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International protection of internally displaced persons

A field study of internal displacement and
available protection in the Republic of South
Sudan

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Summary

The present study aims to explore if international law and its protection mechanisms satisfactorily address the protection needs of internally displaced persons. When answering said question, it will also be possible to identify potential gaps in the protection of internally displaced persons.

Since the end of the Cold War, when roughly 20 million people were living in displacement, the numbers have steadily increased.¹ In the end of 2011 the number of persons internally displaced by armed conflict, generalized violence and human rights violations was around 25 million across the world.² During the corresponding period, the number of refugees has remained relatively stable, between 13 million to 16 million.³ Although the number of people internally displaced is almost twice as many, and despite the fact that internally displaced persons often fall victims to the same human rights violations as refugees, they have not enjoyed the same level of attention and protection from the international community.

To develop an understanding of the situation suffered by many persons living in displacement and to identify the main areas where protection is needed, part of the information gathering for this thesis was conducted as a field study in Juba, in the Republic of South Sudan. South Sudan, the youngest member of the international community of states and an independent country only since 9 July 2011, host large numbers of internally displaced persons due to various reasons. Though situations of displacement are characterized by different conditions and depend on different factors, the aim is that the current study will highlight areas of protection relevant also to situations of displacement outside of the South Sudanese context.

¹ R. Cohen, "Developing and International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 95; Internal Displacement Monitoring Center (IDMC) Homepage, Global IDP Estimates (1990-2011) available at <http://www.internal-displacement.org>, 2012-10-08.

² Internal Displacement Monitoring Center (IDMC), "Global overview 2011 – People Internally Displaced by conflict and violence", p. 8.

³ Internal Displacement Monitoring Center (IDMC), "Internal Displacement – Global Overview of Trends and Developments in 2010", p. 9.

Due to the effects and consequences of displacement, internally displaced persons often find themselves in vulnerable situations. Unlike other vulnerable groups, e.g. children, women, refugees and people with disabilities, internally displaced persons do not enjoy special protection in terms of an international instrument devoted solely to their protection. Hence, this study will also discuss if there is a need for such an instrument, and if the scope of the present definition concerning internally displaced person serves its purpose.

International human rights law and international humanitarian law are the main areas of law that will be explored in light of the situation experienced by internally displaced persons. Reference will also be made to relevant parts of refugee law, since several provisions may be related to the protection of internally displaced persons.

In order to make a difference an important element and prerequisite of any legal protection is the existence of effective and functional monitoring and implementation mechanisms. Consequently, the study will also examine how the institutional protection of internally displaced is constructed and works at the international level, to make sure that situations of displacement are properly dealt with. This part of the thesis will discuss if there is a need for a specialized institution/organization devoted solely to the protection of the internally displaced or if the existing institutional framework is adequate and responds to the existing protection needs.

As a final issue, and due to its potential effects concerning the protection of the internally displaced, this thesis will also examine the perceived fragmentation of international law. More precisely, the relation between human rights law and humanitarian law, the two main bodies of law protecting IDPs, will be investigated. Possible effects of conflicting norms will be identified and discussed.

The thesis demonstrates that existing international and institutional protection are inadequate when compared with the protection needs of IDPs. The thesis also establishes that the lack of implementation regarding existing provisions and norms providing protection for IDPs should be the main concern of the international community. Through an analysis of the parallel applicability of international human rights law and international humanitarian law, it is concluded that the bodies of norms operate in a

complementary manner and that the existence of conflicting norms has a very limited effect on the protection of IDPs.

Abbreviations

CAR	Central African Republic
CPA	Comprehensive Peace Agreement
Common Article 2	Common Article 2 to the Geneva Conventions 1949
Common Article 3	Common Article 3 to the Geneva Conventions 1949
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
GC IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War
GBV	Gender based violence
GoS	Government of Sudan
GoSS	Government of South Sudan
Guiding Principles	Guiding Principles on Internal Displacement
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice

ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDMC	Internal Displacement Monitoring Centre
IDP	Internally Displaced Person
ILO	International Labour Organization
IOM	International Organization for Migration
IRC	International Rescue Committee
Kampala Convention	African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa
LRA	Lord's Resistance Army
NGO	Non-Governmental Organization
NPA	Norwegian Peoples Aid
NRC	Norwegian Refugee Council
OCHA	Office for the Coordination of Humanitarian Affairs
OHCHR	Office of the High Commissioner for Human Rights
OECD	Organisation for Economic Co-Operation and Development
Protocol I	Protocol 1, Additional to the 1949 Geneva

	Convention, and relating to the Victims of International Armed Conflict
Protocol II	Protocol II, Additional to the 1949 Geneva Convention, and relating to the Victims of Non-International Armed Conflict
Refugee Convention	1951 Convention Relating to the Status of Refugees
UDHR	The Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Organization
UNHCR	United Nations High Commissioner for Refugees
UNICEF	United Nations Children Fund
UNMISS	United Nations Mission in South Sudan
WFP	World Food Program

1 Introduction

1.1 Background

In 2010 the United Nations High Commissioner for Refugees (UNHCR) assisted around 10.5 million refugees,⁴ the same year the number of internally displaced persons across the world (IDPs) was estimated to be 27 million.⁵ Today, internal displacement raises some of the most pressing human rights and humanitarian concerns, and presents a serious challenge to existing notions of state sovereignty and issues concerning humanitarian intervention.⁶

Internally displaced persons can be found on all continents but are especially present in Sub-Saharan Africa, the Middle East and the former republics of the Soviet Union. In 2011 Somalia, Sudan, Colombia, the Democratic Republic of Congo (DRC), and Iraq hosted at least one million internally displaced persons each.⁷ However, internal displacement is not a new phenomenon: it has been, and still is, obscured by the notion of state sovereignty, which is said to give governments *cart blanche* concerning the treatment of their own population. Throughout history, there are numerous examples of how states subjected their own citizens to massive displacement, starvation, killings and in some cases genocide, while the rest of the world stood by and watched.⁸ State sovereignty still seems to form the main obstacle concerning the protection of the internally displaced.

In the case of displaced persons who fled from domestic oppression and *crossed a border*, the international community did take action. In the rubble of the Second World War, the UNHCR was created in 1950; and the

⁴ See UNHCR, “Statistical Yearbook 2010: Trends in Displacement, Protection and Solutions”, Table II.1, p. 21.

⁵ See Internal Displacement Monitoring Center (IDMC), “Internal Displacement – Global Overview of Trends and Developments in 2010”, p. 9.

⁶ C. Phoung, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 1.

⁷ Internal Displacement Monitoring Center (IDMC), “Global overview 2011 – People Internally Displaced by conflict and violence”, p. 8.

⁸ R. Cohen, “Developing an International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 87.

following year, the 1951 Convention relating to the status of Refugees (Refugee Convention) was adopted. Fundamentally, the Refugee Convention provides protection in third countries for persons subjected to persecution in their own countries. However, the protection system introduced by the Refugee Convention does not encompass persons in flight or at risk *within* their own countries. Commonly referred to as *internal refugees*, these persons remain under the jurisdiction of their own state and do not enjoy the protection of the Refugee Convention.

Until the beginning of the nineties, internally displaced persons were defined negatively and in relation to refugees as people who had fled their homes, but who were *not* refugees, i.e. remained in their country of origin. By the end of the Cold War, the world saw a dramatic increase in the numbers of internal armed conflicts. As a consequence of these new conflicts the numbers of internally displaced rose from 1,2 million in 11 countries in 1982 to 20-25 million in 40 countries ten years later.⁹ Furthermore, internally displaced persons usually lived under harsh conditions, frequently depending on international response to survive. Internally displaced persons had the highest mortality rates ever recorded during humanitarian emergencies, an observation which highlights their vulnerability. Moreover, IDPs often find themselves in dire situations, more frequently deprived of food, shelter and basic health services than other parts of the population and are more exposed to various human rights abuses.¹⁰ Masses of people in flight are not only affecting their own societies but also have the potential to disrupt the stability of entire countries, destabilizing regional and international security.

In response to the situations of mass displacement described above, and after the lobbying of several non-governmental organizations (NGOs), the United Nations Commission on Human Rights appointed a Special Representative on Internally Displaced Persons in 1992. The first representative chosen for this post was Francis M. Deng, who, at the request of the UN Secretary-General undertook the first comprehensive study on the issue of internal displacement. The work of the special representative

⁹ *ibid*, p. 89.

¹⁰ E. Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 16; R. Cohen, "Developing an International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 89.

resulted, amongst other things, in a working definition of IDPs, a compilation of the legal framework relevant to their protection and the Guiding Principles on Internal Displacement (hereinafter the Guiding Principles).

The interest and relatively recent concern as to the protection of internally displaced persons, not least among Western countries, also seems to have been motivated by a desire to curb refugee flows. The political incentives to harbour refugees that existed throughout the Cold War in principle disappeared with the collapse of the Soviet Union.¹¹ Accordingly, the decreasing number of refugees and the increasing number of IDPs illustrated above are intrinsically linked to the current policy of migration where entry is restricted and borders externalized to prevent “unwanted” immigration. With due respect to the efforts made by international organizations and several NGOs, the interest of limiting the external movement of people among (Western) states therefore seems to have been one of the main reasons for the international attention given to the topic of internal displacement. Twenty years after the special representative on internally displaced persons embarked upon his study this thesis will examine the present scope of international protection provided to IDPs. The point of departure is taken in the current situation and protection needs of the internally displaced in the newly born Republic of South Sudan.

1.2 Purpose and Research Question

The purpose of this master’s thesis is to research the scope of international protection available to internally displaced persons. More specifically, the intention with this study is to identify existing protection needs among internally displaced persons and investigate if the international protection regime answers to those needs. Therefore, the following research question has been formulated:

“Does the framework of international legal and institutional protection meet the protection needs of internally displaced persons?”

¹¹ G.S. Goodwin-Gill, “The Politics of Refugee Protection”, *Refugee Survey Quarterly* (2008) vol. 27, no. 1, p. 9-10 and 20-21.

To identify the protection needs among internally displaced persons, Jonglei State in South Sudan was selected as a case study. Examining and answering the main question above allows an analysis of possible violations of the existing rights of internally displaced persons in Jonglei, as well as identifies potential gaps concerning the protection of IDPs in international law.

Since internal displacement frequently occurs in situations of unrest or armed conflicts,¹² the study will focus on a closer inquiry of relevant protection in human rights and humanitarian law. The presence of a conflict of norms between human rights law and humanitarian law is central to the scope of protection available to internally displaced persons. The relationship between these two bodies of law is thus also being considered.

1.3 Disposition

Section 1 introduces the reader to the subject and scope of the thesis. After the introductory part, section 2 provides an outline of the chosen methodology. This section also identifies necessary demarcations and presents interviews, sources and the procedure.

Section 3 introduces the reader to the notion of internal displacement and sketches the present situation in South Sudan. The first part, subsection 3.1, examines the scope of the definition concerning internally displaced persons established by the Guiding Principles. The second part, subsection 3.2, presents the situation in South Sudan necessary to understand the context and background of the case study. Furthermore, section 3.2 identifies root causes of internal displacement in the state of Jonglei, and demonstrates the presence of displacement in numbers and figures.

The following section, section 4, outlines universal protection needs of the internally displaced. The needs among IDPs in Jonglei State are identified based on an analysis of completed interviews and collected material from

¹² G. Zeender, *Engaging “Armed Non-State Actors on Internally Displaced Persons Protection”*, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 97-98; Internal Displacement Monitoring Center (IDMC), “Internal Displacement – Global Overview of Trends and Developments in 2010”, p. 13.

the field study that was carried out in South Sudan during February and March 2012.

In light of the situation and protection needs of internally displaced persons presented in section 4, section 5 identifies available protection in international law. The first part, subsection 5.1, examines the legal and factual relationship between IDPs and refugees. Subsections 5.2 and 5.3 investigate the applicable bodies of law concerning IDP protection and highlight areas where protection is absent. Subsection 5.4 deals with the institutional arrangements made in order to protect IDPs.

Chapter 6 examines the perceived fragmentation of international law and its potential effects on the protection of IDPs. In particular the relationship between human rights law and humanitarian law and a possible conflict of norms will be studied.

The last part, chapter 7, presents the concluding remarks and answers the research question to the thesis.

2 Methodology

2.1 Case Selection and Delineations

South Sudan was chosen for the case study for several reasons. Becoming an independent nation on 9 July 2011 and being one of the least developed countries in the world,¹³ the government and people of South Sudan face enormous and difficult challenges. One of the consequences of the thirty-year long civil war between the central government in the North and the rebels in the South, was that South Sudan inherited a nation with widespread displacement in several areas. Further developed in section 3 (below), the conflict in South Sudan is not limited to its neighbour in the North, there has also been widespread violence between various groups within South Sudan that resulted in mass displacement. To make the situation even more complex, another reason for displacement in South Sudan has been the recurring attacks carried out by the Lord's Resistance Army (LRA) in the southern states of South Sudan, neighbouring the Central African Republic (CAR), Democratic Republic of Congo (DRC) and Uganda. The object of the case study – internal displacement – is a protracted and present problem in South Sudan.

The choice of South Sudan for a case study is also motivated by its geographical location. Neighbouring states, e.g. the CAR and the DRC are fragile or already unstable. Consequently, mass displacement has the potential to affect not only South Sudan itself but also the stability and security in the entire region.¹⁴ This condition puts the occurrence of internal displacement in South Sudan at the regional agenda and makes it an international concern.

¹³ See Organisation for Economic Co-Operation and Development (OECD), DAC List of ODA Recipients, available at OECD - <http://www.oecd.org/dataoecd/9/50/48858205.pdf>.

¹⁴ N. Geissler, "The International Protection of Internally Displaced Persons", *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 452; R. Cohen, "Developing an International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 89.

As a nascent state, the government of South Sudan also faces the challenge of implementing and enforcing fundamental human rights and humanitarian law provisions. Currently the government is in the process of constructing and shaping a framework of international legal obligations,¹⁵ which have to be respected, protected and promoted by state authorities. With sovereign rights also come responsibilities towards the population. The fact that state authorities have recently assumed responsibility for the implementation of international legal obligations also makes South Sudan an interesting object of study.

In order to make the field study viable, this study is limited to the examination of internal displacement in the state of Jonglei, located in the east of South Sudan. Jonglei was chosen as a case study because of the recent escalation of inter-ethnic conflict that ignited in the end of 2011 and so far has caused the displacement, internal and external, of tens of thousands of persons.¹⁶ Judging from my own experiences in South Sudan the situation in Jonglei also seems relevant because it includes the social structures and current disputes of the South Sudanese society at large, thus making the study relevant to regions others than Jonglei State.

The availability of reliable information is a serious problem in South Sudan and affected the selection of the case study. Currently, the United Nations Mission in South Sudan (UNMISS) and the international humanitarian community have put a lot of attention on the worrying situation in Jonglei, which facilitates the access to information concerning the situation on the ground. Limiting the case study geographically automatically confines the scope of the study further. Since displacement in Jonglei mainly occurs due to inter-ethnic violence, the study excludes other causes, e.g. natural disasters or development projects. However, violence and/or conflict arguably are the main causes to displacement globally,¹⁷ which gives the study greater relevance beyond the South Sudanese context.

¹⁵ United Nations Mission in South Sudan (UNMISS), Press Release, 12 December 2011, "Government pledges to ratify key human rights conventions", available at ReliefWeb - <http://reliefweb.int/node/464506>, 2012-10-08.

¹⁶ Office for the Coordination of Humanitarian Affairs (OCHA), "South Sudan Weekly Humanitarian Bulletin", 15 March 2012, p. 1; OCHA, "South Sudan Weekly Humanitarian Bulletin", 8 March 2012, p. 1.

¹⁷ L.T. Lee, "Protection of Internally Displaced Persons in Internal Conflicts", *ILSA Journal of International and Comparative Law* (1996-1997) vol. 3:529, p. 529; Internal Displacement Monitoring Center (IDMC), "Internal Displacement – Global Overview of

Another important clarification to make concerns the notion of *protection*. Since the thesis will examine protection available to internally displaced persons, the content and scope of the term deserves some attention. In terms of a topic such as internal displacement, which normally occurs in situations of conflict, generalized violence or human rights violations, the content of protection can roughly be divided into four main spheres/actions: political, military and security, legal (including judicial) and humanitarian¹⁸. This study will focus on the third category – *legal and judicial protection*. The sphere of legal/judicial protection could further be divided into sub categories such as national, regional and international legal/judicial protection. This paper focuses on *international* legal and judicial protection related to internal displacement. When warranted, reference will also be made to regional bodies, frameworks and/or instruments. To deliver the intended effect, legal provisions need to be implemented, monitored and enforced. This responsibility normally rests on various institutions and organisations. Consequently, the main aim of this study is to map (international) *legal* and *institutional* protection provided to internally displaced persons.

2.2 Sources

The sources in this thesis partly come from the information obtained during the field study, namely the interviews I conducted with professionals working with IDP protection (see more under section 2.4). In addition to the data identified during the field study, the sources used in this paper are identical to article 38(1) of the Statute of the International Court of Justice.¹⁹ Consequently, reference will be made to international legal conventions, and doctrine, including international legal documents emanating from UN bodies such as resolutions adopted by the Security Council and/or General Assembly. Moreover, documents created by specialized UN organs, such as

Trends and Developments in 2010”, p. 13; E-C Gillard, “The Role of International Humanitarian Law in the Protection of Internally Displaced Persons”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 37.

¹⁸ International Committee of the Red Cross (ICRC), Reports and Documents, “ICRC Protection policy”, *International Review of the Red Cross* (2008) vol. 90, nr. 871, p. 752.

¹⁹ *Statute of the International Court of Justice*, (adopted 26 June 1945, entered into force 24 October 1945 – the ICJ Statute forms an integral part of the Charter of the United Nations, see article 92), 33 U.N.T.S. 933.

UNHCR and OCHA, as well as publications by other recognized international organizations working in the field of IDP protection, will be used.

2.3 Method

The implementation stage of the field study had two main objectives: To collect data through *interviews*, targeting professionals working with protection issues of internally displaced persons, government officials and alike, and to collect *textual data*, mainly documents published by various UN organizations present in South Sudan, NGOs as well as government policy papers and similar. Once in Juba I was able to carry out both of these objectives. However, it proved difficult to conduct interviews with government officials on issues concerning internal displacement since it seems to be a sensitive topic. Moreover, the government was about to launch a disarmament campaign in Jonglei precisely during the time of my stay, a campaign that received a lot of criticism from international actors present in South Sudan.²⁰ The ongoing disarmament campaign made question concerning internal displacement in Jonglei even more susceptible. Although I did not meet with government officials, I tried to obtain as much information as possible on government policies concerning internal displacement during meetings/interviews with representatives working with IDP protection.

The work situation in South Sudan is extremely challenging, not least due to the lack of infrastructure and security concerns. The initial plans included a field visit to one of the reception centres for internally displaced persons in Jonglei to get a first hand perspective of the situation studied in this thesis. Unfortunately, it proved impossible to conduct said field visit due to practical issues and security concerns.

As previously stated, this study is partly based on *qualitative* research. According to some commentators, qualitative methods of research suffer

²⁰ For more information about said disarmament campaign and possible consequences see section 3.

from a lack of reliability and credibility.²¹ However, as shown by *Flyvbjerg* amongst others, there are viable arguments to prove that this is a false premise. According to Flyvbjerg the conventional perception of case-study research is resting on erroneous and/or over-simplified conclusions. The most common critique against qualitative methods of research can be summarized in the following misunderstandings:

1. It is not possible to generalize based on a single case; consequently, the case study is not valuable to scientific development.
2. The case study is not well suited for hypothesis testing and theory building; it works better for generating hypothesis in the initial stages of a research process.
3. Since researchers have a tendency to confirm preconceived notions, the case study is a biased product.²²

If accurate, the critique above would strike a serious blow to qualitative methods of research. However, convincing arguments will be presented to demonstrate that this is not the case, and that context-dependent knowledge stands on equal footing with context-independent research.

Concerning the first point, it is simply an incorrect view that it is impossible to generalize from a single case. The case study is ideal for generalizing by way of *falsification*: if just one observation does not fit with the proposition it can be considered invalid in general and thus revised or rejected.²³ Applying said model in the case of IDP protection, the proposition tested could be formulated as follows: “*international protection addresses the protection needs of internally displaced persons*”. If the proposed example could be proved wrong/falsified, in light of the context in South Sudan, it would also imply that the proposition is not valid in general – a single case generating general knowledge.

²¹ D. T. Campbell, ““Degrees of Freedom” and the Case Study”, *Comparative Political Studies* (1975) vol. 8, no. 2, p. 178-179; B. Flyvbjerg, “Five Misunderstandings About Case-Study Research”, *Qualitative Inquiry* (2006) vol. 12, no. 2, p. 219-221.

²² B. Flyvbjerg, “Five Misunderstandings About Case-Study Research”, *Qualitative Inquiry* (2006) vol. 12, no. 2, p. 221.

²³ *ibid*, p. 226-228.

The second point of critique, that case studies are ill-suited for conducting hypothesis testing and theory building, derives from the first miscalculation that it is impossible to generalize using individual cases. Having proved the first point of critique inaccurate, the second point can accordingly be rejected using the same line of argumentation.

As to the third point of critique, stating that the case study contains a bias towards verification making its scientific value questionable, it favours further examination. A tendency to confirm preconceived notions and hypotheses seems to be a real and present problem in most forms of research and an issue all researchers at some point have to deal with. Nevertheless, to consider that this problem is limited to qualitative methods of research is incorrect. The problem of subjectivism and bias applies to all forms of research methods: they are equally present in the choice of tools and methods in a quantitative study. To some extent, the case study might be more sensitive to questions of subjectivism since the researcher gets close to those studied; reality is forced upon the researcher often implying that the initial hypothesis is falsified and needs to be revised. Quantitative methods are not correspondingly sensitive to subjectivism since quantitative researchers do not get close to those studied. A preconceived starting point therefore risks to become “embedded” throughout the study, since the probability of the researcher being corrected by reality, or the study objects “talking back”, is absent in quantitative methods of research.²⁴

Having examined some of the critique directed against qualitative methods as well as quantitative models of research, it appears that the best way of generating reliable and valid knowledge is achieved by combining the two.²⁵ To tackle the risk of bias in the method of research in this thesis the information extracted from the case study will be compared with material of “primary sources” such as doctrine, case law and documents published by UN organs, to strengthen or falsify theories or information originating from secondary sources. Applying the method described should improve and strengthen the viability of the study as well as minimizing the risk of biased conclusions.

²⁴ *ibid*, p. 234-237.

²⁵ D. T. Campbell, ““Degrees of Freedom” and the Case Study”, *Comparative Political Studies* (1975) vol. 8, no. 2, p. 178-179; 191; B. Flyvbjerg, “Five Misunderstandings About Case-Study Research”, *Qualitative Inquiry* (2006) vol. 12, no. 2, p. 241-242.

2.4 Interviews

During the field study nine interviews were conducted, targeting professionals working within areas related to the protection of internally displaced persons. The interviews were constructed and facilitated to promote a constructive dialogue rather than a unilateral model of interrogation. To maintain a level of consistency, making it possible to compare identical/different views on the same topics, the interviews were framed according to the same matrix.²⁶ Throughout the study, the aim was to extract the personal (professional) experiences and opinions of the persons interviewed rather than the official positions held by respective organization for which they were working.

To ensure the highest level of honesty, open mindedness and independence, and at the request of several of the persons interviewed, they will remain anonymous in this thesis. References to interviews will be denoted by footnotes according to the following model: *Interview 3*, provided the information was extracted during the third interview. To obtain relevant information, the target group of the meetings comprised individuals working with IDP protection and related issues. Consequently, interviews were conducted with protection coordinators/officers working for the *United Nations High Commissioner for Refugees (UNHCR)*, *United Nations Children Fund (UNICEF)*, *Norwegian Refugee Council (NRC)*, *United Nations Mission in South Sudan (UNMISS)*, *Norwegian Peoples Aid (NPA)*, *International Rescue Committee (IRC)*, *Save the Children (SC)*, *International Committee of the Red Cross (ICRC)* and Intersos.

In addition to the interviews, I was also given access to the meetings periodically held by the *South Sudan Protection Cluster*,²⁷ something that proved immensely valuable to create an understanding of how the institutional framework of protection is constructed in the country. Moreover, the meetings facilitated access to up-to-date information on current protection concerns.

²⁶ See Appendix A, for the matrix/questionnaire used during the interviews.

²⁷ See South Sudan Protection Cluster website - <http://southsudanprotectioncluster.org>, 2012-10-08.

The decision to interview professionals working with IDP protection, instead of the IDPs themselves, was made due to several reasons. First, meeting and interviewing internally displaced persons might attract unwanted attention. In situations of internal displacement, it is not unusual that the victim and perpetrator live in proximity to each other. Interviewing victims of human rights abuses within the earshot of their tormentors could put the victims in an even more vulnerable situation. Second, the situation in Jonglei, the state selected for the case study, is very volatile, and it is not advisable or even possible to go there without proper security arrangements. Last, the infrastructure in Jonglei is very poor and in many places close to non-existent. The only way to access large parts of the state's population is by helicopter. The combination of a poor infrastructure and the fact that IDPs often move around for their own safety was also considered when setting the limits for the interviews.

As mentioned above, part of the information gathering process for the thesis was conducted through a Minor Field Study (MFS) in South Sudan. The field study was conducted for two months, during February and March 2012 in Juba, the capital of South Sudan. The study was financed by the Minor Field Study scholarship and sponsored by the *Swedish International Development Cooperation Agency (SIDA)*, via the *International Programme Office for Education and Training (Internationella Programkontoret)* and granted by the *Raoul Wallenberg Institute of Human Rights and Humanitarian Law (RWI)*.

3 Internal displacement and its causes in South Sudan

3.1 An introduction to the Guiding Principles on Internal Displacement

The current chapter will provide the reader with an introduction to internal displacement and the characteristics that make IDP protection separate and more complex than the protection of refugees.²⁸ Furthermore, section 3 provides an overview of the situation and occurrence of internal displacement in South Sudan and more particularly about its causes in Jonglei. The root causes of internal displacement are essential to identify when constructing and evaluating preventive mechanisms of IDP protection.

The need for uniform international standards concerning internally displaced persons became increasingly obvious among international humanitarian stakeholders and relief agencies in the late 1980s and early 1990s. During this period, the international community experienced various examples of humanitarian crises, often caused by internal conflicts, entailing large populations of IDPs.²⁹

The main outcome of the work of the Special Representative was the *Guiding Principles on Internal Displacement*. Thirty in number, the Guiding Principles took two years to draft and were presented to the Commission on Human Rights in 1998. According to Roberta Cohen, Deng's fellow researcher in the project, the decision to draft Guiding Principles and not a treaty was made for three main reasons. First, since internal displacement was a very sensitive topic (and still is) no governmental support existed for a legally binding treaty. Second, the process of treaty making is very slow.

²⁸ N. Geissler, "The International Protection of Internally Displaced Persons", *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 452.

²⁹ E. Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 10.

Since there was an acute need to address the harsh situations of IDPs a document was needed without undue delay. Last, sufficient international law existed to draft a satisfactory document tailored to the needs of internally displaced persons.³⁰ The Guiding Principles include standards for protection *against* arbitrary displacement, protection *during* displacement as well as provisions to ensure protection *after* displacement – during return, resettlement and reintegration.³¹

In contrast to “hard law”, e.g. a treaty, the Guiding Principles are a “soft law” instrument and consequently *not legally binding* on states.³² Although not legally binding, it is argued that the Guiding Principles reflect hard law provisions principally derived from international human rights law, international humanitarian law and refugee law by analogy.³³ Despite their designation as a soft law instrument, the Guiding Principles nonetheless reflect good evidence of international consensus concerning the protection of IDPs. Moreover, the non-binding nature of soft law has limited relevance regarding the formation of (binding) customary international law since soft law can generate widespread and consistent state practice, as well as provide evidence of *opinio juris*, backing a customary rule.³⁴

3.1.1 Defining internal displacement

When the issue of internal displacement became a topic on the agenda of the international community in the beginning of the 1990s, no definition existed as to who qualified as an “internally displaced person”. A definition of IDPs was necessary to deal with situations of displacement, e.g. to identify populations of concern, collect data and evaluate the needs as well as construct policies of assistance.³⁵ In addition to compiling standards for

³⁰ R. Cohen, “Developing an International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 92.

³¹ See the *Guiding Principles on Internal Displacement*.

³² A. Boyle, *Soft Law in International Law-Making*, from M.D. Evans (ed.), *International Law*, (2nd. edn. Oxford University Press 2006), p. 141-143.

³³ W. Kälin, “The Legal Dimensions”, *Forced Migration Review* (2003), Issue 17, p. 15; E. Mooney, “Principles of Protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38 (6), IOM, p. 85.

³⁴ A. Boyle, *Soft Law in International Law-Making*, from M.D. Evans (ed.), *International Law*, (2nd. edn. Oxford University Press 2006), p. 145.

³⁵ E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 10.

protection related to the different phases of displacement, the perhaps biggest contribution offered by the Guiding Principles is the definition of internally displaced persons as:

*Persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.*³⁶

The two core elements of the definition are those of (1) *involuntary movement* and that such movement takes place (2) *within national borders*.³⁷ Although not limited to the causes of displacement mentioned, implicitly made clear by the qualification “in particular”, the definition clearly focuses on persons who would, if they were to cross a border, qualify as refugees within the broader³⁸ definition of the term, used in the instruments found in Latin America and Africa.³⁹ In addition to persons forced to flee their homes due to violence, the definition of internally displaced person also includes people leaving their homes because of natural and human-made disasters. The former is primarily intended to encompass cases of displacement caused by natural disasters such as earthquakes, tsunamis and flooding. As to displacement caused by human-made disasters, the intention of the drafters was primarily to encompass situations of people arbitrarily displaced by, for example development projects.⁴⁰

³⁶ See the *Guiding Principles on Internal Displacement*, Introduction: Scope and Purpose, para. 2.

³⁷ R. Cohen, “Developing an International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 92-93.

³⁸ E. Arboleda, “Refugee Definition in Africa and Latin America: The Lessons of Pragmatism”, *International Journal of Refugee Law* (1991), vol. 3, no. 2, p. 185.

³⁹ See “1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa” (OAU Convention), in addition to a refugee pursuant to the 1951 Refugee Convention the term “refugee” entails “every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality”. In Latin America the “1984 Cartagena Declaration on Refugees” encompasses persons forced to move “because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violations of human rights or circumstances which have seriously disturbed public order.”

⁴⁰ E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 12-13; R. Cohen, “Developing an International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 93.

However, various commentators object to the inclusion of natural or manmade disasters in the IDP definition. The main argument used to support this point of view is that the element of coercion, which characterizes situations of forced displacement, is lacking in situations of natural or human made disasters. According to this approach, coercion requires the action of state authorities or an insurgent group. Moreover, in situations of natural or manmade disasters state authorities are generally willing to assist displaced persons when needed with the support of international stakeholders. Consequently, persons displaced by natural or human-made disasters would only face some of the problems experienced by those displaced by human rights violations or armed conflicts.⁴¹

Yet, the dividing line between different types of displacement – whether caused by violence, natural or human-made disasters – is far from clear; the reluctance of authorities to allow international assistance into an area ravaged by war or a natural disaster may cause new waves of displacement and/or worsen the consequences of the conflict/natural disaster.⁴² The multiple factors causing displacement as well as the complexity connected with the process of separating different types of IDPs, would support the inclusion of “natural and human-made disasters” in the definition. Without this designation persons suffering in such situations otherwise risk being excluded from any assistance and/or support. Contrary to the narrow definition to include only those displaced by violence, are the large numbers of people displaced because of development projects. The global number of internally displaced persons quoted in the introduction,⁴³ around 27 million, is cumulative and only refers to displacement caused by conflict and human rights violations. Since the year 1990, dam constructions and development projects of urban transportations alone have caused the displacement of around 10 million people annually (approximately 220 million in cumulative numbers as of today).⁴⁴ This figure does not include other forms

⁴¹ C. E. Lewis, “Dealing with the Problem of Internally Displaced Persons”, *Georgetown Immigration Law Journal* (1992) vol. 6, no. 4, p. 694-695; N. Geissler, “The International Protection of Internally Displaced Persons”, *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 455-456.

⁴² C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 30.

⁴³ See p. 8 section 1.1.

⁴⁴ M. M. Cernea, “Understanding and Preventing Impoverishment from Displacement: Reflections on the State of Knowledge”, *Journal of Refugee Studies* (1995) vol. 8, no. 3, p. 249.

of development-induced displacement caused by, for example the creation of reserve parks, mining, thermal power plants and the like.⁴⁵ Moreover, situations of development-induced displacement often go unnoticed and attract less support from the international community than people being displaced because of conflict or human rights violations.⁴⁶ According to Cohen, one of the framers to the definition, it “*tries to strike a fair balance between too narrow a framework that risks excluding people and one so broad that it could prove operationally unmanageable.*”⁴⁷ In sum, there does not seem to be a universally accepted definition of internally displaced persons, at least not in legal doctrine, although the definition provided by the Guiding Principles has gained widespread standing and recognition among most international actors working with IDP protection.⁴⁸ However, it can be argued that from a protection point of view the key issue, determining if a person falls within the definition in cases of natural or human-made disasters, should be whether or not assistance and/or compensation are made available by state authorities. Where needed, state authorities should accept and not prevent the access and assistance provided by international relief agencies.⁴⁹

The wider approach and definition found in the Guiding Principles has recently gained additional recognition through the adoption of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention). The Kampala Convention is a regional instrument and its definition of IDPs completely embraces the wording of the Guiding Principles.⁵⁰ To enter into force the Kampala Convention requires the ratification of fifteen Member States of the African Union; so far only fourteen states have ratified the convention,⁵¹ meaning that, strictly speaking, it is not yet a legally binding instrument. Like the

⁴⁵ *ibid*, p. 249.

⁴⁶ Norwegian Refugee Council (NRC), Global IDP Project, “Internal Displacement: Global Overview of Trends and Developments in 2004”, p. 35-37.

⁴⁷ R. Cohen, “Developing an International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 93.

⁴⁸ E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 1, 12 and 23.

⁴⁹ C. Phuon, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 30.

⁵⁰ See Article 1(k) of the Kampala Convention.

⁵¹ See “List of Countries which have Signed, Ratified/Accessed” to the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa”, available at the African Union website - <http://www.au.int/en/treaties>, 2012-10-20.

regional instruments concerning refugees, the Kampala Convention seems to reflect, a more progressive and realistic approach to the problems surrounding internal displacement.

To sum up, the definition of internally displaced persons is much broader than the scope of refugees which makes the use of terms like “internal refugees” misleading and confusing. The concept of refugees would fit into the definition of IDPs with the border-crossing element put aside. If crossing a border, however, only a small portion of the world’s IDPs would qualify as refugees pursuant to the Refugee Convention. It is also worth emphasizing that the definition of internally displaced persons in the Guiding Principles is descriptive and of a *non-legal* nature, it describes a factual circumstance and foremost serves operational purposes in the field.⁵²

3.1.2 When does internal displacement end?

Currently there is no consensus as to *when* someone stops being counted as an internally displaced person.⁵³ Unlike the case of refugees,⁵⁴ there is no list of the situations when internal displacement can be terminated. The only indication given by the Guiding Principles stipulates that: “Displacement shall last no longer than required by the circumstances.”⁵⁵ This provision is not very instructive. Instead of being declaratory and carrying legal implications as in the case of refugees, it clearly demonstrates the descriptive nature of the IDP definition. Regarding displaced persons who remain in their countries, the Guiding Principles provide two possible solutions to their situation: (a) to *return* voluntarily and in safe conditions to their homes or places of habitual residence, or (b) to *resettle* voluntarily in another part of the country, including the localities where they went once

⁵² W. Kälin, “Guiding Principles on Internal Displacements: Annotations”, The American Society of International Law (ASIL) and the Brookings Institution, Studies in Transnational Legal Policy, No. 38, p. 4; N. Geissler, “The International Protection of Internally Displaced Persons”, *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 452-453; E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 13.

⁵³ E. Mooney, “Bringing the End into Sight for Internally Displaced Persons”, *Forced Migration Review* (2003), Issue 17, p. 4-5.

⁵⁴ See Article 1(c) of the 1951 Refugee Convention concerning situations of cessation.

⁵⁵ See Principle 6(3) of the Guiding Principles on Internal Displacement.

displaced.⁵⁶ Currently, there is no uniform or systematic approach used to address the issue of when internal displacement ends. In some cases, it is the willingness of the government and/or the international community to provide assistance, rather than actual existence of displacement that is the deciding factor. In other countries, the government simply announces a date when all IDPs cease to be considered as such. From one day to another, notwithstanding that the factual circumstances remain the same, the plight of internally displaced persons is thus neglected.⁵⁷ So far the approach applied to determine the end of displacement appears to be made on an ad hoc basis applying random criteria.

To tackle the confusion and arbitrariness to issues concerning the cessation of displacement, Mooney, amongst others, has presented an approach that focuses on the continued existence of IDP-specific needs. It suggests that when the needs and vulnerabilities, that characterize displacement no longer exist, the person in question would also cease to be considered an IDP.⁵⁸ A similar approach is supported by Phuong who considers that “*protection and assistance to the internally displaced should cease when their needs are fulfilled*”,⁵⁹ and also by Kälin.⁶⁰ Such a needs-based assessment must be made on a continuous and ad hoc basis since the needs and vulnerability of IDPs depend on the context and circumstances in question.⁶¹

Although no uniform criteria have been set up to facilitate the determination of when displacement ends, the question appears to be important formulating programmes, protection policies and budgets. However, it is most important to the IDPs themselves, since they have the right to know about their benefits and entitlements. Because of the non-declaratory nature of the IDP definition, it needs to be emphasized that although someone ends

⁵⁶ See Principle 28(1) of the Guiding Principles on Internal Displacement.

⁵⁷ E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 21-23 and “Bringing the End into Sight for Internally Displaced Persons”, *Forced Migration Review* (2003), Issue 17, p. 5.

⁵⁸ E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 22-23.

⁵⁹ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press, Cambridge 2004), p. 37.

⁶⁰ W. Kälin, “The Legal Dimensions”, *Forced Migration Review* (2003), No. 17, p. 16.

⁶¹ E. Mooney, “Bringing the End into Sight for Internally Displaced Persons”, *Forced Migration Review* (2003), Issue 17, p. 6; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 36-37.

to be considered an IDP, that person still enjoys the full scope of protection provided by human right law and in times of armed conflict international humanitarian law. The ability to label a person is not necessarily always helpful; the value of deciding when a victim of human rights violations – as is the case with most IDPs – ceases to be a victim should not be overestimated.⁶²

3.2 Internal displacement in South Sudan

South Sudan attained independence on 9 July 2011, making it the youngest nation globally. Before becoming an independent country South Sudan was a part of Sudan. Nevertheless, the history of Sudan and the path to independence of the South has been a long one involving situations of immense human suffering. After half a century of Anglo-Egyptian colonial rule Sudan gained its independence in 1956. Almost immediately, war broke out between the North and the South. The main causes of conflict were the resistance against the political and economical marginalisation of the peripheral regions at the hand of the central government in Khartoum, the unequal distribution of national resources/wealth and the recognition of socio-cultural diversity. Said causes led the country into two prolonged periods of internal conflict between 1955-1972 and 1983-2005. The wars between North and South are believed to have caused the deaths of approximately 2,5 million people and the displacement of 4,5 million (4 million IDPs and 500 000 refugees).⁶³

In 2005 peace negotiation between the North and South resulted in the signing of the Comprehensive Peace Agreement (CPA),⁶⁴ which provided

⁶² W. Kälin, “The Legal Dimensions”, *Forced Migration Review* (2003), No 17, p. 15-16; E. Mooney, “Bringing the End into Sight for Internally Displaced Persons”, *Forced Migration Review* (2003), Issue 17, p. 4; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 37.

⁶³ Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council, “Sudan: Rising inter-tribal violence in the south and renewed clashes in Darfur causes new waves of displacement”, A profile of the displacement situation 27 May, 2010, p. 14, available at - <http://www.unhcr.org/refworld/>, 20120-10-08; CIA World Factbook, Country Profile: South Sudan, Introduction, available at - <https://www.cia.gov/library/publications/the-world-factbook>, 2012-10-08.

⁶⁴ See the Comprehensive Peace Agreement, signed by the Government of Sudan and Sudan People’s Liberation Movement/Army (SPLM/A) in September 2005, available at Refworld website - <http://www.unhcr.org/refworld/>, 2012-10-08.

for an autonomous government in the South, a six-year interim period with power sharing and national elections by 2009 (finally held in April 2010) as well as a referendum on self-determination for Southern Sudan in 2011. The referendum was held in January 2011 and the result was a 98 % vote in favour of independence.

The situation since independence has not been without difficulties. South Sudan – Sudan relations deteriorated in the beginning of 2012 as a consequence of the deadlock in the post-Comprehensive Peace Agreement negotiations, issues concerning border demarcation, oil revenue sharing, citizenship, just to mention a few, remain to be solved. Moreover, the two countries accuse each other of supporting rebel militia, especially in the oil rich border areas, something that has exacerbated the already strained relations. South Sudan has also seen an increase of internal conflicts, foremost in terms of inter-communal/ethnic violence, the proliferation of small arms left behind after the conflict with Sudan has fueled this violence. The causes of displacement in South Sudan can roughly be divided into:

- IDPs displaced by the war between the North and South;
- IDPs displaced by recent inter-communal/ethnic conflicts;
- IDPs displaced by the recent border incidents, especially in the Abyei area;
- IDPs in the areas of southern South Sudan, displaced by attacks carried out by the Ugandan Lord's Resistance Army (LRA);
- IDPs from Darfur who fled to South Sudan (before 9 July 2011).

Furthermore secondary displacement has occurred as a result of:

- returning IDPs who have failed to reintegrate in their places of origin and move back to their places of displacement.⁶⁵

⁶⁵ United Nations, Security Council, Report of the Secretary-General on South Sudan, 7 March 2012, S/2012/140, p. 3, 5-6; Internal Displacement Monitoring Centre (IDMC) and Norwegian Refugee Council, "Sudan: Rising inter-tribal violence in the south and renewed clashes in Darfur causes new waves of displacement", A profile of the displacement situation 27 May, 2010, p. 14-15, available at - <http://www.unhcr.org/refworld/>, 2012-10-08.

No official statistics concerning the number of IDPs exist. However, their number in South Sudan during 2011 was estimated to be around 350 000 (out of a total population of 8,3 million).⁶⁶ This number does not include recent displacement that occurred as a consequence of the ongoing fighting along the South Sudan – Sudan border and intensifying inter-communal/ethnic violence in the beginning of 2012. An overview of conflict related displacement in South Sudan during 2012 is presented in appendix B.

3.2.1 Causes to displacement in Jonglei State

This section will provide a summary of the current situation in Jonglei, the state in South Sudan chosen for the case study in question. It will further identify root causes to the violence and fighting taking place, indirectly causing widespread displacement. However, the root causes and motives for violence that are presented below are typical not only for Jonglei State, but can also be found in other parts of the country.

Jonglei state is located in the east of South Sudan. It borders Ethiopia in the east, the Upper Nile and Unity States in the northeast and northwest, Lakes in the west, and Central and Eastern Equatoria in the southwest and southeast. Jonglei is the largest of South Sudan's states and is inhabited by approximately 1,3 million people. The region also belongs to one of the most underdeveloped in the world. Demographically Jonglei comprises multiple ethnic communities, of which several migrate seasonally to sustain cattle and preserve their pastoral traditions.⁶⁷ The major tribes inhabiting Jonglei are Dinka, (Lou) Nuer, A Nuak and Murle.⁶⁸ A map of Jonglei and the composition of key ethnic groups are presented in appendix B. With little development and commercial exploitation, not only in Jonglei but also in other parts of South South, cattle is a primary currency among pastoral communities. Cows are not only used as hard currency but also represent wealth and social status; they are used as compensation in situations of civil

⁶⁶ United Nations, Security Council, Report of the Secretary-General on South Sudan, 7 March 2012, S/2012/140, p. 15-16; see Sudan Tribune, "South Sudan census results officially released", 7 June 2009, available at - www.sudantribune.com, 2012-10-08.

⁶⁷ International Crisis Group, "Jonglei's Tribal Conflicts: Countering Insecurity in South Sudan", Africa Report No. 154 – 23 December 2009, p. i.

⁶⁸ See Jonglei State official website, available at - <http://jonglei-sd.org/>, 2012-08-10.

cases/wrongdoings as well as payment of dowries. Since access to water and grazing areas is scarce during the dry season the significance of cattle has placed them at the centre of confrontation between communities. Conflicts between these pastoral communities are by no means a new phenomenon in Jonglei and South Sudan. Cattle rustling – in which cattle are stolen from neighbouring tribes – and reprisals are common and have been part of life for generations. What has changed in recent times is the nature and destructive capacity of the violence generated by the cattle rustling. Due to the high proliferation of small arms during and after the civil war against the government in Khartoum, the spears and sticks that historically have been used to carry out cattle rustling were exchanged for modern weapons, making the violence far more deadly. Additionally, the high proliferation of small arms also contributed to the disruption of traditional practices and authority.⁶⁹

Due to inadequate development of social services and the absence of a state presence in Jonglei tribal and ethnic identities remain stronger than any sense of national unity or loyalty to the government of South Sudan. Hence, tribal identities are central to politics not only in Jonglei but also throughout the South Sudanese context. The tense situation between tribal/ethnic communities in Jonglei is exacerbated by widespread perceptions of state bias in favour of Dinka communities, as well as by the common accusation that Khartoum is instigating violence in the South by supporting e.g. the Murles.⁷⁰ Moreover, several communities in Jonglei feel marginalized because of the absence of roads and infrastructure, widespread unemployment, lack of food, land disputes and limited access to justice.⁷¹ The violence between different ethnic communities in Jonglei erupts in cycles but the region saw a significant increase of violent clashes during 2009 and in late 2011. The principal perpetrators of this violence have been groups from Dinka, Lou Nuer and Murle communities. Recent inter-communal fighting in Jonglei has caused several hundred deaths; more than 140 000 persons have been forced into internal displacement and

⁶⁹ International Crisis Group, “Jonglei’s Tribal Conflicts: Countering Insecurity in South Sudan”, Africa Report No. 154 – 23 December 2009, p. i and 1.

⁷⁰ Interviews no. 1, p. 1; no. 3, p. 1; no. 4, p. 1 and no. 6, p. 1; International Crisis Group, “Jonglei’s Tribal Conflicts: Countering Insecurity in South Sudan”, Africa Report No. 154 – 23 December 2009, p. i, 4.

⁷¹ Interviews no. 3, p. 1 and no. 8 p. 1; International Crisis Group, “Jonglei’s Tribal Conflicts: Countering Insecurity in South Sudan”, Africa Report No. 154 – 23 December 2009, p. i.

approximately 15 000 people have fled to Ethiopia to avoid abuse and violence.⁷² A worrying observation attributed to the fighting in Jonglei is that cattle do not appear to be the primary target and reason for confrontations any longer. Instead, the killing and abduction of civilians, in particular of women and children, as well as the burning of entire villages and communities characterize the current violence.⁷³ These conditions would underscore the fact that the conflict in Jonglei has moved away from traditional cattle rustling and taken on political dimensions.

It appears that the current displacement in Jonglei meets the two core elements of the IDP definition. The recent displacement has been caused by conflict and is consequently *involuntary* in nature. Moreover, the movement of individuals has mainly occurred within South Sudan, meaning that the criterion of displacement taking place *within national borders* is also met. According to the Guiding Principles, displacement ends when IDPs choose to return to their homes or habitual residence or voluntarily decide to resettle in any part of the country. Since none of these conditions has been met, it follows that displacement is still an ongoing problem in the Jonglei context.

⁷² United Nations, Security Council, “Report of the Secretary-General on South Sudan”, 7 March 2012, S/2012/140, p. 5-7 and 14-15; Office for the Coordination of Humanitarian Affairs (OCHA), South Sudan, “Weekly Humanitarian Bulletin, 15 March 2012”, p. 1-2.

⁷³ United Nations, Security Council, “Report of the Secretary-General on South Sudan”, 7 March 2012, S/2012/140, p. 5-7.

4 The protection needs of IDPs

4.1 Introduction

Having clarified the meaning of internal displacement in chapter 3 (above) as well as different reasons for displacement occurring in Jonglei State, the current chapter identifies and examines the protection needs among internally displaced persons. Initially, section 4 investigates if there is a universal character to the protection needs among IDP populations. Using material collected during the field study, the protection needs of internally displaced persons in Jonglei State will be identified and considered. An accurate picture concerning the protection needs of IDPs is essential when trying to answer the question of whether or not the framework of international protection meets the protection needs of IDPs.

4.2 Universal protection concerns among IDPs

Since internal displacement can occur due to several reasons, e.g. as a consequence of persecution, conflict, natural disasters or development projects, the protection needs of internally displaced persons vary accordingly. Nevertheless, common or universal protection concerns can still be identified among the majority of persons living in displacement. The current section will therefore illustrate protection issues that arise in most cases of internal displacement.

A feature common among all internally displaced persons, irrespective of the cause of their displacement, is the fact that they have been forced or obliged to leave their homes and as a result suffer from a lack of shelter/housing. Although shelter is included as a basic component when assisting refugees, there is no UN or other agency that meets this need concerning IDPs in humanitarian crises.⁷⁴ Since the lack of shelter follows automatically from the precise nature and definition of displacement –

⁷⁴ E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 16.

*persons who have been forced or obliged to flee or to leave their homes or places of habitual residence*⁷⁵ – it is surprising that such an obvious need has been ignored. Forced to flee their homes IDPs often find themselves cut off from their land, livelihood and ordinary means of income. Moreover, displaced persons are frequently compelled to leave almost all of their belongings behind. In many cases, internally displaced persons find their property occupied or destroyed when returning home, therefore restitution and/or compensation for lost property is a common need among many returning IDPs.⁷⁶ Thus, it can be said that displacement by its very nature strips the individual of two basic components vital for a decent life – shelter/housing and the opportunity to work and have an income. The outset of displacement, often initiated by the loss of shelter and ordinary means of income, creates a set of circumstances that frequently cause further protection concerns.

During and following flight, family detachment is very common. Being displaced and without family or relatives, separated children are extremely vulnerable and susceptible to abuse. Although displaced persons in general suffer from a higher risk of violence and ill-treatment, displaced, separated children are even more susceptible to acts of violence, sexual assault, trafficking and forced conscription by regular forces or armed groups/militias in situations of armed conflict or unrest. However, the greatest threat to the security of children is not always external; it may well originate from within the displaced community. In camp-like situations, children – especially girls – seem to run a higher risk of being abused or raped by a camp member than an outsider. In addition to the destitute situation of internally displaced persons, children born through rape normally experience a higher risk of being abandoned by their families as well as falling victims to discrimination and neglect by their own communities. Moreover, displacement interrupts the education of children

⁷⁵ See the *Guiding Principles on Internal Displacement*, Introduction: Scope and Purpose, para. 2

⁷⁶ Internal Displacement Monitoring Center (IDMC), “Internal Displacement – Global Overview of Trends and Developments in 2010”, 27; UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, para. 269; S. Castles and N. Van Hear with J. Hart, C. Wolff and P. Ryder, “Developing DFID’s Policy Approach to Refugees and Internally Displaced Persons”, Volume 1: Consultancy Report and Policy Recommendations, February 2005, p. 29.

and harms their right to develop. In camps where education opportunities do exist, it is not uncommon that education is being used as a tool for political indoctrination and militarization.⁷⁷

Forced to flee and abandon their homes, leaving their normal source of income/livelihood behind and cut off from their land, IDPs frequently experience food shortages. The World Food Program (WFP) observed that IDPs often are the main beneficiaries of the organisation's assistance. Food insecurity and malnutrition among IDPs often result in other serious health risks, frequently in environments where healthcare is non-existent or provided at a basic level.⁷⁸ Women are a particularly vulnerable group in situations of forced displacement. In addition to being the backbone of the family, women face greater challenges than others during conditions of internal displacement because of special needs such as personal privacy or reproductive health care. Records show that gender specific violence, e.g. (marital) rape and spousal battering, increase during displacement. Having lost their sources of income/livelihood many displaced women are forced into prostitution and exposed to trafficking.⁷⁹

Often fleeing their homes under imminent danger and not able to bring personal belongings, many persons living in displacement lack documentation. This also applies to a considerable number of children that are born in an internal displacement situation. The lack of documentation may result in the denial of healthcare, education, access to justice (e.g.

⁷⁷ Human Rights Watch, "Always on the Run – the Vicious Cycle of Displacement in Eastern Congo", 2010, p. 5, 9, 23 and 37; UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN.4/1996/52/Add.2), "Internally Displaced Persons – Compilation and Analysis of Legal Norms", paras. 114, 124 and 165; S. Castles and N. Van Hear with J. Hart, C. Wolff and P. Ryder, *Developing "DFID's Policy Approach to Refugees and Internally Displaced Persons"*, Volume 1: Consultancy Report and Policy Recommendations, February 2005, p. 37-38.

⁷⁸ E. Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 16; UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN.4/1996/52/Add.2), "Internally Displaced Persons – Compilation and Analysis of Legal Norms", para. 195.

⁷⁹ S. Castles and N. Van Hear with J. Hart, C. Wolff and P. Ryder, "Developing DFID's Policy Approach to Refugees and Internally Displaced Persons", Volume 1: Consultancy Report and Policy Recommendations, February 2005, p. 33-35; E. Mooney, "The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern", *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 17.

property restitution/compensation) as well as voting rights.⁸⁰ The forced return of IDPs is another feature that has the potential to put people at great risk. In many cases, returnees will face the same abuses and human rights violations that caused their flight in the first place. Unlike refugees, who normally can rely on the assistance and protection of UNHCR when returning to their places of habitual residence, a corresponding mechanism for providing protection to returning IDPs does not exist.⁸¹

In addition to the loss of home, land, income, commodities or other forms of property, situations of internal displacement also raise concerns of a less tangible nature; these include symbolic goods such as cultural heritage, friendship and the sense of belonging to a particular place.⁸²

4.3 Protection needs in the South Sudanese context

The field study in South Sudan provided an excellent opportunity in gaining access to unfiltered information on protection issues concerning IDPs. Similarly, the completed interviews and discussions with professionals working on protection related issues proved very valuable, not least due to their practical experience of working in the field. The current section briefly points out some of the protection concerns that were identified among the IDP population in Jonglei State. The presentation is not exhaustive since such an undertaking appears to go beyond the possible scope of this thesis.

4.3.1 Physical protection concerns

Due to the conflict-related nature of recent displacement in Jonglei, physical protection concerns among IDPs was a topic of great concern highlighted

⁸⁰ UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, paras. 258 350.

⁸¹ E. Mooney, “The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 18.

⁸² S. Castles and N. Van Hear with J. Hart, C. Wolff and P. Ryder, “Developing DFID’s Policy Approach to Refugees and Internally Displaced Persons”, Volume 1: Consultancy Report and Policy Recommendations, February 2005, p. 29.

during all completed interviews.⁸³ Risks and violations related to the physical protection of IDPs ranged from killings, torture, rape, inhumane and degrading treatment to abductions/kidnappings as well as beatings. For an in-depth study and a more comprehensive portrait of the violence affecting Jonglei during the last year, see a related report published by UNMISS in June 2012.⁸⁴ Violations of the physical integrity of IDPs were (and are) partly a result to the absence of state institutions and a functioning security infrastructure.

Moreover, all interviews indicated serious protection concerns regarding gender based violence (GBV) among internally displaced persons in Jonglei.⁸⁵ Later on, these concerns were proven valid when the above-mentioned report from UNMISS confirmed the presence of widespread abductions targeting women and children. Following abduction, the women were forced to marry members of the rival/enemy tribe and frequently subjected to rape.⁸⁶

Regarding question of forced recruitment, the answers received during the interviews did not provide a uniform view. Out of nine interviews only three indicated the existence of forced recruitment affecting IDPs, two of the persons interviewed rejected the presence of forced recruitment and the rest of the answers given were more obscure.⁸⁷ I believe that the answers illustrate the sensitivity surrounding the issue of forced recruitment from IDP and refugee camps in South Sudan. The existence of such recruitment has in many cases been used by the enemy as justification for attacking refugee and/or IDP populations – an obvious reason why humanitarian agencies deny its existence. Given this background and that some information indicates its existence, forced recruitment of IDPs is identified as a protection concern within the scope of the current thesis.

⁸³ Interviews 1-9, question 2.12 (2).

⁸⁴ United Nations Mission in South Sudan (UNMISS), “Incidents of Inter-Communal Violence in Jonglei State”, June 2012.

⁸⁵ Interviews 1-9, question 2.12 (3).

⁸⁶ United Nations Mission in South Sudan (UNMISS), “Incidents of Inter-Communal Violence in Jonglei State”, June 2012, p. 16 and 25.

⁸⁷ Interviews 1-9, question 2.12 (6).

4.3.2 Subsistence needs

Subsistence needs among the displaced is a concern globally, therefore it goes without saying that such needs among IDPs in one of the world's poorest countries are desperate. During April 2012, food security monitoring showed alarming levels of malnutrition in Jonglei State.⁸⁸ The study was not targeting IDPs specifically but rather illustrating the situation among the State's entire population. However, keeping in mind that IDPs lose their ordinary occupation (including farming) and consequently have no income, IDPs were most likely found among the part of the population with the worst levels of malnutrition. Out of nine interviews, all but one indicated a desperate need for food distribution, medical care, clothes and shelter.⁸⁹

Although it may not usually fall within the family of subsistence needs a short note will be made about family related concerns identified throughout the field study. All but one of the interviews indicated substantial needs concerning family related issues.⁹⁰ Most worrying was perhaps the huge number of women and children missing and/or abducted⁹¹ as well as children separated from their family without knowing the fate of their loved ones.

4.3.3 Other observations

The protection concern among the displaced population in Jonglei State is multifaceted and complex; undoubtedly protection needs vary from one region to the other. During the current study, humanitarian actors were still unable to access several localities in the State due to security constraints or the lack of roads and necessary infrastructure. Nevertheless, the two main needs – **physical protection** and **subsistence needs** – were identified and emphasized in a majority of the interviews, as well as reflected in relevant reports. The current section tries to complement the two previous ones and explores other observations related to the protection of IDPs.

⁸⁸ Office for the Coordination of Humanitarian Affairs (OCHA), "South Sudan Weekly Humanitarian Bulletin", 13 April 2012, p. 3.

⁸⁹ Interviews 1-9, question 2.12 (7).

⁹⁰ Interviews 1-9, question 2.12 (10).

⁹¹ United Nations Mission in South Sudan (UNMISS), "Incidents of Inter-Communal Violence in Jonglei State", June 2012, p. iii.

Most commentators would agree that the best protection against displacement is preventing it from occurring in the first place. In many cases simple rumours and anecdotal information, e.g. concerning the movement of the enemy and/or the access to food, have caused displacement in Jonglei.⁹² Hence, it seems that the **lack of information** (or access to incorrect information/rumours) has the potential to engender displacement. Providing the affected population with updated and corroborated information is thus likely to reduce or prevent displacement from occurring. Information could be distributed through normal radio channels, since many people nowadays have access to radios or a cell phone with a radio function, or know someone who has.

Discrimination is often identified as a root cause to displacement.⁹³ In the case of Jonglei the feeling of **marginalization and discrimination** among ethnic groups is most certainly one of the reasons behind the conflict. However, discrimination of the IDPs in Jonglei was not identified as a problem during any of the interviews.⁹⁴ Since discrimination frequently causes and seems to be present in situations of displacement, one can only speculate about its perceived absence in Jonglei State. The absence of systematic discrimination may be because state institutions, whose agents and authorities in many cases are the perpetrators of discriminatory treatment, are nonexistent.

Property related needs among IDPs were echoed in all but two of the interviews. Property related issues were also identified as one of the underlying causes of the conflict as well as a cause for recurring displacement.⁹⁵

A majority of the professionals interviewed thought that a provision on **non-refoulement** of IDPs, corresponding to Article 33 of the 1951 Refugee Convention, would have a positive impact and improve the protection of IDPs.⁹⁶ A revision of Article 33 in the Refugee Convention is obviously

⁹² Interview 1, question 1.2.

⁹³ UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), "Internally Displaced Persons – Compilation and Analysis of Legal Norms", para. 48.

⁹⁴ Interviews 1-9, question 2.12 (1).

⁹⁵ Interviews 1-9, question 2.12 (21).

⁹⁶ Interviews 1-9, question 2.12 (24).

needed in order to prohibit the expulsion/return of IDPs to places where their life or freedom would be at risk.

4.3.4 Institutional protection issues

Institutional protection is important when a group of individuals lack the capacity to protect themselves. Since IDPs in many cases are deprived of shelter, food, family and income, they need all the protection and assistance they can get. Moreover, institutional protection is critical when resources are limited, which often can be the case in countries hosting populations of IDPs.

Unlike the issue of legal protection presented in section 4.3 above, the answers from my interviewees became a lot more obscure and ambiguous when turning to the question of institutional protection of IDPs. For the most part, institutional protection would involve an organization devoted to the protection and well-being of IDPs, working directly with government counterparts in affected countries on topics of concern. Unfortunately, some did not seem to have a clear idea of the meaning of institutional protection. This might partially be explained by the general context in South Sudan; due to various reasons a majority of the humanitarian protection agencies only seem to be involved with emergency assistance, providing people with shelter, food and water. However, the seemingly limited understanding of institutional protection also appears to depend on a simple lack of knowledge.

Overall there seemed to be a somewhat universal understanding among the interviewees that a lack of clarity and provisions existed when it came to the responsibility resting on respective organizations involved in IDP protection. In some cases, IDPs were “falling between the cracks”. Clearly there was no organization advocating solely for IDP related issues on the cluster level.⁹⁷ However, the opinions on how to respond to this situation diverged. Answering the question on what could be done to improve the institutional protection of IDPs a majority of the interviewees supported the

⁹⁷ Interviews 2, 4, 7 and 8, question 3.4, Interview 9, question 3.3. For an introduction to the cluster system and the protection cluster in South Sudan, see <http://southsudanprotectioncluster.org/>, 2012-10-08.

idea of expanding the existing mandate of UNHCR to include the protection of IDPs as well. Nonetheless, a minority thought that the creation of a brand new organization, working exclusively with IDP issues, was the right way forward.⁹⁸

There were several advantages supporting an expansion of UNHCR's mandate. First, the organization is already familiar with situations of mass displacement, and since protection issues among refugees and IDPs are often very similar the organization had clear operational advantages.⁹⁹ Other interviewees thought that the mandate of UNHCR as such was not the problem since the organization already took on situations of internal displacement; rather the main concern consisted of capacity issues and the ability to act in a given situation. However, when funds were lacking, the same interviewee also opined that there were selected situations where organizations decided to engage in assisting IDPs. Given the fact that no specific organization works exclusively with the assistance of IDPs, the group ran the risk of being forgotten and their needs given lower priority in relation to other vulnerable groups.¹⁰⁰

A potential problem that was discerned from the interviews and my stay in South Sudan was the short term approach donors and humanitarian partners applied to IDP related issues. There was a complete focus on the delivery of humanitarian aid and assistance during the protection cluster meetings I was able to attend. No organization seemed to be interested in, or have the time to establish, assist and/or construct institutions or structures that could provide long term solutions and protect the rights of IDPs. Short term assistance is critical in many situations in order to keep a population alive. Nonetheless, humanitarian assistance alone does not seem to have the capacity to deliver a sustainable solution to a problem that normally depends on something more than the lack of food or shelter. The shortage of food and shelter are normally only symptoms of the violations of other rights.

Due to situations of selectivity, the institutional protection of IDPs appears to be insufficient, at least when compared to, for example the protection regime of refugees. If this gap is to be filled by a new organization or the

⁹⁸ Interviews 1, 2, 4, 5, 6, 7 and 8, questions 3.6 and 3.7.

⁹⁹ Interviews 4 and 8, question 3.4 and 3.7.

¹⁰⁰ Interview 2, questions 3.4 and 3.7.

expansion of UNHCR's mandate are questions raised that will be dealt with in section 5.4 below. For now, observing that there is a perceived gap in the institutional protection of IDPs among protection professionals working in the field suffices.

5 IDPs and protection in international law

5.1 IDPs and refugees: equal needs but different protection

Chapter 5 identifies avenues of international legal and institutional protection available to internally displaced persons. The current section examines differences and similarities between IDPs and refugees, the protection provided to the latter group and the possibility of extending said protection to IDPs. Section 5.2 provides an overview of applicable bodies of law and their interaction in situations of internal displacement. The protection of IDPs in international law will be examined in section 5.3. Last, section 5.4 studies aspects of the institutional protection available to IDPs.

Internally displaced persons and refugees are essentially created by the same root causes: armed conflicts and human rights abuses.¹⁰¹ Likewise, the harsh situations suffered by IDPs and refugees are very similar, making their protection needs almost identical.¹⁰² Several commentators have therefore argued that internally displaced persons should be afforded the same protection as refugees.¹⁰³ However, as clarified in section 3.1 above, IDPs and refugees are two different (legal) categories of persons according to international law and thus not entitled to equal standards of protection. The present section identifies the reasons given for the different standards of protection and examines their sustainability. To understand the different

¹⁰¹ L. T. Lee, "Protection of Internally Displaced Persons in Internal Conflicts", *ILSA Journal of International and Comparative Law* (1997), vol. 3, no. 3, p. 529.

¹⁰² N. Geissler, "The International Protection of Internally Displaced Persons", *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 457; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 25.

¹⁰³ See for instance A. Shacknove, "Who is a Refugee?", *Ethics* (1985) vol. 95, no. 2, p. 275-284; L. T. Lee, "Internally Displaced Persons and Refugees: Toward a Legal Synthesis?", *Journal of Refugee Studies* (1996) vol. 9, no. 1, p. 27-42.

approaches applied to the protection of IDPs on the one hand and refugees on the other, it is necessary to study the theoretical basis of each concept.

For a person to be considered a refugee, he/she should have crossed an international border because of a well-founded fear of persecution.¹⁰⁴ This simplified legal definition of a refugee is based on the principle that in a normal state of affairs there exists a bond of trust, loyalty, assistance and protection between the citizen and the state (“the social contract”). When this bond is severed the Refugee Convention stipulates for surrogate or stand-in protection by the receiving state. In light of this definition of a refugee, this bond is broken through the display of *persecution* and *alienage*. Accordingly, the conception of a refugee provides the theoretical basis of its definition.¹⁰⁵ However, the regional and broader definitions of a refugee (see section 3.1.1 above) show that the bond between a citizen and her state can be wrecked in a number of ways, and not merely due to the existence of persecution. It can even be argued that persecution, and the present definition of the Refugee Convention, does not capture the core of refugeehood; i.e. the *failure of the state to protect the citizen’s basic needs*. A basic need/human rights approach has partially been incorporated into the regional refugee definitions in Africa and Latin America and implies that the state has a responsibility to protect, not only the individual’s basic political and civil rights, but also economic and social rights. Since persecution only succeeds in illustrating one of the ways the bond between the citizen and the state can be severed, and consequently when surrogate protection should be afforded, the current refugee definition suffers of an inadequate theoretical basis.¹⁰⁶ To argue that IDPs should not be granted equal standards of protection as refugees owing to the mere fact that they have not been subjected to persecution seems to be invalid. In fact, the present definition of IDPs captures and illustrates the different ways the bond between state and citizen can be severed more thoroughly than the Refugee Convention, since the latter only concentrates on the existence of persecution and excludes other manifestations of a wrecked bond between citizen and state.

¹⁰⁴ See Article 1(A)(2) of the 1951 Refugee Convention.

¹⁰⁵ A. Shacknove, “Who is a Refugee?”, *Ethics* (1985) vol. 95, no. 2, p. 275.

¹⁰⁶ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 20-21.

As to the second criteria provided by the refugee concept – *alienage* – a comparison with the notion of IDPs becomes more challenging and complicated. According to Shacknove and in light of the reasons presented above, border crossing is irrelevant to the concept of refugeehood. Since refugeehood is determined by the existence/non-existence of an inherent political bond between the state and the citizen, the importance of a territorial relationship – implied by the element of border crossing – is conceptually irrelevant to the notion of a refugee. Shacknove consequently suggests that border-crossing, as persecution, is simply a subset of a broader category/criteria that should be applied to determine refugee status, namely the “physical access of the international community to the unprotected person”.¹⁰⁷ In this context, “access” means the ability of states or international organizations to supply necessary material or diplomatic assistance unhindered by the government of the country of origin or alike.¹⁰⁸

Although considered conceptually irrelevant by several prominent scholars the border-crossing requirement is still viewed as a central element of the refugee definition.¹⁰⁹ But, if not conceptually relevant to refugeehood, why then is border-crossing so central to the current definition of refugees? The importance of border-crossing in the current legal definition of refugees, effectively excluding people who find themselves in situations of internal displacement, owes to the notion of sovereignty and the centrality of the state as the principal subject in the international legal system. In addition, border-crossing or alienage symbolizes a physical manifestation of the wrecked union between citizen and her state. Limited resources for dealing with situations of displacement should not be underestimated as another reason for excluding IDPs from the current refugee definition.¹¹⁰ Consequently, the requirement of border-crossing in the Refugee Convention reflects the cardinal principle of the legal system in which the Convention operates, i.e. state sovereignty.

The different approaches applied to refugee protection on the one hand, and the protection of IDPs on the other, cannot be justified because of the lack of persecution concerning the latter group. As illustrated above, persecution

¹⁰⁷ A. Shacknove, “Who is a Refugee?”, *Ethics* (1985) vol. 95, no. 2, p. 277, 282-283.

¹⁰⁸ *ibid*, p. 277.

¹⁰⁹ See for instance J. Hathaway, *The Law of Refugee Status*, (Butterworths 1991), p. 29.

¹¹⁰ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 22-23.

is but one manifestation of a broader phenomenon central to the notion of refugeehood: *the absence of state protection of the citizen's basic needs*. The absence of state protection is a phenomenon central to the notion of displacement and the definition of internally displaced persons. However, although not conceptually relevant to refugeehood it can be argued that the element of border-crossing/alienage reflects a fundamental characteristic of the international legal system, i.e. state sovereignty, effectively excluding IDPs from the international protection extended to refugees. Since the factual legal situation of refugees and IDPs is not comparable, a synthesis where IDPs are incorporated under the legal status of refugees, and hence afforded the same protection, is not in accordance with the general principles of international law.¹¹¹ Thus, even though IDPs and refugees are created by the same causes and face similar protection concerns the legal protection of IDPs cannot be founded on refugee law. Unfortunately, the conclusion made above does not improve the situation of IDPs. If not directly caused by state authorities their situation of displacement is often an indirect consequence of the lack of protection from the same government. The above reason for displacement combined with the notion of state sovereignty, which effectively hinders external protection or at least makes such protection dependent on the will and ability of the state concerned, puts internally displaced persons in a situation that could be described as “protection limbo”.

5.2 Applicable bodies of law

The section above concludes that internally displaced persons cannot benefit from the regime of protection constructed in favour of refugees, although the two groups share many similar characteristics. Instead, the main provisions protecting IDPs are found in human rights law and humanitarian law.¹¹² Refugee law can merely serve as a point of orientation when looking for protection in human rights- and humanitarian law.¹¹³

¹¹¹ N. Geissler, “The International Protection of Internally Displaced Persons”, *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 457.

¹¹² E. D. Mooney, “Principles of protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38, no. 6, p. 81; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 41-42; N. Geissler,

At a closer look it can be observed that humanitarian law only applies in situations of armed conflicts. Likewise, the application of human rights law can be restricted, and in some situations even derogated from.¹¹⁴ Thus, the framework of IDP protection available in international law appears to be *situation-dependent*.

The Compilation and Analyses of Legal norms conducted by the Special Representative on internal displacement, as well as other contemporary studies on the subject, highlight the relation of complementarity between human rights law and humanitarian law. Each body of law alone does not provide sufficient protection for IDPs, but used together and in a complementary manner they have the potential to do so.¹¹⁵

Without looking into every article found in human rights law and humanitarian law IDP protection, according to the arguments made above, therefore seems to rest on the assumption that human rights law and humanitarian law interact and operate in a complementary and harmonic manner. Hence, a conflict of norms between the two bodies of law could have a potentially devastating effect to the current notion of IDP protection. Said question seems to be of central importance when examining the international legal protection of IDPs since it would have a direct effect concerning applicable protection to IDPs. For this reason, the prospects of a possible conflict between human right law and humanitarian law will be dealt with in the following chapter.

“The International Protection of Internally Displaced Persons”, *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 459.

¹¹³ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 43-44.

¹¹⁴ See ICCPR Article 4(1).

¹¹⁵ See for instance UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, paras. 7 and 27; W. Kälin, “The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool”, *Refugee Survey Quarterly* (2005), vol. 24, issue 3, p. 28; R. Cohen, “Developing an International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 92; E. D. Mooney, “Principles of Protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38, no. 6, p. 81; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press, 2004), p. 40-42.

5.3 International legal protection and its limitations

The present section will outline the operational features of human rights- and humanitarian law and examine how these features can affect and limit the applicability of respective body of law in situations of internal displacement. It will also highlight some of the material protection available to IDPs, as well as identifying protection gaps in relation to the needs of IDPs from chapter 4 above.

5.3.1 Human rights law

Human right violations are one of the main reasons to the occurrence of internal displacement. Similarly, human rights concerns are at the centre during displacement as well as during return or reintegration. Therefore, human rights law is a primary tool when dealing with the plight of internally displaced persons, especially keeping in mind that IDPs remain effectively cut off from the protection available to refugees.¹¹⁶ Human rights law applies in peace as well as in situations of armed conflicts, although several provisions can be restricted or even derogated from in the latter context.¹¹⁷

Human rights law applies to every individual within the territorial and effective jurisdiction of a state. Notwithstanding the fact that IDPs have been forced to flee their homes, human rights law remains intact and apply at all times – before, during and after displacement.¹¹⁸ The main purpose of human rights law is to protect persons from state abuse. According to the contemporary understanding of human rights the duties of states towards individuals within their jurisdiction includes both *negative and positive obligations*. From an internal displacement perspective negative obligations

¹¹⁶ E. D. Mooney, “Principles of Protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38, no. 6, p. 82.

¹¹⁷ E-C. Gillard, “The Role of International Humanitarian Law in the Protection of Internally Displaced Persons”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 38; see also e.g. Article 4 of the ICCPR.

¹¹⁸ W. Kälin, “The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool”, *Refugee Survey Quarterly* (2005), vol. 24, issue 3, p. 28; E. D. Mooney, “Principles of Protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38, no. 6, p. 82.

would include a duty not to displace individuals, e.g. through harm, inhuman or degrading treatment. Positive obligations comprise e.g. a duty to provide sufficient food or health care services to IDP populations, but also to prevent displacement from being caused by a third party.¹¹⁹

Sources of human rights protection relevant to IDPs can be traced to both international customary and treaty law. An illustration of customary law relevant to IDPs would be *parts* of the 1948 Universal Declaration of Human Rights (UDHR) and the Refugee Convention. Such provisions would include the right to life, non-discrimination, the prohibition of torture and slavery as well as non-refoulement.¹²⁰ Applicable treaty law includes a wide range of conventions such as the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Prevention and Punishment of the Crime Genocide, the International Convention on the Elimination of all Forms of Racial Discrimination, the Convention on the Elimination of all Forms Discrimination Against Women and the Convention on the Rights of the Child. In addition to the enumerated instruments above, protection relevant to IDPs can be found in various regional human rights conventions. The existing framework of human rights law provides IDPs with a wide array of protection. However, as implied by the names of respective convention above, forced displacement has *never been in focus in the development of human rights*.¹²¹ This is true with the exception of the recent Kampala Convention of the African Union. However, said Convention has not yet entered into force.

The main areas of protection needs that were mapped during the field study in South Sudan were physical protection concerns, subsistence needs and

¹¹⁹ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 44.

¹²⁰ D. Shelton, *International Law and 'Relative Normativity'*, from M.D. Evans (ed.), *International Law*, (2nd. edn. Oxford University Press 2006), p. 169-171; J. Allain, "The Jus Cogens Nature of Non-Refoulement", *International Journal of Refugee Law* (2002) vol. 13, no. 4, p. 533 and 557; M. Nowak, *Introduction to the International Human Rights Regime*, (Brill Academic Publishers 2003), p. 19-20.

¹²¹ UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), "Internally Displaced Persons – Compilation and Analysis of Legal Norms", paras. 13-16; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press, 2004), p. 42-43.

property related needs.¹²² These areas, among others, are also identified as main areas of concern in the Compilation conducted by the Special Representative on internal displacement.¹²³ When looking closer into relevant parts of human rights law, e.g. the UDHR, the ICCPR and the ICESCR, the above protection needs appear to be quite well met.¹²⁴ The fact that most IDPs still face such concerns would imply that the main issue is not a lack of (substantive) human rights law provisions but rather the *implementation* of the same. This observation is shared by Phoung and was also voiced during several of the interviews during the field study.¹²⁵ Despite the fact that human rights law seems to provide a pretty well functioning web of protection for IDPs, there are areas of the law which appear to be inadequate or ambiguous. These areas will be examined in section 5.3.3 below.

5.3.2 Humanitarian law

Since armed conflict constitutes the main reason to forced displacement, including internal displacement, international humanitarian law plays a central role in the protection of IDPs. Humanitarian law regulates the permissible methods and means of warfare and aims to protect persons not or no longer taking part in hostilities, including civilians and consequently internally displaced persons. In contrast to human rights law, which in principle is binding on states only, humanitarian law is binding on both states and organized armed groups. The applicability of humanitarian law to organized armed groups is particularly important considering the fact that most IDPs are found in situations of non-international armed conflicts which involves one or several organized armed groups.¹²⁶

¹²² See p. 39-42 above.

¹²³ UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, paras. 66, 180 and 269.

¹²⁴ See e.g. Article 2, 3 and 17 Universal Declaration of Human Rights, Article 11 ICESCR and Article 7 ICCPR.

¹²⁵ C. Phoung, *The International Protection of Internally Displaced Persons*, (Cambridge University Press, 2004), p. 43; see e.g. Interviews no. 1, 2, 5, 7 and 8, question 2.4.

¹²⁶ E-C. Gillard, “The Role of International Humanitarian Law in the Protection of Internally Displaced Persons”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3. p. 38-39; D. Mooney, “Principles of Protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38, no. 6, p. 82-83; C. Phoung, *The International Protection of Internally Displaced Persons*, (Cambridge University Press, 2004), p. 44-45.

Although IDPs are not expressly mentioned in any international humanitarian law instrument this does not mean that they are not protected. Since IDPs are civilians like any other individual not taking direct part in the hostilities during an armed conflict, the provisions concerning their protection can mainly be found in the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, the two Additional Protocols as well as in international customary humanitarian law.¹²⁷ Provisions in humanitarian law can be used both as preventing displacement from occurring and as protection during displacement. However, as mentioned above the scope of humanitarian law applicable in a given situation depends on the conflict in question – if the conflict reaches the threshold criteria for an international armed conflict or a non-international armed conflict. Accordingly, the pending question is how said condition affects the protection available to IDPs.

In *international armed conflicts*, IDPs enjoy the same level of protection as civilians since IDPs essentially are civilians uprooted from their homes. The protection provided by humanitarian law in international armed conflict is quite comprehensive and provisions relevant to IDPs can be found in both the Fourth Geneva Convention and Additional Protocol 1. The fundamental principle of humanitarian law is that wars should be fought between the armed forces of states parties to a conflict and affect the civilian population as little as possible. This principle is manifested, amongst others, in the rule that expressly prohibits individual or mass forcible transfers.¹²⁸ However, said rule only applies on *occupied territories*, effectively curtailing its potential preventive effect. Additionally, the rule admits forcible transfers on occupied territories, e.g. if imperative military reasons would demand so. The prohibition of forcible transfers of civilians also applies in non-international armed conflicts¹²⁹ and is included in the list of war crimes under jurisdiction of the International Criminal Court (ICC).¹³⁰ Additional protection encompassing IDPs are provisions which aim to spare the civilian population from hostilities, these include e.g. the prohibition of targeting

¹²⁷ Due to the limited scope of this thesis a deeper study of international customary law is excluded from the presentation.

¹²⁸ Article 49, part III, 1949 Convention (IV) Relative to the Protection of Civilians in Times of War.

¹²⁹ Article 17, part IV, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

¹³⁰ Article 8(2) vii, Rome Statute of the International Criminal Court.

civilians; the prohibition on indiscriminate violence; a duty to take precaution in attacks to spare the civilian population; the prohibition of targeting civilian property and the prohibition on the starvation of the civilian population as a method of warfare.¹³¹

As illustrated in the paragraph above civilians, and hence IDPs, are provided a relatively comprehensive list of protection during international armed conflicts. Nevertheless, several provisions only apply in limited contexts, i.e. on occupied areas, effectively curtailing their applicability. However, the frequency of international armed conflicts today is low, and it is adjacent to non-international armed conflicts that the highest number of internally displaced persons can be found.¹³²

The only provisions applicable during *non-international armed conflicts* are Article 3 common to the Geneva Conventions (common Article 3) and Protocol II. The threshold of application for Protocol II is high since it only applies to a conflict (not covered by Protocol I) “*which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over parts of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*”.¹³³ Hence, Protocol II is *not* applicable in situations where two or more armed groups fight each other on the territory of a state party to the convention. Since most of the violence taking place in South Sudan is violence *between ethnic groups*, including the conflict in Jonglei, Protocol II does not apply to said situations, notwithstanding the issue of South Sudanese ratification. In addition to the criteria of government forces, the element of territorial control effectively curtails the applicability of Protocol II in modern armed conflicts.¹³⁴

¹³¹ Articles, 51(2); 51(4); 57; 52 and 54, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I).

¹³² J-H Eschenbächer, “The Global Internal Displacement Crisis: Recent Developments and Perspectives for an Improved International Response”, *Refugee Survey Quarterly* (2005) vol. 24, issue 3, p. 51; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 45.

¹³³ Article 1(1), part I, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

¹³⁴ D. Fleck (ed.), *The law of Non-international Armed Conflicts*, from *The Handbook of International Humanitarian Law*, (Oxford University Press 2010), p. 609-610.

Common Article 3 to the Geneva Conventions has a lower threshold of applicability than Protocol II and does not require the involvement of government forces.¹³⁵ Common Article 3 stipulates that civilians shall be treated humanely and without discrimination, it also contains a short list of prohibited acts including the prohibition of humiliating and degrading treatment. The wording of Common Article 3 is quite general and not as specific as the provisions found in Protocol II.

It can be said that international humanitarian law provides quite a comprehensive protection applicable to civilians, especially on occupied territory during international armed conflicts. However, humanitarian law is less concerned with the manner in which civilians are treated by their own state or by organized armed groups in situations of international armed conflicts, the protection is particularly weak in non-international armed conflicts.¹³⁶ Noticeably, it is in the latter type of conflicts where the highest numbers of IDPs can be found today.¹³⁷

5.3.3 Gaps and imperfection concerning the legal protection of IDPs

In the sections above limitations concerning the applicability of human rights law and humanitarian have been examined. This is a question central to the notion of IDP protection since it effectively limits available frameworks of legal protection. In order to answer the main question of this thesis the current section will continue to examine if the provisions of legal protection in international law address the legal protection needs of IDPs (as identified in chapter 4 above). Instead of enumerating every single provision in international law that could apply to situations of internal displacement the current section will identify *areas* and/or situations where the protection of IDPs is unclear or insufficient.

¹³⁵ D. Fleck (ed.), *The law of Non-international Armed Conflicts*, from *The Handbook of International Humanitarian Law*, (Oxford University Press 2010), p. 609.

¹³⁶ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 45-46

¹³⁷ R. Cohen, "Developing an International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 89; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press, 2004), p. 45-46.

The Compilation and Analyses of Legal Norms drafted by the Special Representative highlights four areas of insufficient or non-existent protection concerning IDPs. The first one has already been identified in sections 5.3.1. and 5.3.2 above and concerns the situation-dependent nature of human rights- and humanitarian law and their limited applicability in certain situations. In situations of tensions and disturbances, which do not meet the threshold of an armed conflict, humanitarian law does not apply. At the same time, situations of tensions and internal disturbances allow for the restriction or sometimes even the derogation from human rights law. These situations represent a state of legal vacuum in which IDPs are left without key protection crucial to their well-being and survival. In situations of non-international armed conflicts human rights norms can be restricted or derogated from and the high requirements of applicability of Protocol II leaves IDPs only with Common Article 3 as their last legal lifeline.¹³⁸ In the discussion below this area of insufficient protection will be referred to as the “*applicability gap*”.

The second area of insufficient protection concerns situations where no norm/article exists to address identified needs of IDPs. For instance legal norms are missing concerning the right not to be arbitrarily displaced or the right to restitution or compensation for property lost as a consequence of displacement during armed conflict. Likewise, there is no provision regarding the right to documentation.¹³⁹ Areas where legal protection are missing is labelled “*normative gaps*” in the presentation below.

As to the third area of insufficient protection it concerns those cases where a general norm of protection exists but where such a norm fails to address the identified specific needs of IDPs. An example of this would be the general human right assuring the freedom of movement.¹⁴⁰ Concerning internally

¹³⁸ UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, para. 412; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press, 2004), p. 43.

¹³⁹ R. Cohen, “Developing and International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 92; D. Mooney, “Principles of Protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38, no. 6, p. 83; UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, para. 411.

¹⁴⁰ See for instance Article 12 of the ICCPR.

displaced persons there is no provision articulated that explicitly prohibits the forcible return to areas within their own countries where their lives would be in danger. Today, such norm can only be invoked on behalf of IDPs by analogy from the rule of non-refoulement found in refugee law and by interpretation of Article 12 in ICCPR. The absence of such articulated provision concerning the protection of IDPs seems to have a negative impact as to their protection.¹⁴¹ I will refer to this area as the “*explicit norm gap*” in the following.

Finally, there is a vacuum concerning the protection of IDPs in situations where states have not ratified fundamental human rights instruments and/or the Geneva Convention and its Additional Protocols. Such situation is not specific to the protection of IDPs but is nevertheless common and has a potentially detrimental effect on the protection mechanisms available to IDPs. Although the Geneva Conventions have been ratified by almost all countries, the same cannot be said about the two Additional Protocols. Only 166 states have ratified Protocol II.¹⁴² Where treaty law is missing, one has to rely on relevant parts of international customary law. However, this can be problematic since not all provisions in key human rights- and humanitarian law instruments have gained customary status.¹⁴³ Unsurprisingly, I will refer to this area of insufficient protection as the “*treaty gap*” in the following presentation.

The present section outlines the complex nature and different factors affecting the protection available to IDPs in a given situation. Since forced displacement frequently occurs in situations on the borderline between internal disturbances/tensions and non-international armed conflicts the

¹⁴¹ W. Kälin, “The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool”, *Refugee Survey Quarterly* (2005), vol. 24, issue 3, p. 29; UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, para. 411; R. Cohen, “Developing and International System for Internally Displaced Persons”, *International Studies Perspectives* (2006) vol. 7, issue 2, p. 92; D. Mooney, “Principles of Protection for Internally Displaced Persons”, *International Migration* (2000) vol. 38, p. 83-84.

¹⁴² See website of International Committee of the Red Cross, International Humanitarian Law – Treaties and Documents, Protocol II, available at - <http://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/index.jsp>, 2012-10-09.

¹⁴³ H. Thirlway, *The Sources of International Law*, from M.D. Evans (ed.), *International Law*, (2nd. edn. Oxford University Press 2006), p. 121-124 (Customary rules require an established, widespread, and consistent practice on parts of states; and the *opinio juris* element); C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 49-50.

applicability gap appears to be key when assessing available protection to IDPs. Even if no restrictions or derogations from human rights have been made, the normative gap in the protection of IDPs underlines their vulnerable situation. Moreover, the absence of explicit norms makes the legal protection of IDP ambiguous and one must rely on extensive interpretations of general provisions in human rights law. On top of all some countries have not ratified key instruments of human rights- and humanitarian law, which makes the protection of IDPs dependant on international customary law provisions that are not as comprehensive and detailed as treaty law. Moreover, the development of customary rules often presents theoretical difficulties, e.g. establishing the existence of the necessary psychological element among states (*opinio juris*).¹⁴⁴

5.4 The framework of institutional protection concerning IDPs

Effective legal protection requires the existence and application of legal norms. Moreover, effective legal protection entails the monitoring and enforcement of those legal rules. In the case of human rights law and humanitarian law the monitoring and enforcement should ideally be carried out by national authorities through domestic mechanisms. Since IDPs always remain under the jurisdiction of their national authorities it nevertheless becomes obvious that said institutions in many cases are unable or unwilling to monitor and/or enforce the relevant legal norms preventing displacement from occurring or protecting IDPs in situations of displacement.¹⁴⁵ Due to the described features of displacement IDPs therefore normally depend exclusively on the assistance of international organizations. Consequently, this section will examine the institutional protection provided for IDPs, since it constitutes a central part in the structure of IDP protection.

¹⁴⁴ H. Thirlway, *The Sources of International Law*, from M.D. Evans (ed.), *International Law*, (2nd. edn. Oxford University Press 2006), p. 125 and 133.

¹⁴⁵ N. Geissler, "The International Protection of Internally Displaced Persons", *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 452.

5.4.1 UNHCR and its mandate regarding IDPs

At present no organization exists with a global mandate solely including IDPs. Since refugees and IDPs in most cases suffer from similar human rights violations and thus have the same protection needs many commentators have suggested expanding UNHCR's mandate in order to include internally displaced persons.¹⁴⁶ The two main functions of UNHCR are to provide international protection and to promote the search for permanent solutions to the problem of *refugees*.¹⁴⁷ The organization's mandate is defined in Article 6 of its Statute and covers persons eligible for refugee status under the definition in the Refugee Convention, and also refugees as defined in the OAU Convention and the Cartagena Declaration. According to Article 9 of the UNHCR Statute an extension of above mandate must be subject to the approval of the General Assembly and the availability of funds in order to carry out the operation in question. In 1972 the General Assembly authorized UNHCR to assist "refugees and *other displaced persons*" in the Sudan, here referring to internally displaced persons. UNHCR's involvement in situations concerning IDPs has since then occurred more frequently and in 1991, as an answer to Turkey's refusal to keep its borders open to Iraqi refugees, the organization intervened in northern Iraq in order to provide assistance to IDPs.¹⁴⁸ The decision of intervening was controversial and manifests the inherent problem with a possible expansion of UNHCR's mandate; that is *watering down the institution of asylum*. In-country protection would accordingly undermine the protection in the Refugee Convention. The intervention to assist IDPs in Iraq was by many interpreted and criticized as an overt recognition of the failure to uphold the right of asylum.¹⁴⁹ Another problematic dimension of in-country protection is the risk of politicization. Since UNHCR and other organizations are dependent on the approval of the host state, there is always the risk of being manipulated by external agents as well as by the domestic

¹⁴⁶ See for instance R. Cohen, "Developing and International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 95.

¹⁴⁷ Article 1, UNHCR's Statute.

¹⁴⁸ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 76-81.

¹⁴⁹ *ibid*, p. 81; N. Geissler, "The International Protection of Internally Displaced Persons", *International Journal of Refugee Law* (1999) vol. 11, no. 3, p. 452;.

powers which seek to reroute humanitarian assistance to “their” supporters among the civilian population.¹⁵⁰

UNHCR’s engagement with IDPs has continued to increase but the criteria for its involvement appear to be ambiguous. The Executive Committee of UNHCR has sanctioned the organization’s involvement in situations of internal displacement provided that there is: a) a specific request, b) the consent of the parties involved, c) the availability of funds, d) the possibility of full access, e) security of the staff, f) political support, g) and depending on other UN organs’ operations in the country. In addition to said criteria and prior of involvement, UNHCR should ascertain *that the institution of asylum remains open*.¹⁵¹ In 1993 the criteria for involvement in IDP situations were developed even further by adding a “link criterion” to the above conditions (a-g). Consequently, protection and/or assistance to IDPs may only take place when

- 1) refugees are returning to areas where internally displaced persons are present;
- 2) both internal displacement and refugee flow have the same root causes, e.g. the same conflict; and
- 3) a situation of internal displacement threatens to transform into external displacement (cross-border movement).¹⁵²

The General Assembly has implicitly endorsed said criteria and UNHCR’s involvement in IDP situations, but at the same time stressed that such involvement must not undermine the institution of asylum.¹⁵³ However, even if all of the above criteria are met this does not automatically lead to the involvement by UNHCR. Consequently, no formal commitment for the UNHCR to assist internally displaced persons exists.¹⁵⁴

¹⁵⁰ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 89-90.

¹⁵¹ Note on International Protection, A/AC.96/799, UNHCR, 25 July 1992, para. 33.

¹⁵² “UNHCR’s Role with Internally Displaced Persons”, IOM/33/93-FOM/33/93, 28 April 1993, paras. 7-8.

¹⁵³ General Assembly Resolution 53/125, 12 February 1999, para. 16; see also C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 82-83.

¹⁵⁴ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 84.

5.4.2 Other institutional arrangements

Even if UNHCR takes on some situations involving internal displacement there is no international agency with a global mandate including the protection and assistance of IDPs. Moreover, UNHCR's criteria for involvement presented above allow the interest of the organization (and the donors) on a case-by-case basis, to be the determining factor of when offering assistance to IDPs. This has led to a situation where different humanitarian and development agencies assist and help IDPs in some countries but are totally absent in others. Some commentators even go as far as saying that organizations "pick and choose" IDP situations where they want to become involved.¹⁵⁵ Unfortunately, this ad hoc based approach has resulted in a situation where IDPs are not necessarily protected and/or assisted on a needs based assessment. Consequently, the results of those operations aimed at assisting and/or protecting IDPs are also ad hoc.¹⁵⁶

Instead of expanding the mandate of UNHCR another suggestion is the creation of an entire new international agency, with the primary responsibility for the protection and assistance of IDPs. However, such a solution neither enjoys the necessary political support, nor the required resources for its creation and future operation.¹⁵⁷

In the absence of a better solution the international community has taken a collaborative approach trying to solve outstanding issues concerning the institutional protection of IDPs. All of the UN agencies are supposed to work jointly, coordinated by the UN Emergency Relief Coordinator at headquarters and the Resident/Humanitarian Coordinators in the field, answering the needs of the internally displaced. The collaborative structure has not been very successful in assisting IDPs so far, no one is really in charge. This structure has resulted in little or no accountability for the internally displaced. The coordinator many times lacks the authority and the powerful UN agencies can resist his/her instructions or strategies. For

¹⁵⁵R. Cohen, "Developing and International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, p. 95.

¹⁵⁶ *ibid.*, p. 95; W. Kälin, "The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool", *Refugee Survey Quarterly* (2005), vol. 24, issue 3, p. 30.

¹⁵⁷ R. Cohen, "Developing and International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 95; C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004, p. 85-87.

instance UNHCR was able to refuse when the coordinator asked the organization to take charge of IDP camps in Darfur, Sudan. The task was therefore handed over to inexperienced organizations to the detriment of IDPs. A majority of independent evaluations conducted on the collaborative approach have concluded that it works inadequately.¹⁵⁸

According to the discussion above it can be concluded that there is an *institutional gap* regarding the protection of IDPs. No organization exists with a global mandate including the protection of IDPs. The approach so far has instead been ad hoc, and the assistance offered to IDPs varies from country to country. Moreover, a widening of UNHCR's mandate, which appears to be the most feasible solution today, is problematic. The inherent problem with in-country protection on behalf of the internally displaced is that potential asylum countries interpret such protection as a ground for restricting asylum. The dilemma for UNHCR is obvious: how to protect IDPs without undermining its core (refugee) mandate?

¹⁵⁸ UN Commission on Human Rights, Report of the Representative of the Secretary-General on Internally Displaced Persons, Francis M. Deng, March 4 2004 (E/CN.4/2004/77), paras. 22-29; W. Kälin, "The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool", *Refugee Survey Quarterly* (2005), vol. 24, issue 3, p. 30-31; R. Cohen, "Developing and International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 95-96.

6 Human rights and humanitarian law: conflict or complementarity?

6.1 The notion of fragmentation

As pointed out in section 5.2 above the legal protection of IDPs is based on the idea of complementarity between human rights law and humanitarian law. A conflict of norms between said bodies of law would seemingly have a destructive impact on the protection of IDPs. Thus, the current chapter examines aspects of a possible disharmony between human rights law and humanitarian law and potential effects concerning the protection of the internally displaced.

As an introduction to the current chapter some brief notes will be made about the fragmentation of international law. A basic understanding concerning the notion of fragmentation appears as necessary before continuing with its possible effects on IDP protection. The fragmentation study conducted by the International Law Commission (ILC)¹⁵⁹ will be used as a starting point in order to describe the meaning of fragmentation and its potential consequences on IDP protection. The institutional aspects of fragmentation and international law (how international tribunals manage potential conflicts) were left aside by the ILC¹⁶⁰ and they will neither be dealt with in this presentation, which focuses solely on the issue of possible substantive legal disharmony.

The fragmentation of international law can, rather contradictory, be explained by the ongoing globalization and an increasingly international as well as regional cooperation. The age of internationalization and

¹⁵⁹ International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law”, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006.

¹⁶⁰ *ibid.*, para. 13.

globalization has been accompanied by a dramatic increase of international and regional regimes, specialized rules and legal institutions. International law is nowadays composed of highly specialized regimes/systems, such as trade law, human rights law, environmental law, refugee law, international criminal law and humanitarian law, etc. The notion of fragmentation indicates that said systems tend to develop quite isolated from each other, specialized law-making and institutions are being developed separately from each other, although they all form part of the international law regime. This has resulted in conflicts between normative frameworks or rules from different (competing) systems reflecting different interest, and in the fragmentation of an overall perspective of the law and in the end, the rule of law.¹⁶¹

6.2 Human rights and humanitarian law – overlapping regimes

As noted in sections 5.3.1 and 5.3.2 above, human rights- and humanitarian law contain similar provisions. Both bodies of law can serve to protect the rights of IDPs since they include protective purposes. However, the proximity between human rights- and humanitarian law does not mean that inter-regime conflict is impossible. Quite the opposite, similar provisions and aims rather seem to open up for the parallel applicability of both sets of laws, and hence increase the possible scope of a conflict.¹⁶² The root cause to a possible conflict between human rights- and humanitarian law can be traced back to the purpose and conflicting interest of respective system. Humanitarian law is constructed to apply in extraordinary circumstances and protects the interests of the state parties involved in an armed conflict; its fundamental purpose is to strike a balance between military necessity and human suffering. Conversely, human rights law aims to limit the activities of states vis-à-vis the individual, effectively protecting individuals from

¹⁶¹ *ibid*, paras. 8,9,14 and 15.

¹⁶² A. E. Cassimatis, “International Humanitarian Law, International Human Rights Law, and Fragmentation of International Law”, *International and Comparative Law Quarterly* (2007) vol. 56, issue 3, p. 628.

certain behavior.¹⁶³ The consideration of military necessity is consequently absent in the operational context of human rights law. This observation illuminates the different purposes of respective body of law and also identifies the reason for a possible conflict in a situation where both frameworks apply to the same situation.

Nevertheless, the scope for a conflict of norms is limited to situations where both sets of law apply. Therefore, a conflict of norms between human rights law and humanitarian law is only possible in three situations: 1) when the threshold criteria of an international armed conflict, as defined in Common Article 2 to the Geneva Conventions, are met; 2) when the criteria for a non-international armed conflict are met according to Common Article 3 of the Geneva Conventions, and; 3) when the threshold criteria for a non-international armed conflict in Article 1 of Protocol II are fulfilled. Hence, even if there is a situation of internal unrest and violence, not reaching the threshold level of violence or intensity according to 1-3, human rights law, subjected to possible restrictions/derogations, is the legal framework that will govern the activities of states and thier duties towards individuals under their jurisdiction. The possible contexts where a conflict of norms can arise are consequently limited to *situations of armed conflicts*.

The advisory opinion in the *Nuclear weapons case* delivered by the International Court of Justice (ICJ)¹⁶⁴ and the case of *Isayeva v. Russia*¹⁶⁵ of the European Court of Human Rights (ECtHR) are examples which illustrate situations where a conflict of norms can arise. The former case demonstrates a context where competing norms can apply to the same situation and depending on the normative framework applied the effective protection of the civilian population seem to vary. In the latter case the ECtHR applied human rights law to the armed conflict in Chechnya, notwithstanding the condition that situations of armed conflict previously belonged exclusively to the regulatory framework of humanitarian law.

¹⁶³ H. Krieger, "A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", *Journal of Conflict and Security Law* (2006) vol. 11, no. 2, p. 266.

¹⁶⁴ See *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226.

¹⁶⁵ See *Case of Isayeva v. Russia*, application no. 57950/00, ECtHR, 24 February 2005.

The following section examines how international and regional courts have dealt with the parallel applicability of human rights law and humanitarian law and what (if any) implications it has concerning the protection of civilians and consequently IDPs.

6.3 The application of *lex specialis* and its implications for IDPs

The application of the *lex specialis* maxim to normative conflicts between human rights law and humanitarian law has been confirmed by the ICJ in its advisory opinion of the Nuclear weapons case:

*“The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely the law applicable in armed conflict which is designed to regulate the conduct of hostilities.”¹⁶⁶*

The *lex specialis* rule is a widely recognized maxim of legal interpretation and used to resolve normative conflicts. It stipulates that a particular rule should take precedence over a general standard when both provisions regulate the same subject matter. The *lex specialis* maxim is based on the idea that a more specific rule is preferred over its general counterpart due to its appropriateness of resolving a given situation. In addition, given the specific nature of international law making, a more particular provision should better reflect the intentions and objectives of states – the law makers and subjects of the international law regime.¹⁶⁷

¹⁶⁶ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p.226, para. 25.

¹⁶⁷ H. Krieger, “A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, *Journal of Conflict and Security Law* (2006) vol. 11, no. 2, p. 269; International Law Commission, “Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of

In its advisory opinion cited above the ICJ established that although human rights law (*lex generalis*) continues to apply in times of war, the assessment of what is being considered arbitrary deprivation of life in an armed conflict is to be decided by humanitarian law (*lex specialis*, in this case).¹⁶⁸ Without saying it explicitly the Court tacitly suggests that applying humanitarian law as *lex specialis* would lead to a different result than giving precedence to human rights law. Since humanitarian law allows for proper account being given to *military necessity* and deals with extreme situations where violence is permissible, a valid conclusion appears to be that civilians, and consequently IDPs, enjoy *less protection* in situations of normative conflicts between human rights and humanitarian law.¹⁶⁹ After all, humanitarian law accepts the realities of war with incidental consequences of lawful military operations, including casualties among civilians and destruction of civilian objects.¹⁷⁰ The fact that humanitarian law deals with the abnormal conditions of war and that human rights law primarily is constructed to operate in peacetime conditions would also support such observation.¹⁷¹ It should be noted that the Court's decision is limited to the case in question, the application and outcome of the *lex specialis* maxim depends on the circumstances on a case-by-case basis.¹⁷² However, the application of respective regulatory framework to a given situation could possibly result in different outcomes. Nevertheless, keeping in mind that most situations of internal displacement occur in situations of internal conflicts – not reaching the threshold of Common Article 2 of the Geneva Conventions or Article 1 of Protocol II – it should be remembered that the scope for normative conflicts is limited to the provisions laid down in Common Article 3.

International Law”, Finalized by Martti Koskenniemi, A/CN.4/L.682, 13 April 2006, para. 56.

¹⁶⁸ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p.226, para. 25.

¹⁶⁹ L. Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?”, *International Review of the Red Cross* (2006) vol. 88, no. 864, p. 891 (see the reasoning concerning the targeting of objectives); H. Krieger, “A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, *Journal of Conflict and Security Law* (2006) vol. 11, no. 2, p. 280-281 (see the reasoning concerning the legal differences between human rights and humanitarian law and the principle of proportionality).

¹⁷⁰ H.-P. Gasser, *Protection of the Civilian Population*, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press 2010), p. 248-249.

¹⁷¹ C. Greenwood, *Scope of Application of Humanitarian Law*, in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press 2010), p. 74.

¹⁷² H. Krieger, “A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, *Journal of Conflict and Security Law* (2006) vol. 11, no. 2, p. 269.

Moreover, as will be further investigated in the section below, the parallel applicability of human rights law and humanitarian law does not automatically imply a conflict of norms since both sets of law serve similar purposes. Thus, at first sight the effect concerning the protection of IDPs appears to be relatively limited.

6.4 Human rights law, humanitarian law and complementarity

As stated by the ICJ in the Nuclear weapons case, human rights law continues to apply during armed conflict.¹⁷³ Therefore, parallel applicability of human rights law and humanitarian law governs state conduct during a conflict. How does parallel applicability operate, and is it possible to avoid normative conflicts when two sets of law apply simultaneously since this could affect the legal protection of IDPs harmfully?

The *lex specialis* rule does not imply that *lex generalis* cease to apply in times of armed conflict; it simply assumes that humanitarian law is more specific than human rights law, since the former aims to protect individuals during conflict. However, this is not to say that humanitarian law regularly overrides human right law, such an approach would ignore the contextual character of the *lex specialis* rule. Consequently, the relationship between human rights law and humanitarian law must be determined on a case-by-case basis with special attention to applicable provisions.¹⁷⁴ The interaction between human rights law and humanitarian law can be traced both to treaties and case law originating from international/regional tribunals. For instance, Article 15(2) of the European Convention of Human Rights (ECHR) stipulates that lawful killings under humanitarian law do not violate the rights under Article 2 of the ECHR. Article 15(2) appears to be a clear expression of the *lex specialis maxim* and determines that a justified killing

¹⁷³ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para. 25; see also e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, ICJ Reports 2004, p. 136, para. 106.

¹⁷⁴ H. Krieger, "A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", *Journal of Conflict and Security Law* (2006) vol. 11, no. 2, p. 271.

under humanitarian law does not constitute an arbitrary deprivation of life under the ECHR. The reference made to humanitarian law in Article 15(2) is a sign of the interactive nature between human rights law and humanitarian law.

However, because the *lex specialis maxim* is a contextual norm, exceptions to the prevalence of humanitarian law during conflict exist. Since the underlying motive for applying humanitarian law provisions is that said rules are more special and better suited for armed conflicts, the dominance of humanitarian law becomes questionable when its rules lack greater specificity when compared to human rights law. This can be the case in situations of international administration of territory (when humanitarian law only applies by analogy) and it can also be argued in relation to non-international armed conflicts.¹⁷⁵

In light of the question to this thesis the possible application of human rights law to internal conflicts becomes interesting since great numbers of IDPs are generated in situations of internal violence.¹⁷⁶ Internal armed conflicts are regulated only by Common Article 3 to the Geneva Conventions and by Protocol II. Since Protocol II sets a high threshold of application, its relevance for modern internal conflicts is very limited.¹⁷⁷ In situations of internal armed conflicts, falling below the threshold of Protocol II, Common Article 3 therefore applies alone. However, Common Article 3 includes only minimal and vague regulations on issues concerning e.g. the conduct of hostilities and guarantees on the right to a fair trial. Quite the opposite, human rights law is very elaborate and detailed in this respect.¹⁷⁸ The circumstance that several international and regional human rights treaties allow for individual petition, with no corresponding mechanism in humanitarian law, has contributed to make the legal content of human rights

¹⁷⁵ *ibid*, p. 272-273.

¹⁷⁶ R. Cohen, "Developing and International System for Internally Displaced Persons", *International Studies Perspectives* (2006) vol. 7, issue 2, p. 89.

¹⁷⁷ D. Fleck (ed.), *The Law of Non-international Armed Conflicts*, in *The Handbook of International Humanitarian Law*, (Oxford University Press 2010), p. 609-610.

¹⁷⁸ C. Greenwood, *Scope of Application of Humanitarian Law*, in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, (Oxford University Press 2010), p. 74-75; H. Krieger, "A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study", *Journal of Conflict and Security Law* (2006) vol. 11, no. 2, p. 274.

law more precise and predictable than humanitarian law provisions.¹⁷⁹ Consequently, to apply detailed and specialized human rights law to the conduct of hostilities or concerning due process in situations of internal armed conflict, might be more consistent with the fundamental reason to the *lex specialis maxim* than applying blunter humanitarian law provisions. The application of human rights law by the ECtHR to the conduct of hostilities during the internal armed conflict in Chechnya could reflect this approach.¹⁸⁰ Likewise, while torture is prohibited in armed conflict humanitarian law does not provide a definition of the prohibition. Therefore, human rights law has been used in order to fill this gap and clarify the meaning of said prohibition in armed conflicts.¹⁸¹ Since human rights law has the capacity to effectively regulate particular aspects of armed conflicts it can take precedence over humanitarian law according to the *lex specialis maxim*. This condition appears to reflect the contextual nature of the *lex specialis* rule, which makes it very difficult to generalize when speaking about which body of law – human rights law or humanitarian law – provides best protection for IDPs in situations of parallel applicability.

What needs to be highlighted might instead be the complementary nature between human rights law and humanitarian law and that both sets of law can reinforce each other. In cases where a special norm exists it may be interpreted in the light of the more general norm. Thus, the specialized norm can be seen as the application of the more general norm in a particular case.¹⁸² An example of this would be the prohibition of torture in armed conflicts where humanitarian law contains a general prohibition but human rights law provides a more precise meaning of the prohibition.

From the above it becomes clear that the parallel applicability of human rights law and humanitarian law does not automatically lead to a conflict of norms. Case law of international and regional tribunals on the opposite

¹⁷⁹ L. Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?”, *International Review of the Red Cross* (2006) vol. 88, no. 864, p. 882.

¹⁸⁰ See Case of *Isayeva v. Russia*, application no. 57950/00, ECtHR, 24 February 2005 and Case of *Isayeva, Yusupova and Bazayeva v. Russia*, applications no. 57947/00, 57948/00 and 57949/00, ECtHR, 24 February 2005.

¹⁸¹ See e.g. *Prosecutor v. Furundzija*, Case IT-95-17/1-T, ICTY, Judgment of 10 Dec. 1998, para. 159.

¹⁸² H. Krieger, “A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, *Journal of Conflict and Security Law* (2006) vol. 11, no. 2, p. 275.

indicates a relation of complementarity and interaction. Both sets of law aim to protect the individual from unnecessary harm and their parallel applicability in many cases results in better protection for the individual than applying just one. In situations where humanitarian law only provides a general provision, e.g. concerning the prohibition on torture, the conduct of hostilities in internal armed conflicts or due process, human right law can be used to fill the gaps with substantive norms and rules of conduct. This method seems to be an established practice among international and regional tribunals.¹⁸³ Since both sets of law have similar purposes and are used to reinforce each other the idea of complementarity expressed by the Special Representative on internal displacement seems to be correct.¹⁸⁴ The situations where parallel applicability could result in a conflict of norms that would be harmful to the protection of IDPs therefore appear to be limited.

¹⁸³ See Case of *Isayeva v. Russia*, application no. 57950/00, ECtHR, 24 February 2005 and Case of *Isayeva, Yusupova and Bazayeva v. Russia*, applications no. 57947/00, 57948/00; 57949/00, ECtHR, 24 February 2005; *Prosecutor v. Furundzija*, Case IT-95-17/1-T, ICTY, Judgment of 10 Dec. 1998.

¹⁸⁴ See UN Commission on Human Rights, Report of the Representative of the Secretary-General, Mr. Francis M. Deng, December 5 1995, (E/CN. 4/1996/52/Add.2), “Internally Displaced Persons – Compilation and Analysis of Legal Norms”, paras. 7 and 27.

7 Concluding remarks

7.1 The legal protection of IDPs

Existing legal provisions in international law, in particular human rights- and humanitarian law, do not meet the existing protection needs of IDPs. This is clearly illustrated in section 5.3 above. Not surprisingly, there are *normative gaps* in the legal protection of IDPs, e.g. there is no prohibition concerning the right not to be arbitrarily displaced, neither is there any right to restitution or compensation for lost property as a consequence of displacement during armed conflict. Moreover, there is no provision explicitly prohibiting the forcible return of IDPs to areas within their own countries where their lives would be in danger. Today, such prohibition can only be articulated through extensive interpretation of e.g. Article 12 of the ICCPR (freedom of movement) and by analogy from the rule on non-refoulement found in refugee law (although the tenability of such an analogy can be questioned). Said conditions seem to weaken the protection of IDPs. Even if there might exist a prohibition on arbitrary displacement through the legal construction of several provisions from different instruments, such legal product could not replace the strength and clarity of an explicit norm or prohibition. However, it is noteworthy that the material/normative legal protection of IDPs is relatively extensive. Concerning the physical security and subsistence needs of IDPs these are quite well met in e.g. ICCPR and ICESCR. The main issue regarding the normative protection of the internally displaced rather appears to be a question concerning the *implementation of existing norms*. This observation was confirmed during the field study, where several of the interviewees identified the implementation of already existing norms as the main problem concerning IDP protection. Reconnecting to the initial remarks and question formulated in the introduction to this thesis it can consequently be said that a new international legal instrument, protecting the rights of IDPs, is desirable since explicit protection is lacking in several situations. However, keeping in mind the current problems with implementing the existing rights of IDPs, the “implementation gap” would most likely increase if a new

instrument, devoted solely to IDPs, were introduced to the international legal context. In a way, this already happened at the regional level through the adoption of the Kampala Convention. Thus, it will be very interesting to follow the implementation process of said instrument after its entry into force.

A more serious concern regarding the protection of IDPs than the normative gap seems to be the implications of the “applicability gap”. This problem arises from the fact that both human rights law and humanitarian law to some extent are situation-dependent. The fact that neither body of law applies at all times can result in situations where IDPs find themselves in a legal vacuum. The described situation would typically be a state of affairs characterized by internal disturbances and/or public emergency, allowing restrictions and derogations from human rights law, with the exception from non-derogable rights.¹⁸⁵ At the same time, the threshold for an armed conflict may not be met. The recent inter-communal violence in Jonglei, which caused the displacement of over 100 000 persons, shows that such situations are not uncommon. However, a situation of internal disturbance or public emergency does not automatically imply the restriction and derogation of human right provisions. The affected population would nevertheless be dependent on the benevolence of the state concerned, the same state that frequently causes displacement through human right abuses in the first place.

7.2 Institutional arrangements concerning the protection of IDPs

Since an organization exclusively devoted to the protection and assistance of IDPs never existed, it is hard to tell what kind of consequences the lack of such an organization has had concerning the situation of the internally displaced. However, to argue that the creation of an organization promoting the rights of IDPs would have a negative impact concerning their protection seems hard to maintain. Trying to explain the absence of such an organization with the argument that IDPs fall under the responsibility of

¹⁸⁵ See e.g. Article 4(2) ICCPR.

domestic authorities is not sustainable, or at least inconsistent with the existence of organizations promoting and protecting the rights of women, children and refugees. From this observation it can also be concluded that IDPs do not enjoy the same level of institutional protection as other vulnerable groups (e.g. women, children and refugees). The absence of an institution, and lacking resources concerning humanitarian emergencies globally, seem to be a sinister combination not favouring the protection and well-being of the internally displaced. In a best-case scenario, the involvement of the international community is ad hoc according to the collaborative approach taken by UN and other international organizations. In a worst-case scenario, the promotion and protection of the rights of IDPs simply “falls between the cracks”, since no organization has the mandate, capacity or interest to deal with their plight.

Since the creation of a new organization currently appears as unlikely, and the collaborative approach unsatisfactory from a protection point of view, the most viable solution concerning the institutional protection gap of IDPs would perhaps be to expand the mandate of UNHCR. However, considering the current mandate of UNHCR, such a solution would put the organization in difficult situations. As discussed in section 5.4 above, the involvement of UNHCR in situations of internal displacement could have a potentially devastating effect on the institution of asylum. In-country protection is, and could be used, by a (refugee) receiving state as an argument for rejecting protection and asylum. Adding to the complex relationship between the protection of refugees and IDPs, the refugee regime contains provisions concerning an internal flight alternative.¹⁸⁶ Said provision could in fact generate new internal displacement. Individuals with an internal flight option available would, when forced to return to their country of origin (but not to their home), prima facie meet the defining requirements of an IDP.¹⁸⁷ Consequently, in my opinion there seems to be an intrinsic environment of contradiction between refugee protection and the protection of IDPs. This condition must be taken into account before any possible expansion of UNHCR’s mandate or before the creation of a future organization dealing

¹⁸⁶ See for instance. J. C. Hathaway and M. Foster, *Internal protection/relocation/flight as an aspect of refugee status determination*, in E. Feller, V. Türk and F. Nicholson (eds.), *Protection in International Law: UNHCR’s Global Consultations on International Protection*, (Cambridge university Press 2003).

¹⁸⁷ See the *Guiding Principles on Internal Displacement*, Definition of internally displaced persons, para. 2.

solely with the rights of IDPs. In my view, the absence of institutional protection regarding IDPs is today the biggest challenge, and protection gap, when speaking about IDP protection. Strictly put, there is *no organization* promoting and invoking the *insufficient legal protection* that exists.

7.3 Fragmentation and IDP protection

At first sight, the fragmentation of international law and the conflict of norms seem to have the potential to influence the level of protection provided to IDPs (see section 6.3 above). In situations of armed conflict both humanitarian law and human rights law apply. According to the ICJ, humanitarian law applies as *lex specialis* in situations of armed conflicts, meaning that the notion of military necessity becomes of importance when determining the level of human suffering that can be considered lawful.¹⁸⁸ When compared to the level of protection provided by human rights, humanitarian law and the concept of military necessity therefore seem to move the threshold of human protection to the detriment of civilians and IDPs.

However, after further consideration and examining relevant case law the (harmful) effect of parallel applicability and conflicting norms appear to have no or limited effect regarding IDP protection. First and foremost, situations of conflicting norms are limited to cases of armed conflict. The legal protection enjoyed by civilians (and thus IDPs) is relatively comprehensive during *international* armed conflicts.¹⁸⁹ Moreover, as illustrated in section 6.4, the parallel applicability of human rights and humanitarian law does not automatically lead to a conflict of norms. Since both sets of law have similar protective purposes they rather reinforce and complement each other. The interaction between human rights and humanitarian law seems to have a beneficial effect on the protection of individuals. It can be argued that the *lex specialis maxim*, which traditionally has been interpreted as giving precedence to humanitarian law

¹⁸⁸ *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Reports 1996, p. 226, para. 25.

¹⁸⁹ C. Phuong, *The International Protection of Internally Displaced Persons*, (Cambridge University Press 2004), p. 45.

during armed conflicts,¹⁹⁰ at least partly has been modified in more recent case law of international and regional tribunals.¹⁹¹ The parallel applicability of human rights law and humanitarian law has consequently led to situations where human rights law has been applied as *lex specialis* in certain situations of armed conflicts. The application of human rights law was justified according to the *lex specialis maxim*; in areas where humanitarian law is scarce, human rights law has the capacity to more effectively regulate certain behavior. This development points towards a direction of integration and complementarity between human rights law and humanitarian law, rather than a situation of conflicting interest. Said interaction appears to operate in a positive manner regarding the protection of IDPs since general norms are given a more precise meaning. In turn, this can contribute to a higher level of predictability of the law and thus legal awareness among potential violators and victims. Given the specific nature of internal displacement and its high numbers in areas affected by internal conflict, a continued and increased interaction between human rights and humanitarian law appears as an interesting approach towards improved IDP protection.

¹⁹⁰ L. Doswald-Beck, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?”, *International Review of the Red Cross* (2006) vol. 88, no. 864, p. 882.

¹⁹¹ See for instance *Prosecutor v. Furundzija*, Case IT-95-17/1-T, ICTY, Judgment of 10 Dec. 1998, para. 159; *Case of Isayeva v. Russia*, application no. 57950/00, ECtHR, 24 February 2005.

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Appendix A

1. ROOT CAUSES TO INTERNAL DISPLACEMENT

1.1 Causes to internal displacement in South Sudan (common denominators/differences):

1.2 Causes to internal displacement in Jonglei:

1.3 Numbers of internally displaced in South Sudan/Jonglei:

1.4 Actions taken to combat above causes to displacement:

1.5 Actions taken to combat inter-ethnic violence in Jonglei: What is done to tackle/resolve the root causes to the inter-ethnic conflicts? Displacement is, after all, a symptom of far deeper problems within society.

2. LEGAL PROTECTION NEEDS

2.1 Is the existing definition of IDPs in the guiding principles satisfactory when looking at the situation in South Sudan/Jonglei?

2.2 Available legal protection mechanisms mainly used by your organization (Human Rights Law/Humanitarian Law/National Law):

2.3 Is the existing international legal framework enough considering the protection needs of IDPs in Jonglei (are the legal tools sufficient to tackle existing problems):

2.4 If you consider there to be a lack of protection concerning IDPs does it depend on the absence of legal protection or is it a question of implementation (state unwillingness/unable):

2.5 Do you consider the existing legal framework protecting IDPs too general in its form? Is there a need for specific rights explicitly prohibiting e.g. the discrimination of IDP (today they fall under “other status”) or the recruitment of IDP children to armed forces?

2.6 If explicit IDP protection is needed how should this be implemented, guiding principles, amendments to existing instruments or new legal instrument?

2.7 The protection needs among displaced persons (i.e. displaced due to inter-ethnic conflicts) in Jonglei, 5 bullet points highlighting the most urgent needs.

2.8 Current trends in IDP protection – if you look at migration law a lot is being done by states to externalize migration control, e.g. interception at sea etc. Is there a corresponding trend concerning IDP protection making it possible for states to escape their obligations according to HRL/IHL etc.

2.9 Do you consider the interplay between human rights and humanitarian law to be satisfactory when it comes to IDP protection?

2.10 Do you see a potential protection gap in situations not amounting to a non-international armed conflict but violent/unstable enough to allow restrictions/derogations from human rights law.

2.11 Do you recognize any situation (protection need) in a non-international armed conflict where protection is not afforded by common article 3 or AP II and at the same time human rights are restricted/derogated from.

2.12 Current protection needs in Jonglei:

1. Discrimination
2. Protection of life
3. Gender-specific violence
4. Detention
5. Shielding
6. Forcible recruitment
7. Subsistence needs (food, clothing, and housing).
8. Medical care
9. Free movement
10. Family related needs (reunification)
11. Use of one's own language
12. Religion
13. Work
14. Education
15. Associations
16. Political participation

17. International assistance (to request and receive assistance from government but also to grant and facilitate free passage of relief).

18. Disappearances

19. Missing and dead (search for missing internally displaced persons in any situation, including in armed conflicts, gather information concerning the fate of IDPs and to respectfully bury those who have been killed).

20. Personal identification, documentation and registration (equivalent to refugees).

21. Property-related needs (restitution of property lost as a consequence of displacement or to compensation)..

22. Relief worker and organizations (sufficient protection in humanitarian law?)

23. Right to return (no explicit provision in international law apart from Art. 16(3) ILO Convention 169).

24. Non-refoulement - need for equivalent protection concerning IDPs?

3. INSTITUTIONAL PROTECTION NEEDS

3.1 How does the institutional protection framework look concerning IDPs in South Sudan/Jonglei:

3.2 Which sectors are covered by respective organization?

3.3 Is there sufficient institutional protection provided in order to protect the legal rights of IDPs?

3.4 Is there a lack of provisions regulating institutional protection concerning IDPs (i.e. can UNHCR, WFP, UNICEF, UNDP “pick and choose” situations in which they want to become involved in IDP protection)?

3.5 Is there any representative from the UN Inter-Agency Internal Displacement Division/Unit in South Sudan/Jonglei?

3.6 Is there a need for a specialized organization with a mandate that explicitly covers the protection of IDPs? Is the creation of such an organization viable in your eyes?

3.7 Appropriate to widen the mandate of UNHCR/ICRC/OHCHR?

3.8 What is the role of OHCHR? Human Rights protection should logically fall under its mandate since IDPs remain within their country of origin.

3.9 What kind of mechanisms, if any, exists to promote efficient reporting/early warning of protection problems/ IDP situations? Can IDPs turn to anyone concerning their protection needs/situation?

3.10 Is the individual complaints procedures (e.g. ICCPR) an accessible/effective protection concerning IDPs? Should there be a special mechanism/procedure available to IDPs?

3.11 Is there any monitoring body/institution (domestic level) concerning the rights of the internally displaced in South Sudan?

3.12 Is there any organization to accompany the displaced when returning home?

3.13 Any organization/authority/institution to help IDPs reclaim/claim compensation due to land/property disputes? Is there need for one?

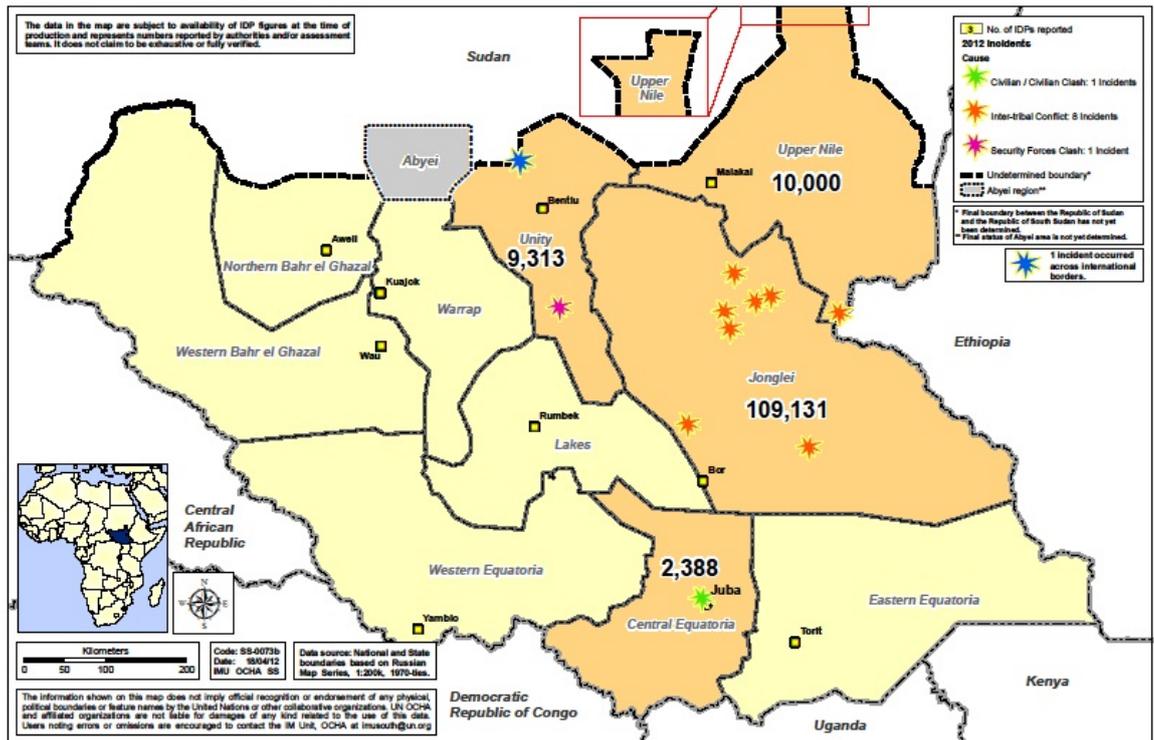
3.14 Are there enough humanitarian workers with protection responsibilities (not dealing mainly with humanitarian assistance)?

3.15 Is there any focal point within the government/ministries who deals with issues related to IDPs?

3.16 Is there any training concerning the rights of IDPs targeting officials/police/military/OAGs?

Appendix B

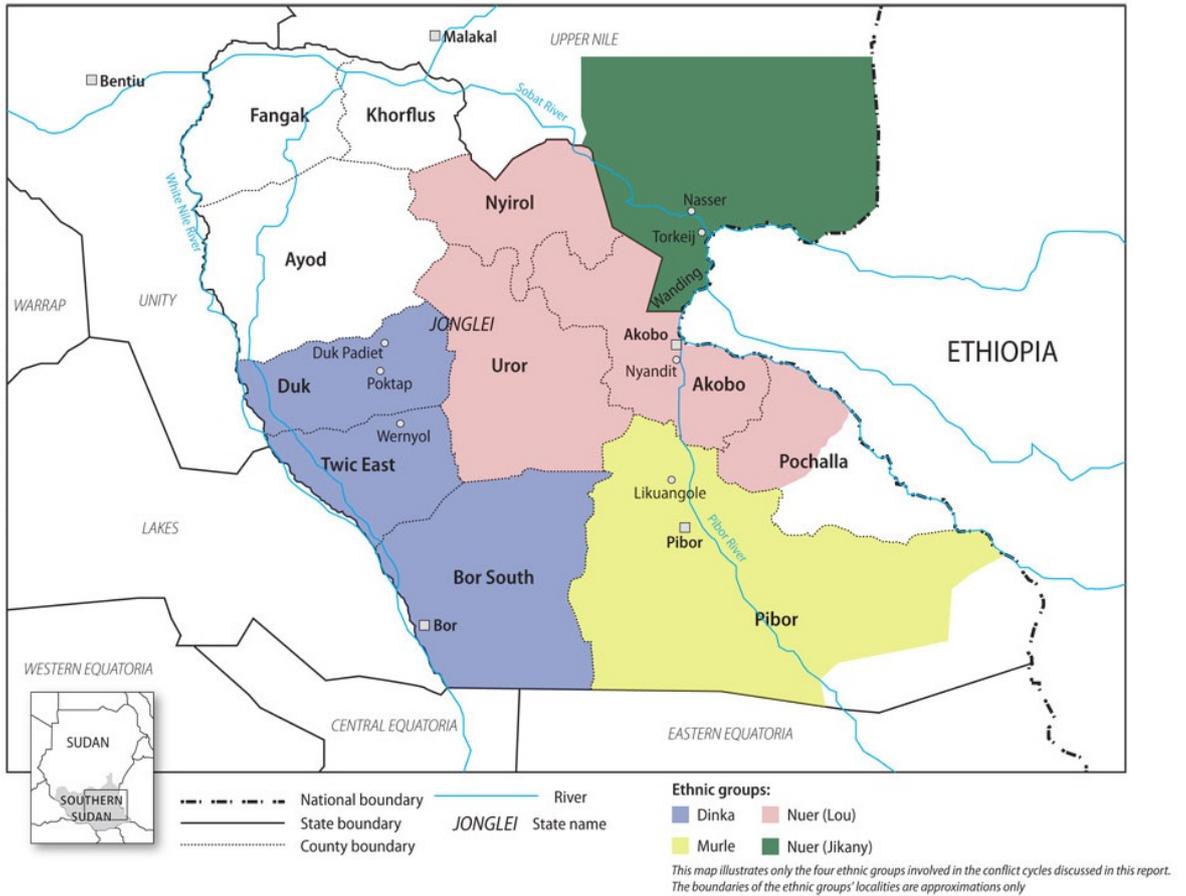
CUMULATIVE FIGURES OF NEW CONFLICT RELATED DISPLACEMENT REPORTED IN 2012 – Status 15/04/12: **129 942 IDPs.**



Source: UN Office for the Coordination of Humanitarian Affairs, Juba, South Sudan, www.unocha.org/south-sudan/

Appendix C

MAP OF JONGLEI AND KEY ETHNIC GROUPS



Source: International Crisis Group¹⁹²

¹⁹² International Crisis Group, “Jonglei’s Tribal Conflicts: Countering Insecurity in South Sudan”, Africa Report No. 154 – 23 December 2009, p. 27.