

The right to water for internally displaced persons in the Sahel region

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Abstract

The number of internally displaced persons (IDPs) has drastically increased over the last five years in the countries of the Sahel region. This situation is linked to the rise of countless armed groups, especially in Mali, Niger and Burkina Faso. The present paper aims to assess the existence and contours of a right to water for IDPs in the Sahel region. In doing so, it examines international humanitarian law and other international law regimes to determine the legal foundations that protect and guarantee IDPs' right to water. The contribution provides the contextual background of armed conflict-induced displacement in the Sahel region, and demonstrates the existence of a right to water for IDPs in the Sahel countries. This right derives not only from international humanitarian law but also from other complementary international rules applicable even in conflict situations. The paper finally discusses and recommends legal and practical ways in which IDPs' right to water can be better realized in the current context of the Sahel region.

Keywords: right to water, internally displaced persons, protection, armed conflict, terrorism, Sahel.

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Introduction

According to the United Nations (UN) Secretary-General, the total number of internally displaced persons (IDPs) and refugees in the Sahel region reached close to 5 million in 2020.¹ These displacements are the result of the unprecedented security crisis in the region. While it is difficult to trace the origins of the crisis, it has been exacerbated by a proliferation of armed groups in the region,² particularly following NATO's military intervention in Libya.³ These armed groups engage in hostilities with State armed forces and with the multinational forces present in the region, and sometimes even fight each other.⁴ The conflict has had numerous, wide-ranging consequences:⁵ *inter alia*, State borders in the Sahel region have become more porous, the illicit drugs trade has gained ground in the region,⁶ and there has been large-scale civilian displacement,⁷ making the conflict cross-border in nature.⁸

IDPs in the Sahel warrant particular attention given the climate conditions,⁹ extreme poverty¹⁰ and “natural drought”¹¹ common in the region, all

- 1 UN Security Council, *Report of the Secretary-General on the activities of the United Nations Office for West Africa and the Sahel*, UN Doc. S/2020/1293, 24 December 2020, p. 7, paras 31 ff. This figure has since increased: see Office of the UN High Commissioner for Refugees (UNHCR), “Grim Milestone as Sahel Violence Displaces 2 Million Inside Their Countries”, statement by UNHCR spokesperson Boris Cheshirkov, 22 January 2021, available at: www.unhcr.org/news/briefing/2021/1/600a92e4125/grim-milestone-sahel-violence-displaces-2-million-inside-countries.html (all internet references were accessed in February 2022).
- 2 See, in particular, the map created by the Armed Conflict Location and Event Data Project (ACLED), available at: <https://acleddata.com/dashboard/#/dashboard>. See also European Council on Foreign Relations, “Mapping Armed Groups in Mali and the Sahel”, available at: https://ecfr.eu/special/sahel_mapping.
- 3 Mathieu Pellerin, “Sahel: Libyan Contagion”, *Politique Étrangère*, Vol. 77, No. 4, 2012; Mohamed Eljarh, *Les défis et enjeux sécuritaires dans l'espace sahélo-sahélien*, 2016, available at: <https://library.fes.de/pdf-files/bueros/fes-pscc/14015.pdf>. See also UN Security Council, *Report of the Assessment Mission on the Impact of the Libyan Crisis on the Sahel Region*, UN Doc. S/2012/42, 18 January 2012, paras 13 ff.
- 4 See ACLED, above note 2; European Council on Foreign Relations, above note 2. In particular, see Laurence Aida Ammour, “Spotlight: How Violent Extremist Groups Exploit Intercommunal Conflicts in the Sahel”, Africa Center for Strategic Studies, 26 February 2020.
- 5 There is a need for water, health care, accommodation, food and financial resources; see UN Office for the Coordination of Humanitarian Affairs, *Humanitarian Needs and Requirements Overview: Sahel Crisis*, April 2021, available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/2021%20Sahel%20Crisis%20HNRO%20EN.pdf>.
- 6 Simon Julien, “The Sahel as a Drug Transit Zone: Actors and Political Consequences”, *Hérodote*, Vol. 142, No. 3, 2011; Serigne Bamba Gaye, *Connexions entre groupes djihadistes et réseaux de contrebande et de trafics illicites au Sahel*, 2017, available at: <https://library.fes.de/pdf-files/bueros/fes-pscc/14175.pdf>
- 7 The Special Rapporteur on the Human Rights of Internally Displaced Persons focuses primarily on people who have been forcibly displaced: see UN General Assembly, *Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons*, UN Doc. A/74/261, 31 July 2019.
- 8 See Alain Antil, “Sahel: The Basis of a Disaster”, *Politique Étrangère*, Vol. 84, No. 3, 2019; see also International Committee of the Red Cross (ICRC), “A Conflict without Borders Continues to Play Out in the Sahel”, news release, 8 July 2020, available at: www.icrc.org/en/document/conflict-without-borders-continues-play-out-sahel.
- 9 International Crisis Group, *The Central Sahel: Scene of New Climate Wars?*, Africa Report No. 154, 2020, available at: www.crisisgroup.org/africa/sahel/b154-le-sahel-central-theatre-des-nouvelles-guerres-climatiques.
- 10 See, for example, World Bank, *Annual Report 2020*, 2020, available at: <https://openknowledge.worldbank.org/handle/10986/2127>.
- 11 Catherine Baron and Alain Bonnassieu, “Les enjeux de l'accès à l'eau en Afrique de l'ouest: Diversité des modes de gouvernance et conflit d'usages”, *Monde en Développement*, Vol. 156, No. 4, 2011.

of which have been exacerbated by the COVID-19 pandemic.¹² Ensuring that these IDPs have access to water has therefore become one of the most critical, long-standing challenges in the Sahel¹³ – water scarcity and the ongoing armed conflicts have increased competition for water resources among local communities, the State and armed groups.¹⁴ The present authors' decision to look at the right to water of IDPs in this region is therefore extremely relevant. Under the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), IDPs are

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.¹⁵

This definition makes the distinction between IDPs and refugees,¹⁶ and also between forcibly displaced people and voluntarily displaced people who may have left the countryside or moved to a different city for any number of reasons.

- 12 See ICRC, *The Sahel Region: Helping People in Burkina Faso, Chad, Mali, Mauritania, and Niger to Cope with the Cumulative Effects of Conflict, Climate Change, and the COVID-19 Pandemic*, Budget Extension Appeal, Geneva, 6 July 2020, p. 2.
- 13 See UN General Assembly, *Report of the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation*, UN Doc. A/75/208, 21 July 2020, pp. 17, 21; ICRC, *Internally Displaced Persons and International Humanitarian Law*, Geneva, 2017; Nina Birkeland, "International Displacement: Global Trends in Conflict-Induced Displacement", *International Review of the Red Cross*, Vol. 91, No. 875, 2009; Catherine Phuong, *The International Protection of Internally Displaced Persons*, Cambridge University Press, Cambridge, 2005. See also the periodic reports of the UN Secretary-General on the activities of the UN Office for West Africa and the Sahel, particularly UN Doc. S/2016/1057, 14 December 2016. See also Human Rights Watch, *World Report 2020: Events of 2019*, January 2020, pp. 22–65; Amnesty International, *Human Rights in Africa: Review of 2019, 2020*, pp. 12–33.
- 14 Boko Haram's control of the Lake Chad region is a key example of this. See Christian Seignobos, "Boko Haram and Lake Chad: An Extension or a Sanctuary?", *Afrique Contemporaine*, Vol. 255, No. 3, 2015. During his 2020 visit to the internal displacement camps in Burkina Faso, the UN High Commissioner for Refugees went as far as to say that: "[t]here is a dramatic lack of water everywhere, and there are no latrines". See "Burkina Faso: Le patron du HCR, au chevet des déplacés internes à Kaya et Dori", *RFI*, 5 February 2020, available at: www.rfi.fr/fr/afrique/20200205-burkina-faso-hcr-filippo-grandi-chevet-d%C3%A9plac%C3%A9s-kaya-dori.
- 15 African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa, 23 October 2009 (entered into force 6 December 2012) (Kampala Convention), Art. 1(k).
- 16 One of the main differences between IDPs and refugees is that refugees have crossed an international border; another is the reasons underlying their displacement. See Caroline Lantero, *Le droit des réfugiés entre droits de l'homme et gestion de l'immigration*, Bruylant, Brussels, 2010, pp. 9, 65; Erika Feller, Volker Türk and Frances Nicholson (eds), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge, 2003. According to UNHCR, there are close to 1 million refugees in Burkina Faso, Mali and Niger. See the R4Sahel Coordination Platform for Forced Displacements in Sahel, available at: <https://data2.unhcr.org/en/situations/sahelcrisis>. In Africa, issues relating to refugee rights are governed by the Geneva Convention relating to the Status of Refugees, 28 July 1951, and the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969.

Recognizing the right to water as a fundamental human right has been a long process, both politically and legally.¹⁷ Politically speaking, States have considered the right to water to be a socially driven objective and a soft law, making it a declared yet imprecise right.¹⁸ Legally speaking, the right to water was initially recognized implicitly¹⁹ before being recognized explicitly. The right to water is recognized as an explicit substantive right, but has not really acquired the status of a stand-alone right.²⁰ It is often invoked in connection with other rights, such as the right to sanitation²¹ and the right to an adequate standard of living,²² and issues are often raised concerning its substance, ownership and effectiveness.²³

As defined by the Committee on Economic, Social and Cultural Rights (CESCR), the right to water “entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses”.²⁴ Ensuring that water is available means ensuring sufficient and continuous access, while “safe” and “acceptable” means water that is free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person’s health. Accessibility covers not only physical accessibility, which means ensuring that there is water in the immediate proximity and that it is accessible to all sections of the population, but also economic accessibility through non-discrimination, and the accessibility of information relating to water.

When looking at the substance and characteristics of the right to water, the question arises as to whether and to what extent international law protects and

- 17 Laurence Boisson de Chazournes, “Le droit à l’eau et la satisfaction des besoins humains: Notions de justice”, in Denis Alland *et al.* (eds), *Unity and Diversity in International Law: Essays in Honour of Professor Pierre Marie Dupuy*, Martinus Nijhoff, Leiden, 2014.
- 18 Christophe Golay, *Droit à l’alimentation et accès à la justice*, Graduate Institute of International and Development Studies, Geneva, 2009, p. 30.
- 19 Universal Declaration of Human Rights, 10 December 1948, Art. 25(1); International Covenant on Economic, Social and Cultural Rights, 16 December 1966, Art. 11. See also Marie-Catherine Petersmann, *Les sources du droit à l’eau en droit international*, Editions Johanet, Paris, 2013, p. 12.
- 20 Pierre Thielborger, *The Right(s) to Water*, European University Institute, Florence, November 2010, pp. 82–83.
- 21 See Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations related to Access to Safe Drinking Water and Sanitation*, UN Doc. A/HRC/12/24, 1 July 2009. In its General Comment No. 14 on “The Right to the Highest Attainable Standard of Health”, 2000, the Committee on Economic, Social and Cultural Rights (CESCR) stated that it interpreted “the right to health, as defined in article 12.1 [of the International Covenant on Economic, Social and Cultural Rights], as an inclusive right extending not only to timely and appropriate health care but also to the underlying determinants of health, such as access to safe and potable water”.
- 22 Stephen C. McCaffrey, “A Human Right to Water: Domestic and International implications”, *Georgetown International Environmental Review*, Vol. 5, No. 1, 1992.
- 23 In terms of ownership of the right to water, some scholars question the issue without providing a definitive answer. See Pierre-Marie Dupuy, “Le droit à l’eau: Droit de l’homme ou droit des Etats?”, in Marcelo Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution through International Law: Liber Amicorum Lucius Caflisch*, Martinus Nijhoff, The Hague, 2007.
- 24 See CESCR, General Comment No. 15, “The Right to Water (Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)”, UN Doc. E/C.12/2002/11, 20 January 2003, p. 2, para. 2. This same definition was used by the African Commission on Human and Peoples’ Rights (ACHPR): see ACHPR, *Guidelines on the Right to Water in Africa*, adopted at the 26th Extra-Ordinary Session of the ACHPR, Banjul, 16–30 July 2019. See also UNGA Res. 64/292, 28 July 2010.

guarantees the right to water of IDPs in States in the Sahel region and whether this right is respected in practice. This study looks at the law governing armed conflicts and other branches of international law to determine the legal foundations that protect and guarantee the right to water for IDPs. It begins with an overview of the situation of IDPs in the region; it then looks at the central issue of the existence of a right to water for people displaced by armed conflict in the countries in the Sahel, and lastly, it reviews the legal and practical ways in which this right is realized.

Legal classification of the situations of violence leading to internal displacements in the Sahel States

The Sahel is the region between the Sahara Desert to the north and Sudan to the south. It is a long stretch of territory covering around ten States, with an arid bioclimate.²⁵ The region has always been a crossroads for trade, exchanges and livestock, and has often been an area of displacement.

While there are numerous reasons for internal displacement, the armed violence that has marred the region for close to a decade is one of the main causes of the massive flows of IDPs in the region,²⁶ especially in what is known as the Central Sahel, which is the border area between Mali, Burkina Faso and Niger.²⁷ It is therefore essential to determine the legal classification of the situations of violence in the region, as a legal or practical response to the situation of these displaced people can only be carried out under international humanitarian law (IHL) if that law is applicable to the situation at hand.²⁸

However, the legal classification of the situation in the Sahel is not straightforward, as attacks can be sporadic, often no group claims for responsibility for the attacks, and some armed groups are unidentified and lack a formal structure.²⁹ Assessing the level of violence should make it possible to determine whether or not there is a non-international armed conflict in the

25 See Abdoul Hameth Ba, *Acteurs et territoires du Sahel: Rôle des mises en relation dans la recomposition des territoires*, ENS Éditions, Lyon, 2007.

26 UNHCR, *Sahel Crisis: Responding to the Urgent Needs of Refugees, Internally Displaced, Returnees and Others of Concern*, June 2020, available at: <https://reliefweb.int/report/burkina-faso/sahel-crisis-2020-responding-urgent-needs-refugees-internally-displaced>.

27 International Crisis Group, above note 9.

28 As a general rule, the application of IHL presupposes the existence of an armed conflict. See Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, coord. Etienne Kuster, ICRC, Geneva, 2018, p. 49. For a more nuanced position, see Robert Kolb, *Advanced Introduction to International Humanitarian Law*, Edward Elgar, Geneva, 2014, pp. 93 ff.

29 The reasons for the lack of identification are usually strategic: see ACLED, *Unidentified Armed Groups*, 2012, pp. 1–2, available at: www.jstor.org/stable/resrep03815. In Burkina Faso, three main groups are operational: Ansarul Islam, created by Malam Ibrahim Dicko, a radical preacher from Soum province in the north of the country; Islamic State in the Greater Sahara, also known as Islamic State in the West Africa Province; and the Group for the Support of Islam and Muslims, which seems to be active in the north of the country, as well as in the east and west. See International Crisis Group, *The Social Roots of Jihadist Violence in Burkina Faso's North*, Africa Report No. 254, 12 October 2017, pp. 3–4.

region.³⁰ If the conclusion is that there is a non-international armed conflict, the large number of armed groups involved could imply that there are in fact several parallel non-international armed conflicts.³¹

Even if the situation does constitute a non-international armed conflict, the question remains as to whether the conflict is governed by Article 3 common to the 1949 Geneva Conventions and Additional Protocol II (AP II). This question is of key importance to the present study. Common Article 3 does not provide a definition of a non-international armed conflict and affords only very limited protection to civilians. AP II, however, sets out more decisive criteria for its application: AP II applies to

all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.³²

It is true that most of the armed groups in the Sahel region do not always exercise this kind of control; this is because they are extremely mobile and their activities are cross-border in nature.³³ However, it is important to point out that AP II does not rule out the possibility of an armed group exercising control over a given portion of territory while also conducting cross-border activities. Even if the control they exercise is often weak, these groups have managed to carry out sustained military operations. This suggests that they meet the criteria set out in AP II. In addition, a smaller number of them do indeed exercise undeniable control over certain stretches of territory.³⁴ In some cases, this control is exercised at water access points, where the armed groups have established a form of governance system for managing the use of water. Determining the type of non-international armed conflict that each armed group is involved in would require a case-by-case analysis. Yet a broader interpretation of the criteria set out in AP II would

30 For Burkina Faso, for instance, see the analysis by Geneva Academy, “Non-International Armed Conflicts in Burkina Faso”, *RULAC*, available at: www.rulac.org/browse/conflicts/non-international-armed-conflicts-in-burkina-faso. For information on how such an assessment can be carried out, see Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009; see also N. Melzer, above note 28, pp. 3 ff.

31 See the overview of the situation in each of these countries on the RULAC website, available at: www.rulac.org/.

32 Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 1(1).

33 Giovanni Zanoletti, “Sahel: Pourquoi prendre les armes? Une revue de littérature”, coord. Elodie Riche, Agence Française de Développement, *Papiers de Recherche*, No. 134, July 2020.

34 This is the case most notably in Mali, and during some periods for some of the armed groups active in the north of Burkina Faso and in Niger. For a long time, this was also the case for Boko Haram in Nigeria.

suggest that a good number of the hostilities in the region fall within the definition laid down in this instrument.³⁵

While each country is different, the situation is similar across the Sahel States affected by these conflicts. In Mali,³⁶ Burkina Faso³⁷ and Niger,³⁸ for example, there are several non-international armed conflicts in which the national armed forces are fighting against insurgent – and particularly Islamist – groups. While the intervention of foreign forces in a non-international armed conflict could affect its classification as such,³⁹ it would appear that this has not been the case in the Sahel.⁴⁰

Ultimately, as there is no fighting between State armed forces and the hostilities are not conducted without a State's consent when they cross into the territory of that State,⁴¹ the conflicts in the Sahel remain non-international armed conflicts. In addition to the hostilities between armed groups and State forces, there are also non-international armed conflicts between these insurgent groups.⁴² In addition to these more conventional conflicts, there has been a rise in inter-community violence, particularly in Mali and Burkina Faso, with some situations of violence reaching such a level of intensity and organization as to qualify as non-international armed conflicts.⁴³

The overview provided above does not reflect the full complexity of the situation on the ground. As the aim of this study is not to provide an in-depth classification of the conflicts in the Sahel region, we will conclude that, while the causes of the internal displacements in the Sahel are certainly more complex, the

35 Julia Grignon, *L'applicabilité temporelle du droit international humanitaire*, Schulthess, Zurich, 2014, pp. 146, 168.

36 Diakonia International Humanitarian Law Centre, *Qualification juridique de la situation au Mali et droit international applicable*, Note juridique, October 2019, pp. 9–16.

37 See Geneva Academy, “Burkina Faso”, *RULAC*, available at: www.rulac.org/browse/countries/burkina-faso.

38 See Geneva Academy, “Niger”, *RULAC*, available at: www.rulac.org/browse/countries/niger.

39 Some scholars believe that the intervention of international forces in a conflict is enough to trigger the application of the law of international armed conflicts. On this issue, see Jérôme de Hemptinne, *Les conflits armés en mutation*, Pedone, Paris, 2020, pp. 135–190. The UN Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) has a robust mandate that enables it to engage in fighting with armed groups in the country; see UNSC Res. 2531, 29 June 2020. The same is true of the G5 Sahel Joint Force, a multinational force made up of troops from Burkina Faso, Mali, Mauritania, Niger and Chad. Its mandate is to “address the impact of terrorism and transnational organized crime”.

40 Diakonia International Humanitarian Law Centre, above note 36, pp. 12–16. The ICRC supports this stance: see N. Melzer, above note 28, p. 89. Concerning the intervention of multinational forces, see, for example, Vincent Bernard, “Editorial: Multinational Operations and the Law – Great Expectations and Great Responsibilities”, *International Review of the Red Cross*, Vol. 95, No. 891–892, 2013.

41 Within international rules, there is some dispute concerning the definition of a non-international armed conflict that involves State forces fighting against an insurgent group in the territory of another State without that State's consent. Some scholars believe that due to the lack of consent, such a conflict is an international armed conflict between the State initially caught in the hostilities with the armed group and the non-consenting State to which the initially non-international armed conflict has spread. For more in-depth information on the criteria for an armed conflict to become international, see Dietrich Schindler, *Le droit international humanitaire et les conflits armés internes internationalisés*, Cambridge University Press, Cambridge, 2010.

42 Diakonia International Humanitarian Law Centre, above note 36, pp. 13–14.

43 *Ibid.*, pp. 16–18.

multiple violations of human rights in the armed conflicts in question are the main factor driving these displacement.⁴⁴ Those who have been internally displaced for reasons other than the armed conflicts are not covered by IHL, although they are still protected by international human rights law. However, where the link between climate change, on the one hand, and violent extremism and inter-community conflict in the region, on the other,⁴⁵ can be established, these displacements will be included in this analysis, in order to show the inevitable interconnection between the various causes of displacement.

We will now look at the legal aspects of the international protection of the right to water for IDPs.

The existence of a right to water for internally displaced persons

The right to water for IDPs is recognized implicitly in IHL and also more generally by international human rights law and other branches of international law.

Implicit recognition in international humanitarian law

Strictly speaking, the purpose of IHL is not to set out individual rights in an abstract and generalized manner.⁴⁶ As such, the *explicit* recognition of the right to water within IHL is limited *ratione personae*, meaning that it is only explicitly granted to prisoners of war⁴⁷ and detainees.⁴⁸ IDPs are therefore not explicitly granted a specific right to water under IHL, and any search for a clear and explicit affirmation of this right in the *corpus juris* of IHL would be in vain. This lack of an explicit and specific recognition of the right to water for IDPs has been replaced with an implicit recognition of this right, by way of the general protection afforded to civilian populations and to certain objects used for civilian purposes during armed conflicts.

44 For example, some displacements that may appear at first glance to be the result of weather events would not be governed by IHL. However, even in these circumstances, the choice of areas for displacement and the number of displaced people are strongly affected by the dangerous security situation in the region.

45 International Crisis Group, above note 9, paras V, VI. See also UN Security Council, above note 1, para. 72.

46 On the centrality of the notion of people protected under IHL, see Marco Sassòli, *International Humanitarian Law: Rules, Controversies and Solutions to Problems Arising in Warfare*, Edward Elgar, Northampton, MA, 2019, pp. 231 ff.

47 Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950), Arts 20(2), 29(3); Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 54(2–3); Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 118, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

48 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV), Arts 89, 127; AP II, Art. 5(1)(b); ICRC Customary Law Study, above note 47, Rule 118.

Firstly, this implicit recognition of the right to water for IDPs is justifiable because IDPs are considered to fall within the category of civilians.⁴⁹ This interpretation stems from the provisions of IHL concerning the prevention of displacements of civilian populations, which therefore also apply to IDPs.⁵⁰ Under the principle of non-discrimination, including IDPs in the definition of civilian populations means that all protections and guarantees afforded to civilian populations, including the right to water, must be extended to IDPs as well. However, in the current context of internal displacements in the Sahel region, including all IDPs in the category of civilians could be problematic—it could undermine the efficacy of the protection afforded to IDPs, since in some instances the civilian population may be brimming with combatants or civilians directly involved in the hostilities,⁵¹ and this may blur the distinction between civilians and people who are regularly taking part in the hostilities.⁵² In any event, the presence of combatants and people directly participating in hostilities within the civilian population—with the exception of individuals with a continuous combat function—does not remove the protection afforded to civilians under IHL.⁵³

Secondly, IDPs' right to water may also stem from the general protection afforded to objects indispensable to the survival of the civilian population, from the protection afforded to the natural environment and from the principle of humanity.⁵⁴ As regards the general protection afforded to certain civilian objects, under Article 14 of AP II it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, including drinking water installations and supplies and irrigation works.⁵⁵ This provision is aimed specifically at drinking water and irrigation resources, thereby directly protecting water and, in turn, the right to access it, not only for personal consumption⁵⁶ (i.e., drinking water) but also to meet basic needs (i.e., irrigation

49 See GC IV, particularly Arts 4, 27. Other key provisions in this regard are AP I, Arts 51, 75; AP II, Arts 4, 5; ICRC Customary Law Study, above note 47, Rules 1, 7; N. Melzer, above note 28, p. 262.

50 IHL expressly prohibits parties to an armed conflict from forcibly displacing civilians, regardless of whether it is an international or non-international armed conflict, unless the security of the civilians in question is threatened or the displacement is required by military imperatives. GC IV, Arts 49, 147; AP I, Art. 85(4)(a); AP II, Art. 17; ICRC Customary Law Study, above note 47, Rule 129. See also AP I, Arts 51(7), 78(1); AP II, Art. 4(3)(e).

51 This practice is prohibited under IHL; see AP I, Art. 51(7); ICRC Customary Law Study, above note 47, Rule 97.

52 The jihadist armed groups in the region can rarely be identified. They often mix with the population, which can make the work of the State armed forces difficult and sometimes result in violations of the principle of distinction.

53 See N. Melzer, above note 28, p. 95.

54 See Mara Tignino, *Water During and After Armed Conflicts: What Protection in International Law?*, Brill, Leiden, 2016, pp. 10 ff; see also ICRC Customary Law Study, above note 47, Rule 118.

55 Article 14 of AP II states that it is “prohibited to attack, destroy, remove or render useless ... objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works”.

56 See CESCR, above note 24, para. 2. The World Health Organization's recommended minimum for survival is 20 litres per person per day. To fulfil people's right to water, States should provide at least 50–100 litres per inhabitant per day; see World Health Organization, *Guidelines for Drinking-Water Quality*, 4th ed., 2017, p. 84.

and other water-dependent needs). In Africa, this includes the use of water for agriculture and other subsistence-related purposes.⁵⁷

The right to water for IDPs is also protected through the generally recognized protection of the natural environment,⁵⁸ particularly in connection with the principle of precaution during armed conflicts.⁵⁹ Indeed, the *lato sensu*⁶⁰ natural environment is the ultimate water source. Parties to a conflict have an obligation to take care to “protect the natural environment against widespread, long-term and severe damage” while carrying out their military operations.⁶¹ This obligation includes the protection of water resources.⁶² Water resources are also covered specifically in Article 15 of AP II, which prohibits attacks on hydraulic works such as dams.⁶³ These rules are all derived from the fact that the natural environment is considered civilian in nature. The interests and needs of civilian populations, including IDPs, are the cornerstone of this protection-based approach.⁶⁴

Lastly, and more indirectly, the right to water for people who have been internally displaced as a result of an armed conflict stems from certain cardinal principles of IHL, particularly the principle of humanity.⁶⁵ The principle of humanity, which constitutes one of the two sides of IHL—the other being the principle of military necessity—is based on human dignity. This is the legal minimum of protection afforded to all people who are not directly participating in hostilities under common Article 3(1), and can thus be applied to IDPs, thereby forming one of the bases for this group’s right to water in the context of an armed conflict. This is because access to water is undeniably one of the “elementary considerations of humanity”,⁶⁶ since it is intrinsically linked to both

57 ACHPR, above note 24, Part 3, Guidelines 12 ff.

58 See ICRC, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, Geneva, 2020; see also Michael Bothe *et al.*, “International Law Protecting the Environment during Armed Conflict: Gaps and Opportunities”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010; Alexandre Kiss, “Les protocoles additionnels aux conventions de Genève de 1949 et la protection des biens de l’environnement”, in Christophe Swinarski (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984.

59 ICRC Customary Law Study, above note 47, Rule 44.

60 See the *travaux préparatoires* of the Additional Protocols to the Geneva Conventions, particular A. Kiss, above note 58, pp. 181–182.

61 See International Law Commission (ILC), *Protection of the Environment in Relation to Armed Conflicts: Draft Principles Provisionally Adopted by the Drafting Committee*, UN Doc. A/CN.4/L.937, 2019, Principle 13(2).

62 Mara Tignino, “Le régime de protection des ressources naturelles en temps de conflit armé et ses faiblesses”, in Société Française pour le Droit International, *Le droit international face aux enjeux environnementaux: Colloque d’Aix-en-Provence*, Pedone, Paris, 2010.

63 Article 15 reads: “Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”

64 See ILC, above note 61, Principle 8.

65 For the principle of humanity, see R. Kolb, above note 28, pp. 78–81.

66 This is the expression used by the International Court of Justice (ICJ) in its judgment on the *Corfu Channel* case: see ICJ, *Corfu Channel (United Kingdom v. Albania)*, Judgment, 9 April 1949, *ICJ Reports 1949*, p. 22: “Such obligations [to inform] are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles,

life and dignified living conditions. Access to water is without a doubt an indispensable condition for the life and survival of all people.

The obligation to respect the dignity of IDPs specifically can also be used as a foundation for their right to water. Article 17 of AP II, which relates directly to the forced movement of civilians, stipulates that “all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition”.⁶⁷ The references to hygiene, health and nutrition implicitly include the need to access water as part of this package of guaranteed rights.⁶⁸

Now that we have analyzed how IDPs’ right to water is both explicitly and implicitly protected by IHL, we will turn to the additional protection provided under human rights law.

Additional recognition under international human rights law

The application of IHL during an armed conflict does not mean that international human rights law cannot also be applied. In times of armed conflict, IHL provides a special legal framework for protecting civilian populations, while other branches of law, such as international human rights law, serve as generally applicable systems of law.⁶⁹ Here, we will focus on international human rights law as a norms-based driver of the right to water in international law. This right is recognized in international human rights law, since all human beings must be able to access water in any region of the world.⁷⁰

Although human rights law protects all individuals, this does not prevent there from being a specific system of laws for certain categories of individuals. In terms of the international legal instruments applicable to internal displacements, it is worth mentioning the Kampala Convention, which is the only international legal instrument concerning IDPs that is applicable to and binding

namely: elementary considerations of humanity, even more exacting in peace than in war”. See also ICJ, *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, 5 February 1970, *ICJ Reports 1970*, p. 32 (“principles and rules concerning the basic rights of the human person”); Pierre-Marie Dupuy, “Les ‘considérations élémentaires d’humanité’ dans la jurisprudence internationale de la Cour internationale de Justice”, in René-Jean Dupuy (ed.), *Droit et justice: Mélanges en l’honneur de Nicolas Valticos*, Pedone, Paris, 1999.

67 AP II, Art. 17: “1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition. 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.”

68 See CESCR, above note 24, p. 2, para. 2.

69 See UN Office of the High Commissioner for Human Rights (UN Human Rights), *International Legal Protection of Human Rights in Armed Conflict*, New York and Geneva, 2011; Louise Doswald-Beck and Sylvain Vité, “International Humanitarian Law and Human Rights Law”, *International Review of the Red Cross*, Vol. 33, No. 293, 1993.

70 L. Boisson de Chazournes, above note 17, p. 968.

on most of the States in the Sahel region.⁷¹ The Kampala Convention sets out precise obligations aimed at guaranteeing that displaced people have access to water and other vital supplies, regardless of whether the displacement is forced and whether it is linked to an armed conflict. The protection of IDPs' right to water is both explicitly and implicitly laid down in the Convention, as in addition to being explicitly mentioned, it is linked to the right to dignity and the right to a sufficient standard of living.

In terms of the explicit recognition of this right, the Kampala Convention makes reference to applicable humanitarian law in this regard⁷² and very specifically sets out obligations in the case of internal displacement linked to an armed conflict. For instance, Article 7(5)(c) directly requires armed groups to respect IDPs' right to water. Article 9(2)(b) requires States Parties to provide IDPs, regardless of the cause of their displacement, with adequate humanitarian assistance, including food and water, with the least possible delay. Furthermore, the Convention prohibits States Parties from subjecting IDPs to starvation (thus echoing Article 14 of AP II), which represents an implicit protection of the right to water.⁷³

More implicitly, the protection of the right to water as part of the right to dignity and the right to a sufficient standard of living is covered throughout the Kampala Convention, with the aim of ensuring a minimum of dignity for IDPs. Article 3(1)(c) of the Convention requires States Parties to "respect and ensure respect for the principles of humanity and human dignity of internally displaced persons", and Article 3(1)(j) requires them to "ensure assistance to internally displaced persons by meeting their basic needs". As noted above, the Convention also requires States Parties to provide "adequate humanitarian assistance, which shall include food, water, shelter, medical care and other health services, sanitation, education, and any other necessary social services".⁷⁴ The principle of protecting and assisting IDPs, particularly with regard to their access to water and to dignified living conditions, stems from the UN *Guiding Principles on Business and Human Rights*, the legal force of which has been confirmed by the consensus on their adoption.⁷⁵ In Africa, the same protection-based approach has been adopted through several subregional legal instruments.⁷⁶

While the recognition of the right to water covers all individuals, the CESCR's General Comment No. 15 on the right to water goes further and

71 Burkina Faso since 5 July 2012, Mali since 7 November 2012, and Niger since 10 May 2012. For details of the other States' ratification dates, see African Union, "List of Countries which Have Signed, Ratified/ Acceded to the Kampala Convention", 18 June 2020, available at: <https://tinyurl.com/yu8azckd>.

72 Kampala Convention, Art. 3(1)(f).

73 *Ibid.*, Art. 4(5).

74 *Ibid.*, Art. 9(2)(b).

75 The Human Rights Council approved the *Guiding Principles on Business and Human Rights* in Resolution 17/4 on 16 June 2011.

76 See, for example, the Protocol on the Protection and Assistance to Internally Displaced Persons, adopted by the International Conference on the Great Lakes Region on 30 November 2006. For more in-depth insight into the origins of and reasons for the Protocol, see Norwegian Refugee Council, International Displacement Monitoring Centre and International Refugee Rights Initiative, *The Great Lakes Pact and the Rights of Displaced People: A Guide for Civil Society*, September 2008, available at: www.refworld.org/docid/48d390a42.html

directly mentions IDPs, stating that IDPs, like refugees and asylum-seekers, must have access to adequate water whether they stay in camps or in urban and rural areas.⁷⁷ More recently, the UN Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation has reaffirmed the substantive aspects of the right to water and sanitation for IDPs, stating:

All forcibly displaced persons are equally entitled to the human rights to safe drinking water and sanitation irrespective of their current location and the status bestowed on them, and even in cases where they are considered ineligible for international refugee protection. Access to water and to sanitation is not only a fundamental human right for human survival and health but also for living life in dignity.⁷⁸

The changes leading to the international recognition of the right to water have also come from other branches of international law, such as international environmental law and international law on the protection of waterways. Some conventions adopted as part of these branches of international law recognize the right to water as a human right and are particularly relevant for this study, as they have been adopted by States in the Sahel region, which are no doubt acutely aware of the importance of water and the need to ensure universal access to it.⁷⁹ It is therefore not surprising that some consider the right to water to be part of customary international law.⁸⁰

In light of the above, we can conclude that IDPs in the Sahel region enjoy a right to water under the international law applicable to their situation. This right is recognized both implicitly and explicitly in IHL, international human rights law and other branches of international law. Yet the text-based recognition of the right to water is not always enough to ensure that it is applied in practice. The right to water must not remain an illusory, theoretical principle – to paraphrase the European Court of Human Rights (ECtHR)⁸¹ – but rather must be a “concrete right”. We will therefore now look at how effectively the right to water is realized in the context of IDPs in the Sahel.

77 See CESCR, above note 24, para. 16.

78 See UN General Assembly, *Report of the Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation*, UN Doc. A/HRC/39/55, 2018, paras 9–10. The ACHPR also specifically mentions IDPs’ access to water and requires States to ensure that water is supplied in displacement, migrant and refugees camps. See ACHPR, above note 24, Guideline 25.

79 Charter of the Waters of the Senegal River, 2002; Water Charter of the Niger Basin, 2008; Water Charter of the Lake Chad Basin, 2012. On this issue, see Henri Smets, “Le droit à l’eau potable en droit interne”, *Revue Européenne de Droit de l’Environnement*, No. 4, 2003; L. Boisson de Chazournes, above note 17, pp. 967–970.

80 Mara Tignino, “Water, International Peace and Security”, *International Review of the Red Cross*, Vol. 92, No. 879, 2010; Mara Tignino, “L’eau, la guerre et le droit”, *Recherche/droit*, available at: www.unige.ch/campus/files/8014/7246/8160/campus108_recherche4_2RE4.pdf. For more in-depth information, see Mara Tignino, *L’eau et la guerre: Éléments pour un régime juridique*, Collection de l’Académie de Droit International Humanitaire et des Droits Humains, Bruylant, Brussels, 2011, p. 489.

81 ECtHR, *Muhammad and Muhammad v. Romania* (Grand Chamber), 2020, para. 122; ECtHR, *Takus v. Greece*, 2012, para. 63; ECtHR, *Geleri v. Romania*, 2011, para. 48.

Implementation of the right to water for internally displaced persons

We will start by looking at the obstacles hindering the effective implementation of the right to water for IDPs in the Sahel region, and then put forward some solutions.

Obstacles hindering the effective implementation of the right to water for internally displaced persons

Most of the obstacles hindering the effective implementation of the right to water are either practical or legal in nature.

Practical obstacles

First of all, the security situation in the Sahel region means that numerous water points, which tend to be people's main source of water, have become harder to access. Armed groups in the region do not only attack the State armed forces; they also target basic State services, community services and anything relating to public institutions.⁸² In Mali, some areas of Niger and the north of Burkina Faso, for instance, the fighting caused all State technical teams to flee the region, resulting in a major deterioration in water installations, which have been destroyed, pillaged or left to ruin. This has affected traditional water supply circuits run by the public authorities.⁸³

Furthermore, the climate in the region has made access to water a major issue, and armed groups do not hesitate to take control of water points in order to support their operations. In some cases, these groups have set up a form of governance system to manage how water is used in the villages and on the land.⁸⁴ They have been able to do this because State armed forces have withdrawn and there is a lack of basic social services in many of these areas. In these instances, only people who have pledged allegiance to the armed groups are given access to the water points controlled by those groups. As IDPs are fleeing the ill-treatment of these groups and the way of life they impose, they are excluded *de facto* from having access to these water points. And when it comes to using any State or community services that may be left, IDPs tend to avoid any contact or collaboration with State or community representatives for fear of reprisals by the armed groups.⁸⁵

82 A. Antil, above note 8; International Crisis Group, *Burkina Faso: Stopping the Spiral of Violence*, Africa Report No. 287, 20 February 2020, p. 10.

83 Vincent Bonnacase and Julien Brachet, "Les 'crises sahéniennes' entre perceptions locales et gestions internationales", *Politique Africaine*, Vol. 130, No. 2, 2013.

84 Observatoire de la Démocratie et des Droits de l'Homme, *Burkina Faso: Risque d'un nouveau Rwanda? Bilan de la Violence au Burkina Faso*, 2020, p. 12.

85 See, among others, International Crisis Group, *Sidelining the Islamic State in Niger's Tillabery*, Africa Report No. 289, 3 June 2020, pp. 11 ff.

Secondly, the difficulties that IDPs in the region experience in accessing water are made worse by the deep impact of drought and climate change. In a drought situation, in which access to water is never certain, IDPs face increased difficulties in accessing water. In response to this situation, the African Commission on Human and Peoples' Rights (ACHPR) has said that States are required to put in place appropriate adaptation measures to enhance the resilience of water infrastructure, particularly with regard to extreme weather events. The Commission has also said that, in some circumstances, fulfilling the right to water involves implementing public policies aimed at protecting the most vulnerable people.⁸⁶ These are all things that can create legal hurdles.

Legal obstacles

Legal obstacles can arise when identifying those responsible for fulfilling the right to water and determining the extent of their obligation. Firstly, while the State takes primary responsibility for ensuring the right to water, armed groups may also fall within this category. The issue of whether armed groups can be forced to respect human rights remains to be clarified,⁸⁷ but there appears to no longer be any doubt that they are subject to the rules of IHL.⁸⁸ As such, we could quite easily consider that the provisions of IHL concerning the right to water of IDPs place a related obligation on armed groups.⁸⁹ This position is all the more justifiable since, as we have seen, some of the armed groups operating in the Sahel region exercise State-like control, enabling them to apply these provisions.⁹⁰ This affirmation in principle must not, however, hide the complexity of the problem – in practice, several of these armed groups do not exercise any real control over the areas in which they operate, and such groups often cannot be located to ensure that they fulfil this responsibility.

The second legal issue relates to the extent of the obligations stemming from the recognition of the right to water. The State is considered the main entity responsible for fulfilling the right to water, but what is the extent of the State's obligation in the context of drought and a dangerous security situation that has considerably reduced the State's presence in the region? The answer to this question depends in large part on the origin and type of the obligation, and calls for a distinction to be made between the need for abstention by the responsible

⁸⁶ ACHPR, above note 24, Guideline 31.

⁸⁷ Ludovic Hennebel and H  l  ne Tigroudja, *Trait   de droit international des droits de l'homme*, Pedone, Paris, 2018, p. 451; Zakaria Dabon  , *Le droit international public relatif aux groupes arm  s non   tatiques*, Schulthess, Geneva, 2012, p. 419. See also Anne-Catherine Fortas, *La surveillance de l'ex  cution des arr  ts et d  cisions des Cours europ  enne et interam  ricaine des Droits de l'Homme: Contribution    l'  tude du droit du contentieux international*, Pedone, Paris, 2015.

⁸⁸ Jann K. Kleffner, "The Applicability of International Humanitarian Law to Organized Armed Groups", *International Review of the Red Cross*, Vol. 93, No. 882, 2011.

⁸⁹ See also Kampala Convention, Art. 7(5)(c).

⁹⁰ A. Antil, above note 8, pp. 95–96.

entity⁹¹ and the need for action.⁹² In terms of abstention, an obligation to fulfil the right to water only makes sense if there are sufficient water resources. In this case, the obligation entails, for instance, not depriving an IDP of water and not subjecting that person to starvation. However, where there is a need for action, there may be objective limits that prevent the State from effectively fulfilling its obligation and realizing the right to water. Furthermore, even without the worsening security situation in these countries, the supply of drinking water has never been totally ensured.⁹³

In this regard, the extent of the State's obligation must be viewed in terms of the concept of progressive realization, which is usually associated with economic, social and cultural rights.⁹⁴ The Special Rapporteur on the Human Rights to Safe Drinking Water and Sanitation has said that the rights to water and sanitation cannot be realized over a short period of time and often depend on the availability of resources and their usage; States are therefore responsible for taking measures to ensure that these rights are progressively realized.⁹⁵ However, progressive realization must not be a pretext for avoiding obligations. The strict distinction between political rights, on the one hand, and economic, social and cultural rights, on the other—a distinction based on the concept of progressive realization—has become a topic of dispute, since human rights are now recognized as being interdependent.⁹⁶ Nevertheless, some aspects of the right to water constitute minimum core obligations requiring an immediate guarantee. The local context should also be taken into account when determining these minimum core obligations, since the scope of the obligation towards each individual can vary from one context to the next.⁹⁷ As we have seen, this minimum obligation should cover an individual's water needs for their personal and domestic use and for subsistence purposes.⁹⁸ For women and young girls, for example, the right to water includes the right to basic sanitation to ensure a level of bodily hygiene that is adapted to their specific needs. The same goes for young children and infants, owing to their vulnerability.

In Burkina Faso, for instance, access to drinking water, particularly in rural areas, remains problematic, while the rate of access to proper sanitation is just above 38% in urban areas and, in 2018, was just 15% in rural areas.⁹⁹ Given that Sahel

91 On prohibiting attacks on water resources, see Ameur Zemmal, "The Protection of Water in Times of Armed Conflict", *International Review of the Red Cross*, Vol. 35, No. 308, 1995.

92 For a human rights' perspective, see UN General Assembly, above notes 7 and 13.

93 In Burkina Faso, for example, the coverage rate is estimated to be 52% in rural areas and 89% in urban areas; see Programme National d'Approvisionnement en Eau Potable, *Rapport national, bilan annuel 2019*, March 2020.

94 See International Covenant on Economic, Social and Cultural Rights, Art. 2(1); see also L. Hennebel and H. Tigroudja, above note 87, pp. 1196 ff.

95 UN General Assembly, above note 13, p. 2, para. 3.

96 L. Hennebel and H. Tigroudja, above note 87, p. 1198; see also Carlos Miguel Herrera, *Les droits sociaux*, PUF, Paris, 2009.

97 UN General Assembly, above note 13, p. 10, para. 32.

98 ACHPR, above note 24.

99 See Organisation for Economic Cooperation and Development, *Report on Official Development Assistance*, 2019, p. xv.

States struggle to provide widespread access to water, realization of the right to water for IDPs is plagued with difficulties. Nevertheless, the State is required to use the maximum resources possible in order to realize the right to water, with the most vulnerable people taking priority. This involves the principles of effective use of the “maximum of the available resources” and “maximum allocation and usage”.¹⁰⁰ The State’s obligations to ensure transparent management of available resources and to combat practices such as corruption and embezzlement are particularly important in this regard. We know that these problems are widespread in the States in the Sahel region. As an example, in Burkina Faso, the Emergency Plan for the Sahel has faced criticism because its implementation only strengthened the population’s perception that the funds were being poorly managed. Practices like these feed into the narrative of the armed groups, which seek to discredit State institutions in the eyes of the population.¹⁰¹

Let us now look at some possible solutions for a more effective realization of the right to water.

Solutions for the effective realization of the right to water for internally displaced persons

There are both legal and operational measures that can be taken to ensure the effective realization of the right to water for IDPs. We will now look at these two types of measures in turn.

Legal measures

Firstly, the legal framework safeguarding IDPs in the States of the Sahel region needs to be strengthened. This can be achieved by incorporating international legal instruments specifically aimed at protecting IDPs into domestic law. In some of the Sahel States, some of the obligations set out in the Kampala Convention have already been transposed into domestic law.¹⁰² However, this legislation is insufficient, and there is an urgent need to adopt a comprehensive and inclusive law specifically concerning IDPs.¹⁰³ Domestic legislation implementing the Kampala Convention must go hand in hand with a national policy for the management of IDPs.

Integrating these international rules into domestic legislation will provide an institutional and legal guarantee of IDPs’ rights. This, in turn, will help to ensure the justiciability of these rights within the domestic judicial system and

100 UN General Assembly, above note 13, p. 2, para. 5 ff.

101 Observatoire de la Démocratie et des Droits de l’Homme, above note 84, p. 12.

102 For Burkina Faso, for example, see Act No. 012-2014/AN on the Prevention and Management of Risks, Humanitarian Crises and Disasters, 22 April 2014.

103 See Sanwé Médard Kiénoù, *Étude de la compatibilité de la législation Burkinabè à la convention de Kampala*. See Article 12 of Niger’s Constitution: “Each individual has the right to life, to health, to physical and moral integrity, to a healthy and sufficient food supply, to drinking water, to education and instruction in the conditions specified by the law.” See also Niger’s Law No. 2018-74 on the Protection and Assistance of Internally Displaced Persons, 10 December 2018.

other mechanisms. Some national judicial authorities have, for example, made direct reference to the UN *Guiding Principles on Internal Displacement* (Guiding Principles) when handing down their decisions; the Constitutional Court of Colombia is one example of this.¹⁰⁴ In Sri Lanka, IDPs have cited the Guiding Principles in order to call for larger food rations, smaller but more regular food supplies, clean water and greater personal security.¹⁰⁵ The Constitutional Court of South Africa has also recognized the right to water, making reference to an international instrument.¹⁰⁶ The ECtHR has often made reference to the Guiding Principles and has made them its own. One example is the *Dogan et al. v. Turkey* case, in which the judge made reference to Principles 18 and 28, relating to States' obligation to guarantee dignified living conditions for displaced people.¹⁰⁷ The right to water should be clearly established in the national constitutions of Sahel States, and the legal status and practical implications of this right should be reflected in domestic water-related legislation.¹⁰⁸ These legal instruments should establish the principle of water as a public good and also lay down the major principles governing access to water, including the need to take into consideration the most vulnerable people.

Another way in which rules-based mechanisms can be strengthened is through criminal sanctions for violations of the right to water of IDPs, particularly within the context of an armed conflict. IHL does not directly classify violations of the right to water as grave breaches of the Geneva Conventions. The Rome Statute of the International Criminal Court (ICC) partly fills this gap, as it considers certain attacks on the environment and other types of acts that could undermine the right to water of civilians as war crimes.¹⁰⁹ In non-international armed conflicts, certain violations of the right to water can fall within the category of grave breaches under common Article 3.¹¹⁰

Other violations of the laws and customs of war that are applicable to non-international armed conflict and that constitute war crimes are also relevant here. The main ones are pillaging, the destruction of civilian objects and the contamination of water resources.¹¹¹ In this regard, it is worth indicating that when submitting the request for an arrest warrant to be issued against President

104 UN General Assembly, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin: Addendum: Mission to Colombia*, UN Doc. A/HRC/4/38/Add.3, 2007, paras 41, 42. See also Supreme Court of India, *Virendra Gaur v. State of Haryana*, 1995 (2) SCC 577, 1994; High Court of Rajasthan, *L. K. Koolwal v. State of Rajasthan*, AIR 1988 Raj, 1986, p. 146.

105 Elizabeth Ferris, "Assessing the Impact of the Principles: An Unfinished Task", *Forced Migration Review*, December 2008, p. 10.

106 Constitutional Court of South Africa, *Mazibuko and Others v. City of Johannesburg and Others*, 2009.

107 ECtHR, *Dogan et al. v. Turkey*, Appl. No. 8803/02, Judgment, 29 June 2004, para. 154.

108 In Senegal, new water legislation was adopted in 2008 and new sanitation legislation in 2009, namely Law No. 2008-59 on the Organization of the Public Drinking Water Service and the Collective Sanitation of Domestic Wastewater, 24 September 2008, and the 2009 Sanitation Code.

109 Rome Statute of the International Criminal Court (Rome Statute), 1998, Art. 8(2)(b)(iv) on grave breaches.

110 For example, violence to life (depriving someone of water) or dignity.

111 See AP II, Art. 14; AP I, Arts 54, 55.

Omar Al Bashir of Sudan, the Prosecutor's Office of the ICC made reference to the deprivation of the means of survival of the Fur, Masalit and Zaghawa civilian populations by government forces in Darfur. The accusations included the contamination of water resources, but under the crime of genocide.¹¹² The Pre-Trial Chamber did not, however, deem that there were reasonable grounds to believe that such contaminations were a core feature of the government forces' attacks and did not uphold the accusation of genocide in this regard.¹¹³ The decision nonetheless highlighted the gravity of attacks on water resources in a drought situation¹¹⁴ and shows that acts which violate the right to water can lead to prosecution.

Nevertheless, as the ICC's competence is additional to that of the Sahel States, it is the States that have primary responsibility for setting out a legal framework to sanction (i.e., criminal, civil and administrative sanctions) violations of the right to water.¹¹⁵ These legal texts should also sanction the forcible displacement of civilian groups, which is the trigger that leads to all other violations of their rights.¹¹⁶ This approach to internal displacement in an armed conflict is a key component of IHL. The Kampala Convention adopts the same approach by laying down provisions aimed at preventing forced displacements regardless of the grounds.¹¹⁷ However, these legal solutions need to go hand in hand with operational measures.

Operational measures

As mentioned above, legal solutions alone are not enough; operational measures are also needed to ensure that IDPs are better cared for and their basic needs, such as water and sanitation, are met. This is first and foremost the responsibility of the State in which the forced displacement took place. It is important to underline that, from a legal standpoint, the existence of an armed conflict does not in any way release the State from its responsibility to safeguard individuals' rights and ensure that they are realized.¹¹⁸ It is therefore essential to re-deploy basic social services in affected areas, and the actions of States should include a non-military dimension as well as a military one. In the medium term, this could even entail fostering a dialogue with the armed groups in order to spare civilians the effects

112 ICC, *The Prosecutor vs. Omar Hassan Ahmad Al Bashir*, ICC-02/05-01/09, 2009.

113 *Ibid.*, Decision on Application for Warrant, 4 March 2009, paras 91–98.

114 See, in particular, *ibid.*, Dissenting Opinion of Judge Usacka.

115 Niger's Law No. 2018-74, above note 103, Art. 35, stipulates: "A prison sentence of no less than five years and no more than ten years and a fine of two million francs will be handed down to anyone who: 1) violates the rights of internally displaced people to live in satisfactory conditions of dignity, security, sanitation, nutrition, water, health and shelter in particular."

116 S. M. Kienou, above note 103, pp. 8 ff. See also Law No. 2018-74, above note 103, which sets out criminal sanctions for perpetrators of forced displacements (Art. 31).

117 See above note 50.

118 See UN Human Rights, above note 69, pp. 76–78; see also Hans-Joachim Heintze, "Recouplement de la protection des droits de l'Homme et du droit international humanitaire (DIH) dans les situations de crise et de conflit", *Cultures & Conflits*, No. 60, 2005.

of the conflicts in the region wherever possible.¹¹⁹ However, the actions of the State alone are undoubtedly not enough. Alongside the State's response, it is important to involve other stakeholders, such as humanitarian organizations and international organizations.

The role of non-State humanitarian and security organizations

When it comes to the contribution of non-State humanitarian and security organizations in realizing the right to water for IDPs, the work of the International Committee of the Red Cross (ICRC) in the Sahel region warrants particular attention. The ICRC's right of humanitarian initiative, which is recognized both in international conventions – common Article 3 in the case of non-international armed conflicts – and through its long-standing international practice, means that it has a privileged position in this regard.¹²⁰ It is therefore not surprising that the ICRC has a strong presence in the region.

The work of such organizations must take a comprehensive approach. While particular attention should be paid to IDPs, it is important that the humanitarian response covers all individuals made vulnerable by the armed conflict. (Some people are unable to flee the effects of the conflict precisely because of their vulnerability – the elderly, sick people, etc.) This comprehensive approach, which is prioritized by the ICRC,¹²¹ also has the advantage of preventing tensions between displaced people and local communities,¹²² and it thereby ensures that the needs of displaced people can be more broadly met, as the majority of these individuals are hosted by local people themselves rather than in displacement camps.¹²³ This approach has also been adopted by the International Law Commission. Furthermore, neutral humanitarian organizations can serve as a bridge for dialogue with States and can convince armed groups to accept humanitarian aid, including water supplies for people in areas under the armed groups' control. In the same vein, the role of peacekeeping missions, such as MINUSMA in Mali, can include the provision of water to IDPs. The mandate of protecting the civilian population can easily be interpreted in this way.¹²⁴

119 International Crisis Group, above note 82, p. 29.

120 Although the ICRC has a broader mandate, both in international and non-international armed conflicts (such as those in the Sahel), its right of humanitarian initiative is clearly recognized in common Article 3, which expressly mentions the ICRC as a humanitarian organization.

121 Jakob Kellenberger, "The ICRC's Response to Internal Displacement: Strengths, Challenges and Constraints", *International Review of the Red Cross*, Vol. 91, No. 875, 2009, pp. 476–478.

122 These tensions sometimes arise because local people think that people in displacement camps are in a better situation due to the State and international aid they receive. When there is widespread poverty, these frustrations among the local community are understandable.

123 In Burkina Faso, for instance, in 2019, 59% of displaced people lived in the host community, 35% in individual housing, 4% in makeshift housing and 1% in collective centres: see UNHCR, *Burkina Faso: Évaluation en temps réel de l'opération de l'UNHCR et du Gouvernement sur les personnes déplacées internes 2019*, 2019, p. 3.

124 The obligation for parties to an armed conflict to comply with IHL implies an obligation to afford civilians with due protection, in particular by guaranteeing their fundamental rights, including the right to water; see ICRC Customary Law Study, above note 47, Rule 139. The obligation of multinational peacekeeping forces to ensure compliance with IHL also implies that those peacekeeping forces should ensure that

Moreover, the G5 Sahel Joint Force, whose mandate includes aspects of “development” in addition to military action,¹²⁵ could be used for this type of rapid response.¹²⁶

In addition, water should be a key component of the structural response, with a view to restoring peace and returning IDPs to their homes. In the Sahel region, the likelihood of having access to water is a decisive factor in IDPs’ decisions to return home. The issue of returning home was highlighted by the ACHPR in the case of *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v. Sudan*.¹²⁷ The case relates to almost exactly the same events as those cited above in relation to the arrest warrant for President Al Bashir before the ICC. In the ACHPR case, the claimants, who were from Darfur, were victims, *inter alia*, of the destruction of water infrastructure and the poisoning of certain wells. Noting a series of violations—including of the right to water—by Sudan’s head of State, the ACHPR considered that the restoration of water infrastructure was one of the measures to be taken by the State and was a condition for the safe and dignified return of IDPs.¹²⁸

In Botswana, where water is not as scarce as it is in Darfur and the Sahel, the courts came to the same conclusion concerning the return of the indigenous Bushmen population. They considered that access to water was one of the conditions relating to the Bushmen’s right to return to their ancestral lands.¹²⁹ As such, in a situation of armed conflict like that in the Sahel, the right to water and the protection of water resources should be an important component of any peace deals with armed groups.¹³⁰

Conclusion

We can make two conclusive remarks based on the above analysis. Firstly, while IHL does not *stricto sensu* confer a right to water on IDPs directly and explicitly, the inclusion of this group in the category of civilians means that IHL safeguards their right to water indirectly and implicitly through the general protection afforded to civilians and civilian objects during armed conflicts. We can therefore

civilians’ fundamental rights, including the right to water, are fulfilled: see ICRC, *International Humanitarian Law*, Handbook for Parliamentarians No. 25, 2016, pp. 30–31. See also ICRC, “Internally Displaced Persons and International Humanitarian Law”, fact sheet, Geneva, 2017, available at: <https://www.icrc.org/en/document/internally-displaced-persons-and-international-humanitarian-law-factsheet>; Inter-Parliamentary Union and UNHCR, *Internal Displacement: Responsibility and Action*, Handbook for Parliamentarians No. 20, 2013, available at: <http://archive.ipu.org/PDF/publications/Displacement-e.pdf>.

125 See Convention on the Creation of the G5 Sahel Joint Force, 19 December 2014, Arts 4, 5.

126 See ILC, above note 61, Principle 8.

127 ACHPR, *Sudan Human Rights Organization and Centre on Housing Rights and Evictions (COHRE) v. Sudan*, 279/03–296/05, 2009.

128 *Ibid.*, para. 229.

129 Court of Appeal of Botswana, Ruling of 27 January 2011 Upholding the Decision of 21 July 2010.

130 See ILC, above note 61, Principle 23; see also Global High-Level Panel on Water and Peace, *Think-Tank Roundtable Report: The Protection of Water During and After Armed Conflicts*, Geneva, 2016, p. 11.

affirm that the right to water of IDPs in the Sahel States is – as a guarantee made to all civilian populations – a fundamental right, and that States have primary responsibility for ensuring compliance with and the realization of this right, although the armed groups and other parties involved in the conflict share this responsibility.

Secondly, since IHL, international human rights law and other relevant branches of international law can be jointly applied in times of armed conflict – and in the absence of an explicit and direct protection of the right to water for IDPs under IHL – the right to water is also recognized and protected under international human rights law and, above all, by way of the humane treatment to which all human beings are entitled. As such, the right to water of IDPs is firmly anchored in the *corpus juris* of IHL and international human rights law.

However, this indisputable anchoring in international law alone is not enough to ensure that the right to water is satisfactorily realized, not only because of certain legal obstacles but also, and above all, because of several practical barriers, such as the dangerous security situation and the objective limits on water resources within the States concerned. All stakeholders therefore need to work to provide a coordinated humanitarian response to these challenges. This response must be based on the key principles of non-discrimination, equal access to information and the involvement of IDPs themselves. In a context like the Sahel, the situation of women and young girls must be treated with the utmost care, not only because of their specific water, hygiene and sanitation needs, but also because, more often than not, there is a certain division of roles that means that they are more vulnerable than other family members when trying to access water. These issues, which are interesting in and of themselves, cannot be developed further within the limited framework of this analysis and should be the subject of a more in-depth analysis in subsequent studies.