>.

Regarding the failed implementation issues, it consists of cases where implementation of the policies has either been very problematic or where despite initial commitments, laws and policies have not advanced at all<sup>423</sup>. According to Phil Orchard, "there are several pathways that can lead to the introduction of IDP laws and policies at the domestic level followed by a failure to successfully implement them. States may be making a good faith effort but lack the capacity or governance structures to ensure laws or policies move beyond the paper stage. They may face ongoing conflicts which limit access for governmental actors. They may have inadequate institutional support within government, with the law or policy being provided to government departments which have little knowledge or policy base or field capability. Efforts introduced at the national level may be blocked through domestic opposition, including at the state or local level. Finally, states may also be simply engaging in rhetorical action, supporting such policies and laws because there is international pressure to do so, but then making no real efforts to either finalize the documents (which may remain in a draft stage for years) or to bring their requirements into action"<sup>424</sup>. In other words, problematic implementation occurs where the State has introduced legislation or policies, but the implementation has generally not occurred either due to a lack of capacity or political will, or where the law or policy is being widely ignored by State officials. For

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<sup>421</sup> *Ibid.*

<sup>422</sup> Somalia Policy framework on displacement within Somalia, 2014.

<sup>423</sup> Orchard, *supra* note 418, p. 193.

<sup>424</sup> *Ibid.*

example, Burundi's national policies exist but are widely ignored by the national authorities<sup>425</sup>. Furthermore, lack of implementation reflects cases here a policy or law may exist, but only in a draft stage or the government undertaken no action to implement it<sup>426</sup>.

In regard of the precedent, the implement issues of the national laws and policies are categorized in the present thesis into two types: limited and problematic implementation of the national laws and policies. The national laws or policies which are implemented in a limited way, despite the implementation has lots of issues: either narrowed or only focusing on returns as durable solutions, and limited support. In sum, limited implementation occurs where the State has made clear commitments to implementing legislation or policies, but that actual practice has been limited with no clear IDP definition, limited support for a range of durable solutions, or lack of ongoing support for IDPs. While, regarding the problematic implementation occurs where the State has introduced legislation or policies, but where implementation has generally not occurred either due to a lack of capacity or political will, or where the law or policy is being widely ignored by State officials.

The Kampala Convention addresses internal displacement comprehensively, that is, in relation to all causes of displacement and all phases of displacement and requires states to incorporate their obligations under the Convention into domestic law. There is no one way to incorporate international obligations related to IDP protection into national laws and policies. But in all cases, two preliminary steps are necessary for the development of comprehensive and effective IDP laws or policies: assessing existing laws and policies that relate to different aspects of displacement and identifying the causes and patterns of internal displacement. Many countries worldwide have adopted national laws or policies to protect the rights of IDPs. African states were among the first to develop national laws and

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<sup>425</sup> Burundi Arusha Peace and Reconciliation Agreement for Burundi, Protocol IV, 2000 AND Protocol for the Creation of a Permanent Framework for Consultation on the Protection of Displaced Persons, 2001. The Iraqi National policy on displacement of 2008 goes in the same sense, of problematic implementation which lead to a failure implementation.

<sup>426</sup> Central African Republic, Draft National Law and Policy on Internal Displacement, 2014.

policies based on the Guiding Principles to better protect IDPs: Angola was the first in 2000, followed by Burundi (2001), Sierra Leone (2002), Liberia (2004), Uganda (2004) and Sudan (2009). Other states have draft IDP policies or laws, including Chad, Côte d’Ivoire, Kenya and Nigeria. Yet other states are using the Guiding Principles as the principal framework for addressing internal displacement<sup>427</sup>.

### **3.3. THE LIMITS OF THE SUBREGIONAL FRAMEWORK: PACT ON SECURITY, STABILITY AND DEVELOPMENT IN THE GREAT LAKES REGION**

In response to some of the specific challenges faced by the countries of Africa’s Great Lakes region<sup>428</sup>, the AU and the UN initiated the International Conference on the Great Lakes Region (ICGLR)<sup>429</sup>. This process was founded on a recognition of the interconnectedness of the region’s populations, its security and economies, and the need to seek regional solutions to issues affecting the entire region. The process culminated in the signing by 11 states of the Pact on Security, Stability and Development in the Great Lakes Region<sup>430</sup> (the Great Lakes Pact) in December 2006.

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<sup>427</sup> IDMC, “Making the Kampala Convention works for IDPs”, (2010), p. 11, available at: <https://www.internal-displacement.org/publications/making-the-kampala-convention-work-for-idps> (accessed date 1/3/2023)

<sup>428</sup> From the website of the International Conference on the Great Lakes Region, the inter-governmental organization was established “based on the recognition that political instability and conflicts in these countries have a considerable regional dimension and thus require a concerted effort in order to promote sustainable peace and development.” <https://icglr.org/who-we-are/the-icglr> (date of access 9/24/2022). Thus, the challenges that led the Conference are the political instability and conflicts in these countries, “most notably among the conflicts that have had cross-border impacts or origins are the 1994 Rwandan genocide that led to the loss of more than 800,000 lives, and the political instability in DRC” <https://icglr.org/who-we-are/the-icglr> (date of access 9/24/2022).

<sup>429</sup> The “founding history began in 2000 when the United Nations Security Council, as stated in its resolutions 1291 and 1304, called for an International Conference on peace, security, democracy and development in the Great Lakes region. Later that year, the Secretariat of the International Conference was established in Nairobi, Kenya, under the umbrella of the United Nations and the African Union” <https://icglr.org/who-we-are/the-icglr> (date of access 9/24/2022).

<sup>430</sup> IDMC, “The Great Lakes Pact and the rights of displaced people: A guide for civil society”, (2008), available at

The Pact identifies four priority areas: economic development and regional integration; democracy and good governance; humanitarian and social issues; and peace and security<sup>431</sup>. At the core to the Pact are the ten protocols, which lay out more concrete legal frameworks for achieving the goals set out in the four priority areas<sup>432</sup>, as broadly explained in the Dar-es-Salam Declarations following the creation of the International Conference. Amid the ten protocols, two of these protocols deal specifically with protecting the rights of forcibly displaced persons: the Protocol on the Protection and Assistance to Internally Displaced Persons (IDP Protocol)<sup>433</sup>, and the Protocol on the Property Rights of Returning Populations (Property Protocol)<sup>434</sup>. The adoption of these two protocols was a significant recognition by member states of the crucial link between protecting the rights of forcibly displaced people and achieving peace, security and development in the Great Lakes Region. The Pact through its IDPs Protocols was the first multilateral instrument in the world to commit member states to the adoption and implementation of the Guiding Principles on Internal Displacement as a framework for protecting the rights of IDPs, to the use of the Annotations of the Guiding Principles as an authoritative source for interpreting the Guiding Principles and to the enactment of domestic legislation to implement the Principles<sup>435</sup>. The Great Lakes Pact and its IDP-related protocols reflect member states' commitment to uphold the existing protection standards set out in the Guiding Principles, including the definition of IDPs as set out in the Guiding Principles, and protection measures for IDPs due to all causes and in all phases of displacement<sup>436</sup>. The Pact also addresses some of the specific concerns that have arisen from the experience of internal displacement in the Great Lakes region, such as

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<https://www.internal-displacement.org/sites/default/files/publications/documents/2008-af-great-lake-guide-thematic-en.pdf>

(accessed date 1/4/2023).

<sup>431</sup> Pact on Security, Stability and Development in the Great Lakes Region (2006), art. 4(1), (14) and (15).

<sup>432</sup> *Ibid.*, Chapter II.

<sup>433</sup> ICGLR "Protocol on the Protection and Assistance of IDPs" 2006.

<sup>434</sup> *Ibid.*

<sup>435</sup> Pact on Security, Stability and Development in the Great Lakes Region, article 12. See also the Protocol on Protection and Assistance on Internally Displaced Persons Art 6(2).

<sup>436</sup> ICGLR, *supra* note 433, art. 1.

protection measures for pastoralists<sup>437</sup>, host communities<sup>438</sup> and families of mixed ethnic identity<sup>439</sup>. Furthermore, it strengthens the legal basis for IDPs to claim their rights, including the rights to access to information, to participate in and be informed of decisions that affect their lives, and the right to receive humanitarian assistance<sup>440</sup>.

However, the Great Lakes Pact, although seeming to be complete has some limits. In fact, the right of the freedom of movement, one of the fundamental rights provided under the international human rights norms such as the ICCPR and the ACHPR is narrowed under the IDPs Protocol related to the Great Lakes Pact for Peace, Security and Development. Thus, in the Art. 4.1(g), the freedom of movement is guaranteed but a narrower expression is added “within designated areas of location”<sup>441</sup>.

Yet the national laws, policies and the IDPs Protocols related to the Great Lakes Pact for Peace, Security and Development are among the developments that led to the adoption of the Kampala Convention. But due to the lack of a comprehensive and specialized legal framework specifically designed to protect the rights of IDPs legal framework for IDPs, and in order to get solutions about the issues of addressing the causes of the displacement, protecting and assisting the IDPs, a framework with a broader range of binding provisions is necessary. By reinforcing these norms and bringing them together into one instrument, it offers a unique legal framework to address about the issues of internal displacement and provides a clearer and stronger legal basis for IDPs’ protection.

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<sup>437</sup> *Ibid.*, art. 4(1)(c).

<sup>438</sup> *Ibid.*, art. 4(1)(e).

<sup>439</sup> *Ibid.*, art. 4(1)(h).

<sup>440</sup> *Ibid.*, art. 3(6).

<sup>441</sup> Protocol on the Protection and Assistance to Internally Displaced Persons in the Great Lake Region, Art. 4.1(g) “Ensure freedom of movement and choice of residence within designated areas of location, except when restrictions on such movement and residence are necessary, justified, and proportionate to the requirements of maintaining public security, public order and public health;”

#### **4. THE SPECIFICITIES OF THE KAMPALA COVENTION**

This point discusses some of the main provisions of the Kampala Convention and highlight the improvement made in the context of protection and assistance of IDPs, through the provisions of the Convention. In fact, the Kampala Convention sets out the rights of IDPs and the responsibilities of states and other actors in relation to the protection and assistance of IDPs. It also provides a number of innovative mechanisms for the protection and assistance of IDPs, including provisions for the prevention and reduction of internal displacement; provisions for the protection of IDPs from violence, abuse, and exploitation; provisions for the promotion of durable solutions for IDPs, including return, rehabilitation, reintegration, and local integration, mechanism for the monitoring and reporting on the situation of IDPs in Africa. Thus, the substantive provisions of the convention are discussed in 4 (1), followed by the description of the innovative and important provisions of the convention.

##### **4.1. THE SUBSTANTIVE PROVISIONS OF THE KAMPALA CONVENTION**

Accordingly, the Convention's Preamble explicitly makes reference to a number of regional instruments, namely, the African Charter on Human and Peoples' Rights, the Protocol on the Rights of Women in Africa, and the African Charter on the Rights and Welfare of the Child. The Preamble also refers to regional refugee instruments such as the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1994 Document on Refugees and Forced Population Displacement in Africa. The Convention gives the Guiding Principles strong recognition and endorsement, even though at the ministerial Conference at Khartoum, some states' representatives were reluctant to incorporate the principles, arguing that Guiding Principles had been the work of the UN Secretariat and had included insufficient involvement by States. The preamble acknowledges that the Guiding Principles set out "the inherent rights of internally displaced persons as provided for and protected in international human rights and humanitarian law"

and that they “are recognized as an important international framework for the protection of Internally Displaced Persons”<sup>442</sup>. The Convention gives the Guiding Principles strong recognition and endorsement, even though at the ministerial Conference at Khartoum, some states’ representatives were reluctant to incorporate the principles, arguing that Guiding Principles had been the work of the UN Secretariat and had included insufficient involvement by States.

The Convention also drew some of its important principles from other regional instruments such as the Constitutive Act<sup>443</sup> and the Protocol Relating to the Establishment of the Peace and Security Council of the African Union which have specific reference to IDPs.

The definition provided by the Convention is an example of the improvement brought by the Convention in the protection of IDPs. According to the IDPs’ definition in the Kampala Convention is overall consistent with the Guiding Principles and provides for equal treatment of all internally displaced persons, whether displaced by armed conflict, generalized violence, human rights violations, disasters<sup>444</sup>. It also provides specific provisions in the Article 10, related to the “Displacement Induced by Projects”<sup>445</sup>. This article focuses on the prevention of displacement, the exploration of feasible alternatives and the carrying out of a prior socio-economic and environmental impact assessment of proposed development projects<sup>446</sup>. Another specific point of the Convention is that, unlike some national laws restricting the definition of the IDPs Convention, the definition is not only applicable to nationals. But non-nationals who are displaced within their country of habitual residence are also included in the definition.

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<sup>442</sup> Kampala Convention, *supra* note 19, para.10.

<sup>443</sup> Constitutive Act of the African Union, *United Nations Treaty Series*, Vol. 2158, p.3 (No. 37733).

<sup>444</sup> Kampala Convention, *supra* note 19, art. 1 (k).

<sup>445</sup> *Ibid.*, art. 10.

<sup>446</sup> *Ibid.*, art. 10 (1)(2)(3).

Other specificity of the convention is the provisions related to responsibilities of stakeholders. Like most of the existing legal framework, providing States to protect and assist the IDPs<sup>447</sup>, the Kampala Convention as well sets out the responsibilities of States regarding internal displacement<sup>448</sup>. States undertake to prevent arbitrary displacement<sup>449</sup>, to protect IDPs' fundamental human rights during displacement<sup>450</sup>, and to find durable solutions<sup>451</sup>. States also commit to identify a national authority or body responsible for responding to internal displacement<sup>452</sup>. Further, the Kampala convention provides responsibilities of other relevant stakeholders or non-states actors, such as armed groups, CSOs, international organizations and the AU<sup>453</sup>.

In the same sense of the international humanitarian law, the Kampala Convention recognizes that, in situations of armed conflict, non-state armed groups have obligations to respect the rights of IDPs<sup>454</sup>. For example, armed groups are prohibited from carrying out arbitrary displacement, separating family members, restricting IDPs' freedom of movement,

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<sup>447</sup> For example, the IDPs Protocol in the Pact on Protection and Assisting the IDPs in the Great Lakes Region in Africa “focuses almost exclusively on member states as far as responsibility to protect is concerned, particularly in Article 3, “Responsibility to Protect Internally Displaced Persons” and in Article 4, “Scope of Protection” as well as in Articles 5 and 6. It is clear that the Protocol underlines the protection function of member states, who bear the primary responsibility for internally displaced persons. The Guiding Principles also recognize the primary responsibility of states, or “national authorities”, for the protection and humanitarian assistance of internally displaced persons – Principle 3. In Article 4, the Protocol commits member states to protect internally displaced persons in general and as reflected in the Guiding Principles in particular...”, cited from COMPARISON OF THE KAMPALA CONVENTION AND THE IDP PROTOCOL OF THE GREAT LAKES PACT, A briefing note by the International Refugee Rights Initiative, January 2014.

<sup>448</sup> Kampala Convention, *supra* note 19, art. 2 (d).

<sup>449</sup> *Ibid.*, arts. 4, 10

<sup>450</sup> *Ibid.*, arts. 3, 5, 9

<sup>451</sup> *Ibid.*, art. 11

<sup>452</sup> Kampala Convention, *supra* note 19, arts. 3(2)(b) “Designate an authority or body, where needed, responsible for coordinating activities aimed at protecting and assisting internally displaced persons and assign responsibilities to appropriate organs for protection and assistance, and for cooperating with relevant international organizations or agencies, and civil society organizations, where no such authority or body exists;”

<sup>453</sup> *Ibid.*, arts. 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13.

<sup>454</sup> *Ibid.*, art. 7(5). Further, in the article 7(4).



recruiting children or permitting them to take part in hostilities and impeding humanitarian assistance and passage of relief aid. Equally, and in accordance with states' duties to prevent interference with the enjoyment of human rights by non-state actors, states must hold members of armed groups criminally responsible for human rights abuses and violations of international humanitarian law.

Regarding the obligations relating to the African Union, the Convention asks the AU with supporting the efforts of states to protect and assist IDPs<sup>455</sup> by: strengthening the institutional framework and capacity of the African Union with respect to protection and assistance to internally displaced persons<sup>456</sup> ; coordinating the mobilization of resources<sup>457</sup>; collaborating with international organizations, humanitarian agencies and civil society organizations<sup>458</sup>; cooperating directly with African States and international organizations and humanitarian agencies, civil society organizations and other relevant actors, with respect to appropriate measures to be taken in relation to the protection of and assistance to internally displaced persons<sup>459</sup>; sharing information with the African Commission on Human and Peoples' Rights (ACHPR)<sup>460</sup>; cooperating with the ACHPR Special Rapporteur for Refugees, Returnees, IDPs and Asylum Seekers<sup>461</sup>; States Parties agree that the Conference of the States Parties shall be convened regularly and facilitated by the African Union<sup>462</sup>. Further, the Kampala Convention commits states to respect the mandate and Constitutive Act of the African Union, including its right to intervene in AU member states in cases of

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<sup>455</sup> *Ibid.*, art. 8(3).

<sup>456</sup> *Ibid.*, art. 8(3)(a).

<sup>457</sup> *Ibid.*, art. 8(3)(b).

<sup>458</sup> *Ibid.*, art. 8(3)(c).

<sup>459</sup> *Ibid.*, art. 8(3)(d).

<sup>460</sup> *Ibid.*, art. 8(3)(e).

<sup>461</sup> *Ibid.*, art. 8(3)(f).

<sup>462</sup> *Ibid.*, art. 14(3).

war crimes, genocide and crimes against humanity<sup>463</sup>; and the right of AU member states to request intervention from the AU to restore peace and security<sup>464</sup>.

Unlike most existing legal framework related on the protection and the assistance of IDPs, the Kampala Convention have specifics provisions on the prevention and protection of all situations of internal displacement regardless of its causes, and the arbitrary displacement<sup>465</sup>. The Convention provides that all people have a right to be protected against arbitrary displacement. One of the objects and purposes of the Kampala Convention is to “promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement”<sup>466</sup>. To this end, it requires states to prevent displacement as a result of conflict and human rights violations, by respecting their obligations under international law, including human rights and humanitarian law<sup>467</sup>. In relation to displacement caused by natural disasters, the Convention requires states to devise early warning systems, to establish and implement early warning systems, and to adopt measures for disaster preparedness and disaster management<sup>468</sup>. In the case of development or other projects, whether carried out by public or private actors, states must ensure that feasible alternatives to displacement are explored, that the socio-economic and environmental impact of development projects are assessed prior to the undertaking of such a project, and that people likely to be displaced are informed and consulted<sup>469</sup>. States are also required to “endeavor to protect communities with special attachment to and dependency on land due to their particular culture and spiritual values from being displaced

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<sup>463</sup> *Ibid.*, art. 8(1).

<sup>464</sup> *Ibid.*, art. 8(2).

<sup>465</sup> *Ibid.*, art. 4(4).

<sup>466</sup> *Ibid.*, art. 2(a).

<sup>467</sup> *Ibid.*, art. 4(1).

<sup>468</sup> *Ibid.*, art. 4(2).

<sup>469</sup> *Ibid.*, art. 10.

from such land, except where the displacement is justified by compelling and overriding public interests<sup>470</sup>.

According to the article 9(2)(b), “States shall provide internally displaced persons to the fullest extent practicable and with the least possible delay, with adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services, and where appropriate, extend such assistance to local and host communities”. Accordingly, the Convention imposes obligations on states to assess the needs and vulnerabilities of IDPs and host communities (or to facilitate such assessments<sup>471</sup>, and to provide adequate humanitarian assistance to IDPs, in all phases of displacement. The humanitarian assistance must be extended to local and host communities, when and where necessary and appropriate<sup>472</sup>.

The Kampala Convention highlights the specific needs of separated and unaccompanied children, female heads of household, expectant mothers, mothers with young children, the elderly and the disable<sup>473</sup>. States must allow the rapid and unimpeded passage of relief consignments, equipment and humanitarian personnel to IDPs<sup>474</sup>. They must also enable and facilitate the role of local and international organizations and humanitarian agencies, CSOs and other actors in providing protection and assistance to IDPs<sup>475</sup>. As It is true that the UNHCR has been working for IDPs since the 1970s and has provided good offices on a case- by-case basis in serious humanitarian situations (for example, in Sudan in 1972). Thus, although the Statute of the Office of the United Nations High Commissioner for

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<sup>470</sup> *Ibid.*, art. 4(5).

<sup>471</sup> *Ibid.*, 5(5).

<sup>472</sup> *Ibid.*, 9(2)(b).

<sup>473</sup> *Ibid.*, 9(2)(c).

<sup>474</sup> *Ibid* arts. 3(1)(j), 5(7).

<sup>475</sup> *Ibid*, art. 5(7).

Refugees does not provide specific jurisdiction for IDPs, UNHCR nevertheless engaged in many transactions with IDPs.

Further, the article 6 regulates the conduct of the international organizations and humanitarian agencies<sup>476</sup>, to respect the rights of IDPs under international law<sup>477</sup> and to conduct activities in accordance with the principles of humanity, neutrality, impartiality and independence, as well as international standards and codes of conduct<sup>478</sup>.

The Cooperation between states and CSOs is essential for effective IDP protection and assistance. It is in that sense, the Convention incorporates several provisions related to the cooperation with CSOs. The Convention commits states parties to cooperate with CSOs and to allow them to provide assistance to IDPs. Several provisions of the Kampala Convention, similarly to the Guiding Principles<sup>479</sup>, concern, specifically, humanitarian assistance and the role of international organizations and humanitarian agencies<sup>480</sup>.

#### **4.2. INNOVATIVE AND IMPORTANT ASPECTS OF THE CONVENTION**

One of the most significant revisions was the insertion, in article 7(4), of criminal liability for members of armed groups responsible for acts that violate the rights of IDPs, whether under international or national laws. This assignment of criminal responsibility was innovative<sup>481</sup>. The concerned armed groups “Armed Groups” means dissident armed forces or other organized armed groups that are distinct from the armed forces of the state<sup>482</sup>. The definition of ‘armed groups’ in article 1(e) extends to ‘dissident armed forces or other organized armed groups that are distinct from the armed forces of the State’. This definition

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<sup>476</sup> *Ibid*, art. 6(1).

<sup>477</sup> *Ibid*, art. 6(2).

<sup>478</sup> *Ibid*, art. 6(3).

<sup>479</sup> UN Guiding Principles on internally Displaced Persons, 24-27.

<sup>480</sup> Kampala Convention *supra* note 19, arts. 5(3), 5(5) and 6.

<sup>481</sup> Okello, *supra* note 344, p. 372.

<sup>482</sup> Kampala Convention, *supra* note 19, art. 1(e).

attracted strong interventions by some States, most of which expressed concern that including such groups in the Convention could inadvertently confer legitimacy on them. Supported by Sudan and Egypt, Libya even proposed the deletion of article 1(e) and all subsequent references to ‘armed groups’ in the Convention. Libya later dropped the proposal and article 1(e) was retained, with States in favor arguing that the removal of references to ‘armed groups’ denied the fact of their existence and the importance of holding them accountable for their actions. The debate regarding article 1(e) also included discussion of the relationship between ‘armed groups’ as defined here, and ‘non-State actors’ as defined in article 1(n). Here, the resource persons participating in the debate advised that, while ‘armed groups’ are generally also ‘non-State actors’, there exists a grey area concerning ‘armed groups’ that operate by virtue of their links to individuals associated with the State<sup>483</sup>.

According to Okello, The article 9 referring to the obligations of States Parties relating to the protection and assistance of IDPs during internal displacement is arguably the most important provision of the Convention<sup>484</sup>. Article 9(1) emphasizes the obligations on States to respect the fundamental human rights of IDPs, while article 9(2) sets out specific areas of activity requiring action by States. These include measures to ensure satisfactory living conditions, address special needs, guarantee freedom of movement, reunite families who have been separated, and allow IDPs to participate in decisions that affect their lives. Article 9 was intentionally made comprehensive and deals with a wide range of important rights for IDPs. For example, many IDPs encounter discrimination, often as a result of displacement itself. Article 9(1)(a) requires States to protect the rights of IDPs to non-discrimination, in accordance with the Universal Declaration of Human Rights, other international human rights instruments, and the Guiding Principles. Thus, the Kampala Convention promotes the principles of non-discrimination, humane treatment, equality and

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<sup>483</sup> Okello, *supra* note 344, p. 365.

<sup>484</sup> *Ibid.*, p. 373.

equal protection of the law<sup>485</sup>. It explicitly refers to the principle of non-discrimination in the preamble and four distinct provisions<sup>486</sup>. IDPs, being displaced within their country of nationality or habitual residence, are entitled to the full protection of their rights on the same basis as other citizens or habitual residents of the country. No IDP should be the subject of discrimination, either on grounds of their displacement or on any other grounds such as their race, ethnicity, or political affiliation.

Article 9(1)(b) requires States to refrain from and prevent “genocide, crimes against humanity, war crimes and other violations of international humanitarian law” against IDPs. Article 9(1)(c) further requires them to protect IDPs from “killing, summary execution, arbitrary detention, abduction, enforced disappearance or torture and other forms of cruel, inhuman or degrading treatment or punishment”. Discussions regarding these provisions were delicate, given reports stating of brutal war and accounts of genocide in some States. While all States spoke strongly in support of article 9(1)(b), Sudan stood out when it defended the actions it had taken to prevent genocide in Darfur. With sexual and gender-based violence, human trafficking, and child recruitment into armed groups being significant issues in Africa, article 9(1)(d) obliges States to protect IDPs from such acts. Article 9(1)(e) requires States to prevent “starvation”, reinforcing similar obligations on States under international humanitarian law. This provision was not debated. Article 9(2) imposes positive obligations on States to implement specific measures aimed at protecting and assisting IDPs. The emphasis here is on accessing and meeting the basic needs of IDPs and hosting communities. Article 9(2)(e) requires States to respect the rights of IDPs to seek safety in another part of the country and to be protected against forcible return to places where life, safety, liberty, and/or health would be at risk. This provision echoes the language of the principle of *non-refoulement* under international refugee and human rights law. In fact, an earlier version of the provision had even included explicit reference to “the right to

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<sup>485</sup> Kampala Convention, *supra* note 19, art. 3(1)(d).

<sup>486</sup> *Ibid*, preamble-para 10, arts. 3(1)(d),5(1), 9(1)(a) and 9(2)(a).

seek asylum”. However, this was replaced with the article 9(2)(f) guarantee of “freedom of movement and choice of residence” for IDPs, in order to keep the focus of the Kampala Convention on internal displacement. The right of IDPs to seek asylum elsewhere was instead addressed later, in article 20(1). The remaining parts of article 9(2) include obligations on African States to safeguard the civilian and humanitarian character of IDP settlements (article 9(2)(g)), protect property left behind, (article 9(2)(i)), safeguard against environmental degradation (article 9(2)(j)), and consult IDPs regarding decisions that affect them (article 9(2)(k)). Article 9(2)(l) obliges States to ensure that IDPs enjoy their civic and political rights. The reference here to IDPs ‘who are citizens’ is unfortunate given that noncitizens also have rights. In order to assess the impact of humanitarian interventions, article 9(2)(m) requires States to monitor and evaluate the humanitarian assistance delivered to IDPs, including in accordance with the Sphere Standards. Finally, many States lack capacity to fulfil their obligations. Thus, article 9(3) requires them to seek assistance from international organizations and other humanitarian actors. The phrase “where appropriate” was added to address the concerns of States about being duty-bound to work with such actors, as discussed above.

In anticipation of these recurring problems above mentioned, the Kampala Convention highlights a number of specific measures for states to take:

- Registration and personal documentation: States must maintain a register of all IDPs<sup>487</sup> and, independently of this, must issue or replace documents necessary for IDPs’ enjoyment of their rights, such as passports, personal identification documents, birth certificates and marriage certificates<sup>488</sup>. States are prohibited from imposing unreasonable conditions, such as requiring IDPs to return to their area of habitual residence, to obtain such documents<sup>489</sup>. Women, men, and separated and

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<sup>487</sup> Kampala Convention, *supra* note 19, art. 13(1).

<sup>488</sup> *Ibid*, art. 13(2).

<sup>489</sup> *Ibid*, art. 13(3).

unaccompanied children have the right to have these documents issued in their own names<sup>490</sup>.

- Property, land and compensation: States must take measures to protect individual, collective and cultural property belonging to displaced people, whether it was left behind or is in their possession<sup>491</sup>. States must also establish mechanisms for resolving disputes relating to the property of IDPs<sup>492</sup>. States must take all appropriate measures, whenever possible, to restore the lands of communities with a special dependency and attachment to such land<sup>493</sup>. More generally, states commit to providing effective remedies to all people affected by displacement, including through the establishment of effective legal frameworks to provide just and fair compensation and other forms of reparations to IDPs for damage incurred as a result of displacement<sup>494</sup>.
- Information, consultation and participation: States must consult IDPs and allow them to participate in decisions related to their protection and assistance during displacement<sup>495</sup>. States must also ensure that internally displaced citizens are able to enjoy their right to public participation, including the right to vote and to be elected to public office<sup>496</sup>. People who are likely to be displaced by projects must be informed and consulted about feasible alternatives<sup>497</sup>. In relation to durable solutions, states must give IDPs information so that they can make a free and informed choice on whether to return, integrate locally or relocate elsewhere in the country, and they must ensure IDPs' participation in finding sustainable solutions<sup>498</sup>.

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<sup>490</sup> Kampala Convention, *supra* note 19, art. 13(4).

<sup>491</sup> *Ibid.*, art. 9(2)(i).

<sup>492</sup> *Ibid.*, art. 11(4).

<sup>493</sup> *Ibid.*, art. 11(5).

<sup>494</sup> *Ibid.*, art. 12.

<sup>495</sup> art. 9(2)(k).

<sup>496</sup> *Ibid.*, art. 9(2)(l).

<sup>497</sup> *Ibid.*, art. 10(2).

<sup>498</sup> *Ibid.*, art. 11(2).



- Family unity and reunification: the Convention provided that the members of non-state armed groups are specifically prohibited from separating family members<sup>499</sup>. States must take measures to trace and reunify members of families separated during displacement and otherwise facilitate the re-establishment of family ties<sup>500</sup>.

In relation to the durable solutions, the Kampala Convention commits states to seek lasting solutions to the problem of displacement<sup>501</sup>. States must endeavor to incorporate relevant principles contained in the Kampala Convention into peace negotiations and agreements for the purpose of finding sustainable solutions to the problem of internal displacement<sup>502</sup>. States are responsible for promoting and creating satisfactory conditions for each of these options on a sustainable basis and in circumstances of safety and dignity<sup>503</sup>. The Convention also explicitly recognizes IDPs' right to voluntarily chose to return home, integrate locally in areas of displacement or relocate to another part of the country<sup>504</sup>.

Regarding the monitoring states' compliance, the Kampala Convention provides for the establishment of a Conference of States Parties to monitor and review the implementation of the objectives of the Convention<sup>505</sup>. This Conference is meant to serve as a means for states to enhance their capacity for cooperation and mutual support<sup>506</sup>. It shall be convened "regularly" and facilitated by the African Union<sup>507</sup>. States must also indicate the measures they have taken to give effect to the Kampala Convention whenever they present their reports under Article 62 of the African Charter on Human and Peoples' Rights, which has been ratified by the 54 AU member states. Those AU member states that have joined the

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<sup>499</sup> *Ibid.*, article 7(5)(c).

<sup>500</sup> *Ibid.*, art. 9(2)(h).

<sup>501</sup> *Ibid.*, arts. 2(a), 2(c).

<sup>502</sup> *Ibid.*, art. 3(2)(e).

<sup>503</sup> *Ibid.*, art. 11.

<sup>504</sup> *Ibid.*

<sup>505</sup> *Ibid.*, art. 14(1).

<sup>506</sup> *Ibid.*, art. 14(2).

<sup>507</sup> *Ibid.*, art. 14(3)

African Peer Review Mechanism (APRM) must also report on such measures when they present their reports under the APRM<sup>508</sup>.

Various efforts by the then OAU, the AU, including ministerial statements, resolutions, and Executive Council decisions issued at the regional and continental levels, resulted in the approval of the AU instrument for the protection of IDPs in Kampala in October 2009<sup>509</sup>. The African Union Convention for the Protection and Assistance of Internally Displaced Persons (the AU Convention) is a unique and bold measure designed to convert the non-binding UN Guiding Principles into a binding legal instrument that defines rights and responsibilities<sup>510</sup>. That is why the Kampala Convention is said to have transformed what had remained “soft law” for more than a decade into “hard law” by clearly articulating the rights and obligations of duty bearers and right holders<sup>511</sup>. The Kampala Convention treats IDPs as subjects of rights rather than victims of circumstance, while at the same time spelling out the obligations of States as primary duty bearers and identifying roles for other relevant responders. Besides the state’s responsibility, the Convention also engages the individual responsibility of armed forces, and that of non-state actors, including, armed opposition groups<sup>512</sup>. This Convention is not only the first legally binding treaty at the continental level, but it is also the first to concisely explain the rights and obligations of IDPs and States. It articulates the general duties of States pertaining to the protection and aid of IDPs, as well as the obligations of the AU itself, international organizations, armed groups, non-State actors, and States Parties, both during and after displacement. The Convention also requires States to offer long-term alternatives or durable solutions for IDPs, such as sustainable repatriation, local integration, or relocation,

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<sup>508</sup> *Ibid.*, art. 14(4).

<sup>509</sup> Kampala Summit for the African Heads of States and Governments, October 2009.

<sup>510</sup> Won Kidane, “Managing Forced Displacement by Law in Africa: The Role of the New African Union IDPs Convention”, *Vanderbilt Law Review*, Vol. 44, No. 1 (2021).

<sup>511</sup> Chaloka Benyani, “The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law”, *Proceedings of the ASIL Annual Meeting* (2008), 194–195. See also, *supra* note 132, p. 273.

<sup>512</sup> *Ibid.*, p. 198.

as well as compensation and registration and access to personal documents for all IDPs. The Convention interprets sovereignty as a positive obligation, entailing responsibility for the protection and general welfare of citizens and those subject to the authority of the State. The recognition of sovereignty as a state obligation is crucial because it means that states cannot abandon their fundamental responsibility towards their population while keeping invoking the principle of sovereignty and non-interference in internal affairs. Often, states, on the sake of the principles of sovereignty and non-interference on internal affairs, tend to ignore the situation of IDPs and obstructed international organizations and aid agencies for rapid international assistance<sup>513</sup>.

Regional norms may easily gain legitimacy among states in the region. They are better placed in providing opportunities to circumvent the oft-difficult treaty-making at the international level. They may also serve as tailor-made tools for addressing distinct regional dynamics in internal displacement. There is also a possibility that gradual regional approaches may encourage the development of new norms at the international level.

The Kampala Convention is a legally binding treaty that sets out the rights and protections of internally displaced persons (IDPs) in Africa. It was adopted by the African Union (AU) in 2009 and entered into force in 2012. The Convention provides a framework for governments, civil society, and other stakeholders to address the needs and rights of IDPs in Africa, including those displaced by conflict, natural disasters, and other situations.

The implementation of the Kampala Convention is carried out at the national level, through the adoption of national legislation and policies that align with the provisions of the Convention. Governments are required to take steps to protect and assist IDPs within their territory, and to ensure that IDPs have access to justice and remedies for any violations of their rights. As of 2022, the Kampala Convention has been ratified by 33 countries in

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<sup>513</sup> Jürgen Haacke, “Myanmar, the Responsibility to Protect, and the Need for Practical Assistance”, *Global Responsibility to Protect*, Vol. 1, No. 2, (2009), p. 162.

Africa<sup>514</sup>. This means that these countries have formally expressed their agreement to be bound by the provisions of the Convention and have committed to taking steps to implement it at the national level.

The Kampala Convention has had some success in improving the situation of IDPs in Africa. It has helped to raise awareness about the plight of IDPs and has provided a framework for governments to address their needs.

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<sup>514</sup> Kampala Convention, *supra* note 19, status.

## CHAPTER VII: CONCLUSIONS AND PERSPECTIVES

In this thesis, some restrictive national laws or policies recognized by international human rights organizations as violation of the right of the freedom of movement, are highlighted to show the lack of protection of the IDPs by the territorial governments. Some restrictive measures are taken to impeach IDPs to move from camps to camps as the case of thousands of displaced persons confined in camps in Syria<sup>515</sup>, while others are impeached or chased from their homes such the Palestinian case in Israel, violating the right of freedom to choose one's residence<sup>516</sup>. The enactment of these restrictive measures of the right of freedom of movement draws our attention to proceed an assessment to clarify if those measures comply with the article 12(3). Thus, an assessment of these measures is conducted above up in this thesis, according to the principle of proportionality used by the Human Rights Committee. The Propiska measure from Azerbaijan, the Nigerian IDPs Pass measure taken by the Government are inter alia the measures highlighted in this thesis. As already mentioned previously in this thesis, international organizations, human rights associations or NGOs state about these measures just as restrictive and violation of freedom of movement, without any deep explanation, and prove of violation of human rights. Therefore, this thesis, through the assessment method of the principle of proportionality, there has been a prove of the violation of the right of the freedom of movement of the citizens and the IDPs, particularly. Thus, in the measures of the territorial States restricted measures, the violation of the right of the freedom of movement was assessed by using the principle of necessity and proportionality. Regarding the right to movement within a country, the Committee has criticized provisions requiring individuals to apply for permission to change their residence or to seek the approval of the local authorities of the place of destination, as well as delays in processing such written applications. States' practice presents an even richer array of

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<sup>515</sup> Human Rights watch "Syria: Thousands of displaced confined to camps" (2018), available at : <https://www.hrw.org/news/2018/08/01/syria-thousands-displaced-confined-camps> (accessed date December 22, 2022)

<sup>516</sup> Concluding observations on Israel, (1998) UN doc. CCPR/C/79/Add. 93.

obstacles making it more difficult to leave the country, in particular for their own nationals. Although the second sentence of this paragraph is related to the displacement from one country to another, the first paragraph shows that the Committee is against and find unlawful the administrative measures restricting the freedom of movement, as in the case of the *Propiska* and other restrictive measures.

From the definition given for a measure to be effective or appropriate (as it must make it possible to achieve the aim pursued), and from the objective of the propiska measure, we can say that this requirement is not met. Indeed, the Propiska is a system designed to control internal population movements, and prevent unauthorized migration, by tying individuals, and their access to social services, to a fixed abode. An important function of the propiska was to restrict migration to large cities. The objective of the measure is to restrict migration by controlling internal movement. But, still according to reports, for example, the *propiska* is not impeaching internal movement and unauthorized migration. Consequently, this measure is only enacted to restrict the right of the freedom of movement.

In regard of the assessment proving that the restrictive measures are violating the freedom of movement and to choose residence of the IDPs, under the article 12(1)(2) of the ICCPR, therefore not in compliance with the article 12(3) of the same Covenant, different recommendations raised up.

In order to improve the legal protection and assistance to IDPs, the question to be asked is whether to develop a new international legal framework for protection or to establish standards of treatment and international agency of protection that can be followed by government to implement the existing frameworks?

If adopting a convention or treaty is not going to be an effective solution but what about creating a body which will control the legal implementation of the existing laws of IDPs. While the passage of such laws (treaties or convention) is to be encouraged, the drafting process should take place along with more rapid adoption of decrees and policies that support timely responses to internal displacement crises through measures requiring neither legal amendment nor the passage of new legislation.

Unlike the UNHCR, which has overarching responsibility for supporting refugees<sup>517</sup>, there is no comparable organization for assisting internally displaced people. Establishing an effective system of international protection and support for internally displaced persons is therefore as much a humanitarian and human rights concern as it is very important issue for regional and international peace and security.

In addition, the international texts do not define neither a framework, a status for the particular situation of the IDPs nor a special agency in analogy to the UNHCR. In that sense, some scholars sustain that the existing regime of international human rights and humanitarian laws offer a firm basis to enforce the accountability of states. They argue that the best approach to legally protect the IDPs lies in the development and spreading of existing international human rights and humanitarian law.

The Kampala Convention represents a historic breakthrough in normative terms<sup>518</sup>. The Kampala Convention is the first binding multilateral legal instrument specifically

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<sup>517</sup> U.N. Doc. GA/428 (V) (1950) The Statute of the Office of the United Nations High Commissioner for Refugees, General Assembly Resolution 428 (V) of 14 December 1950. See also GUY S. GOODWIN-GILL, “The Refugee in International Law” (Chapter1, Section 3.1) p5 [... UNHCR was established by the General Assembly to provide ‘the necessary legal protection for refugees’ and to seek ‘permanent solutions for the problem of refugees’....it is to be ‘humanitarian’ and ‘social’ and to relate, as a rule, to groups and categories of refugees.

<sup>518</sup> One of the normative innovative of the Kampala Convention is the article 9(2)(f), related to the obligation to States Parties to guarantee of the freedom of the movement. In that sense, the Kampala Convention provided that, States Parties to the Convention are obliged to guarantee the freedom of movement and choice of residence of IDPs, except where restrictions on

governing protection and assistance for IDPs. Since the entry into force, a total of forty (40) African states have signed the Convention<sup>519</sup>, of which have also ratified or acceded to the Convention and are legally bound by its provisions. Meanwhile, only thirty-one (33) States have ratified the Kampala Convention<sup>520</sup> and still the main concerned ones, such as Sudan, have not signed nor ratified<sup>521</sup>.

Also, despite the coordination system established by the UNGP on Internal Displacement, the Principles still suffer from their weak operational application in the field. Therefore, the implementation of the existing standards is not yet strong. In other words, there are existing standards on IDPs protection but when it comes to the implementation, we note the vacuum pertaining. In Salvador for instance, gang groups are uprooting people and the measures contained in the “Safe El Salvador Plan” that the government has established to protect or assist the IDPs are sometimes not effective in practice.

The question of internal displacement is also a politically sensitive one for sovereign states. Governments are often unwilling to admit to the presence of such populations on their territory, since they are indicative of the state’s failure to protect its citizens. Further, internally displaced persons may themselves be reluctant to report to or register with the local authorities. The institutional component is lacking, no organization or agency is today, alone, responsible for the protection of the IDPs. It is true that the UNHCR has worked with IDPs since the 1970s and has provided good offices in serious humanitarian situations on a case-by-case basis (for example, in Sudan in 1972). Consequently, despite the fact that the Statute of the Office of the United Nations High Commissioner for Refugees does not provide specific jurisdiction over IDPs, UNHCR engaged in numerous transactions with IDPs. In addition to the specific support of the UNHCR, the NGOs and Civil Society

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such movement and residence are necessary, justified and proportionate to the requirements of ensuring security for IDPs or maintaining public security, order and public health.

<sup>519</sup> Kampala Convention, *supra* note 19, “status”

<sup>520</sup> *Ibid.*

<sup>521</sup> *Ibid.*



organizations are performing numerous functions in support of the victims of violence and for internally displaced persons in the absence of dedicated Government institutional assistance to them. These organizations are frequently filling a huge protection gap and many victims find themselves entirely reliant on their support. This is welcome, and these organizations must be supported and better resourced to continue their work. The assistance and humanitarian aid are primarily the responsibility of the national authorities. Where national authorities are unable to provide protection or assistance, international humanitarian organizations can protect and assist IDPs. A large number of national and international NGOs offer their help: accommodation, hygiene, surveillance, land rights, etc.

In armed conflict, for example, the humanitarian needs are immense, and the means to satisfy those needs within the conflict area are severely limited. Sometimes internally displaced persons find a degree of security, but the price they invariably pay is that of being completely uprooted, consequently then losing their homes, their jobs and their livelihoods. That situation leads to more suffering, insecurity, harassment persecution and vulnerability. Broadly speaking, Internally Displaced Persons can be exposed to direct physical threats. In many countries, camps and settlements for displaced persons have been the target of attacks by the warring parties, a problem in situations where those camps are believed to accommodate military elements. Internally Displaced Persons move from one place to another, seeking safety and protection inside their own country. Unlike the refugees, who benefit from the system of international protection and assistance, those who are displaced internally fall under the domestic jurisdiction and responsibility of the state, without having specific legal framework or institutional basis for their international protection and assistance<sup>522</sup>. Given that certain provisions of international law frameworks, such as the right to freedom of movement and the choice of residence, are violated during forced

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<sup>522</sup> E/CN.4/1993/35 21 January 1993 COMMISSION ON HUMAN RIGHTS Forty-ninth session Item 11 (a) of the provisional agenda/ Note by the Secretary-General Para 3. In the paragraph 6 of the same Comprehensive study, the conclusion of the report prepared by Mr. Jacques Cuénod stated that "within the United Nations system there is no entity entrusted with the responsibility of ensuring that aid is provided to needy internally displaced persons [...]"

displacement, and that the specific needs and vulnerability of IDPs are not accounted for in the existing laws, it is time for IDPs to be protected under international law.

In regard of the problems highlighted in relation of the legal protection and implementation issues of the existing legal norms, it might be argued that the development of an international legal agencies for the protection of internally displaced persons is needed to establish standards of treatment that governments and other actors can be encouraged to observe for better implementation of the existing legal framework, such as the humanitarian law, the human rights law, the UN Guiding Principles, the Kampala Convention.