



THE KAMPALA CONVENTION AND ITS CONTRIBUTION IN FILLING THE PROTECTION GAP IN INTERNATIONAL LAW

Mehari Taddele Maru, MSc, MPA, LLB

Abstract

In October 2009, the African Union (AU) Summit in Kampala, Uganda, adopted the AU Convention on the Protection and Assistance of Internally Displaced Persons (the Kampala Convention). The principal objective of this research project is to examine a few major provisions of the Kampala Convention and offer a legal analysis of its content, novelty and contributions to the governance of internal displacement. It aims to answer the extent to which the Kampala Convention fills the protection gap that exists in international law in the areas of internal displacement and identify its contributions to International Law. Its strengths and weaknesses are cited.

Keywords: Kampala Convention, international law, African Union

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Brief Introduction and Justification for the Kampala Convention

The management of international and regional governance of forced migration is one of the major complex global issues of our time. The complexity increases in the context of Africa due to the multiple forms and trends of internal displacement, and its numerous adverse impacts on various issues. The large number of forced migrants and their grim life situation makes it even more problematic.

In Africa, forced migration takes varied forms and trends. Apart from forced migrants due to conflicts, there are spontaneous migrations of peasants as a result of drought and famine; and seasonal traditional migrations of agro-pastoralist communities in search of water and grazing lands. Internal displacement as outcome and aggravating factors of conflicts often result in displacement of population.¹ Poor socio-economic and environmental conditions as well as armed conflicts² have resulted in a significant increase in refugees and IDPs. Persistent famine also produces IDPs, and in turn, internal displacement induced by famine triggers conflicts. Bad governance contributes to poverty and conflict, which in turn, contributes to unemployment, migration and displacement.

Causes and trends of forced migrations are best understood in terms of the *Push-Pull Framework* as a useful tool for understanding and explaining the causes and nature of forced migration.³ While the Pull-factors refer to better opportunities, better income, and an increasing demand for labour in a globalized economic competition, Push-factors include insecurity of life, conflict, persecution, famine and drought, man-made and natural disasters.⁴ Push-factors also refer to abuses and violations of human rights of IDPs resulting from increased xenophobic reactions and ethnic and other types of discrimination in the areas of origin or destination that contribute to the rise of further displacement. These push-factors induce internal displacement. Internal displacement as a consequence of the push-factors falls under the category of forced migration.

Nowhere are the problem of internal displacement and the plight of IDPs more troubling than in Africa. Currently, over 50 per cent of global IDPs live in Africa.⁵ In Sudan alone, there are more than 6 million IDPs as a result of Conflict Induced

¹ Maru, Mehari Taddele (2004) *Migration, Ethnic Diversity and Federalism in Ethiopia*, University of Oxford, Unpublished Dissertation, Refugee Studies Centre, Queen Elizabeth House, Pp 1-2.

² The Norwegian Refugee Council (2009) *Internally Displaced People: A Global Survey*, Internet update, www.idpproject.org/regions/Africa_idps.htm (accessed 21 May 2010).

³ AU, Decision on the Draft Migration Policy Framework for Africa - Doc. EX.CL/276 (IX).

⁴ See also Lee, Everett (1996) *A Theory of Migration*, University of Pennsylvania, available from <http://www.jstor.org/pss/2060063> (accessed 18 July 2009).

⁵ Forced Migration Online <http://www.forcedmigration.org/browse/regional/africa.htm> (accessed 27 February 2009).

Displacement, the greatest number in any country in the World. In the Democratic Republic of the Congo (DRC) alone, there are more than 4 million IDPs and refugees, whereas in Uganda, there are more than 2 million IDPs, and in Kenya, the post-election violence (PEV) has resulted in more than 300,000 IDPs.⁶ Africa hosts well over 12 million IDPs due to Conflict Induced Displacement.⁷ Owing to the renewed fighting and security problems in Somalia, and the recent fighting in Darfur Sudan, which has further displaced more than 40,000 people, and this number is expected to increase with the upcoming referendum in Southern Sudan.⁸ These numbers do not include the IDPs because of causes such as Development Induced Displacement, Man-made Disaster Induced Displacement such as arson, industrial and chemical disasters, and Natural Disaster Induced Displacement like drought, tropical cyclone, flood, cholera and other epidemics.

In addition to the large number of IDPs, the extreme circumstances under which IDPs live make the governance of internal displacement even more important and urgent. Internal displacement negates the most fundamental human rights. This is particularly applicable to freedom of movement and residence, the right to life and livelihood, the right to health, the right to education, and property and other rights. Seen through the prism of human rights, freedom of movement and residence is not only about freedom to move and reside but includes the freedom to remain in the place of one's choice.

Recent records reveal that health problems kill more IDPs than violent conflicts.⁹ IDPs face catastrophic degree of health risks because of the pronounced conditions of living. Their restricted access to water and poor sanitation of extreme level, aggravate their health circumstances. The absence of, or limited access to, health services further deteriorates their situation. Many African IDP camps have record levels of mortality rates. The Crude Mortality Rate (CMR) in IDP camps in Uganda is 2.8 deaths per 10,000 IDPs per day, whereas the internationally recognized CMR emergency threshold for Sub-Saharan Africa is 0.9 and 0.5 for the World. In Northern Ugandan, IDPs are three times more likely to die compared to other nationals in African countries. Compared to the World CMR emergency threshold, the risk of death for African IDPs is five times higher. With mortality rate of 10.46 for children under five, internally displaced children face the worst health threats.¹⁰ This rate is five and ten times higher than the CMR for Sub-

⁶ Recent conflicts in Somalia have produced 1.3 million IDPs and more than half a million IDPs in DRC. Integrated Regional Information Networks (IRIN), *Somalia: Thousands of Somalis fleeing to Ethiopia*, 4 February 2009. Online and UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/498ab63f1e.html>; <http://www.reliefweb.int/rw/rwb.nsf/db900SID/CVIE-7NYQLB?OpenDocument&rc=1> (accessed 8 February 2009).

⁷ IDMC (2009) *Internal Displacement, Global Overview of Trends and Developments in 2008*, Norwegian Refugee Council, Geneva, Switzerland, Pp. 41, available from www.internal-displacement.org (accessed 12 October 2009).

⁸ See the websites of Reliefweb, IDMC and UNHCR for more detail data; available from [http://www.reliefweb.int/rw/fullMaps_Af.nsf/luFullMap/DE7D398A1F328D17852575540077F39E/\\$File/CE-2009-COD-0121_fr.pdf?OpenElement](http://www.reliefweb.int/rw/fullMaps_Af.nsf/luFullMap/DE7D398A1F328D17852575540077F39E/$File/CE-2009-COD-0121_fr.pdf?OpenElement); [http://www.reliefweb.int/rw/fullMaps_Af.nsf/luFullMap/7126C8161490FAE085257554006C5713/\\$File/map.pdf?OpenElement](http://www.reliefweb.int/rw/fullMaps_Af.nsf/luFullMap/7126C8161490FAE085257554006C5713/$File/map.pdf?OpenElement); [http://www.internaldisplacement.org/8025708F004BE3B1/\(httpInfoFiles\)/890516A5EDC23EFEC125742E003311D9/\\$file/IDMC_Global_Overview_PR_2008.pdf](http://www.internaldisplacement.org/8025708F004BE3B1/(httpInfoFiles)/890516A5EDC23EFEC125742E003311D9/$file/IDMC_Global_Overview_PR_2008.pdf); <http://www.unhcr.org/publ/PUBL/4444afc50.pdf> (accessed 8 February 2009); UNHCR Briefing Notes 6 February 2009, available from <http://www.unhcr.org/news/NEWS/498c2015b.html> (accessed 8 February 2009).

⁹ Allen, Tim (2006) *Trial Justice: International Criminal Court and the Lord's Resistance Army*, International African Institute, Zed Books, London.

¹⁰ Ibid, Pp. 57-58.

Sahara Africa and the World respectively.¹¹ In some African camps, HIV/AIDs prevalence is 11 per cent. Significantly contributing to the overall CMR, malnutrition is very high in IDP camps with 4.4 per cent.¹² Communicable diseases such as cholera, malaria, and respiratory problems constitute 80 per cent of all death of IDPs. Apart from these devastating health risks to IDPs, these diseases could become epidemic outbreaks among host communities and populations of neighbouring countries. This indicates how local conditions can affect the global situation.

All highly vulnerable groups such as children, women, persons with disability, indigenous peoples are conferred with special protection in international law in addition to the protection to which they are entitled as citizens. The commonly shared characteristics among these categories of society are: extreme vulnerability, reduced agency due to varied kind of incapacity (age, gender, disability or number) and specific needs of protection and special assistance that stem from their vulnerability. The conventions and declaration on the rights of the child, on gender discrimination, and indigenous peoples and minority groups offer international protection mechanisms in addition and complementary to those granted to all human beings and citizens of a country. The increased vulnerability, reduced agency and their special protection and assistance needs of IDPs are briefly summarized in the above discussion.

If international protection and assistance are provided under international law for other vulnerable groups, why should not international law provide similar protection to IDPs who face similar or even higher degrees of vulnerability and hence more needs compared to other vulnerable groups. In a nut shell, the absence of binding law has left million of IDPs out of the compass of the international protection of human rights, thus, resulting in a 'protection gap'.

Given the urgent needs for the protection, the large number and high vulnerabilities of IDPs in Africa, the absence of a binding legal regime dedicated to IDPs in the form of a convention and institutional framework in all levels (international, regional or national) laws is a serious legal protection gap.¹³ Owing to the previously mentioned important and urgent considerations, since 1992, internal displacement has been at the top of the agenda of the OAU/AU.¹⁴ However, the process towards an instrument on IDPs began with a familiarization workshop in 1998. As a follow-up to this workshop, the Khartoum Declaration was an important milestone. Adopted at the OAU Ministerial Meeting on Refugees, Returnees and Internally Displaced Persons in Africa in 1998, the Khartoum Declaration pointed out the need to focus on the prevention of internal displacement and protection of IDPs.¹⁵ The same year, the OAU

¹¹ The Sphere Project (2004) *The Principles, Humanitarian Charter and Minimum Standard in Disaster Response*, http://www.sphereproject.org/handbook/html/7_ch5.htm (accessed 27 July 2010).

¹² See *Infra* note 20, Pp 58-57.

¹³ Nyanduga, Bahame (2004) *The challenge of internal displacement in Africa*, *Forced Migration Review* 21. <http://www.fmreview.org/FMRpdfs/FMR21/FMR21full.pdf> (accessed 01 January 2010); Ngugi, Elias (2006) *Internally Displaced Persons: Towards an Effective International Legal Protection Regime*, LLM Thesis, University of Pretoria, Unpublished; Goodwin-Gill, Guy (2000) 'UNHCR and the internal displacement: Stepping into a legal and political minefield' *World Refugee Survey*, US Committee for Refugee, Washington DC; Bushra, Ali Gouda (2009) *Internal Displacement Law and Policy: Analysis of International Norms and Domestic Jurisprudence*, Vandepas Publishing, USA: Lake Mary.

¹⁴ OAU, Resolution on Refugees and Displaced Persons in Africa, CM/Res.1370 (LV), OAU, Resolution on Refugees and Displaced Persons in Africa CM/Dec. 362 (LXVI)/Assembly Harare, Zimbabwe.

¹⁵ OAU, Decision on the Report of the Secretary-General on the Thirtieth Ordinary Session of the OAU Commission on Refugees, on the Situation of Refugees, Returnees and Displaced Persons in Africa, CM Dec.459 (LXX).

predicted that the number and plight of IDPs would increase at an alarming rate.¹⁶ Organized by different institutions working on displacement issues, several regional and continental meetings were conducted in Addis Ababa, Banjul, Gaborone, Abuja, and other places. Indeed since its establishment, the AU adopted comprehensive policies governing migration and internal displacement. It considered how the decline in the interest of the traditional African and other countries of refuge could increase the number of IDPs and problems related to internal displacement in the future. The most prominent AU policies on migration include the Migration Policy Framework for Africa (MPFA),¹⁷ and the African Common Position on Migration and Development (African Common Position).¹⁸

The 2006 AU Banjul Summit played a pivotal role in accelerating the process towards a convention on IDPs. Expressing its serious concern regarding the alarming increase and plight of IDPs, it decided to develop a mechanism for monitoring the situation of forced migrants including IDPs.¹⁹ In its Ninth Ordinary Session of the Executive Council endorsed the Annotated Framework,²⁰ which served as the basis for the draft Kampala Convention.²¹ More importantly, it requested a special Summit of Heads of State and Government to consider the adoption of the Kampala Convention. Moreover, as an additional mechanism, it endorsed the Annual Report on the Protection and Assistance Situation of Victims of Forced Displacement in Africa.²²

Preceded by Meetings of Experts of Member States of the AU, more than three Ministerial Conferences on Refugees, Returnees and Internally Displaced Persons were conducted in the process of drafting of the Kampala Convention. The Executive Council and Assembly of Heads of State and Government of the AU in its Fourteenth Ordinary Session held on January 2009, Addis Ababa, Ethiopia deliberated and decided on the situation and governance²³ of internal displacement. It endorsed the recommendations and the draft Kampala Convention of the conference of Experts of MS on displacement. It also adopted the Report of the Second Ministerial Conference, and endorsed the revised version of the Draft Convention in preparation for the Summit of Heads of State and Government.²⁴ In October 2009, the AU Summit adopted the Kampala Convention. The following sections of the article discuss the Kampala Convention in more detail.

The Kampala Convention and Its Provisions

Apart from the preamble, the Kampala Convention has 23 articles. The preamble offers the rationale for developing the convention; it contextualizes the international norms such as the GPID to the situation of internal displacement in Africa. Presenting the legal

¹⁶ OAU, Resolution CM/Dec. 362 (LXVI)/Assembly Harare, Zimbabwe.

¹⁷ AU, Decision on the Draft Migration Policy Framework for Africa - Doc. EX.CL/276 (IX).

¹⁸ AU, Decision on African Common Position on Migration and Development – Doc. EX.CL/277 (IX) Assembly/AU/JUN 2006.

¹⁹ AU, Decision on the Situation of Refugees, Returnees and Displaced Persons, Doc. EX.CL/254 (IX).

²⁰ Decision on the Ministerial Conference on Refugees, Returnees and Internally Displaced Persons - (Doc. EX.CL/259 (IX).

²¹ Ibid.

²² Ibid.

²³ AU (2009) African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (hereafter The Kampala Convention), Executive Council Decision on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa, Ethiopia on 1 February 2010, EX.CL/Dec.529 (XVI), available from <http://www.africa-union.org/.html> (accessed 12 June 2010).

²⁴ AU, Decision on the Report on the Situation of Refugees, Returnees and Internally Displaced Persons in Africa, Doc. EX.CL/460 (XIV).

underpinnings within the AU and UN system, the preamble furnishes the legislative intention of the Kampala Convention. It recognizes the need for a binding instrument to govern internal displacement in Africa. While removing the legal lacuna in the protection of IDPs has motivated the AU to develop the Kampala Convention, the disastrous impact of internal displacement on peace, security, environment and development of countries was another important justification necessitating such a treaty.²⁵

The remaining provisions of the Kampala Convention cover all the three phases of internal displacement— prevention of displacement, protection and provision of assistance to IDPs during displacement, and durable solution to IDPs in the form of return, relocation or resettlement. The Kampala Convention offers distinctively tailored protection to IDPs. It is comprehensive in terms of covering all phases and causes of internal displacement. It has a human rights-based approach designed to meet the specific needs of IDPs. It details the responsibilities of all actors who come into contact with IDPs. The duties of the AU, UN and Regional Economic Communities, Civil Societies Organizations and aid organizations are enumerated.

The Objectives of the Kampala Convention

A significant contribution of Africa to international law, the Kampala Convention is a remarkable treaty that puts Africa at the forefront of international norm-setting. It aims to address an increasingly *urgent and long-standing* need to fill the legal protection gap in regional governance of internal displacement that existed in international law for a long time. It responds to a wide to a global agreement that IDPs has been the most neglected vulnerable groups without specific, sufficient and effective legal protection in international law—this is the so called ‘protection gap’.

The need to fill the protection gap was urgent because a) the gravity of the plight of the victims of protracted displacement; the profound negative impact of internal displacement on the fundamental human rights of IDPs, sweeping infringement on the collection of human rights as a result of being uprooted and its disastrous consequences on their livelihood; This creates special vulnerabilities and specific needs for IDPs thereof an urgent need to provide special protection; b) the sheer number of IDPs on the African continent is the second most cause of urgency. On the narrow definition of IDPs, limited to Conflict-induced Displacement, Africa hosts close to twelve million IDPs, while on a more inclusive definition that encompasses Development-induced Displacement, Natural Disaster-induced Displacement and Man-made Disaster-induced Displacement, it exceeds twenty million;²⁶ c) the sheer number and the trend of increasing IDPs over the past one decade or so unmistakably indicates an alarming increase in the number of IDPs in the near future due to Natural disaster induced displacement and development induced displacement;²⁷ d) the gravity and large number of IDPs aside, the disastrous impact of protracted internal displacement

²⁵ UNGA (2009) *Climate change and its possible security implications: report of the Secretary-General*, 11 September 2009, A/64/350, available at: <http://www.unhcr.org/refworld/docid/4ad5e6380.html> (accessed 17 October 2010).

²⁶ IDMC and UN OCHA (2009) *Monitoring disaster displacement in the context of climate change: Findings of a study by the United Nations Office for the Coordination of Humanitarian Affairs and the Internal Displacement Monitoring Centre*, Geneva, Norwegian Refugee Council, Pp. 11-12, available from www.internal-displacement.org (accessed November 2009).

²⁷ Pachauri, Rajendra and Reisinger, Andy (eds.) (2007) *IPCC Climate Change 2007: Synthesis Report, Summary for Policymakers, Contribution of Working Groups I, II and III to the Fourth Assessment*, IPCC, Geneva, Switzerland 104, Pp 515, available from <http://www.ipcc.ch/ipccreports/tar/wg2/pdf/wg2TARchap10.pdf> (accessed November 2009).

on peace, development and environment adds to the urgency and importance of removing this protection gap.²⁸ These major facts attest the urgency of filling this serious protection lacuna in international law.

International law has made great strides in offering protection to other vulnerable groups facing high risks to life and livelihood and with special needs. For example, Human Rights Law through Convention on the Rights of the Child offers comprehensive and binding protection to the child in the light of the distinctive and high vulnerability faced by the child;²⁹ Refugee law provides backup protection to refugees around the world;³⁰ civilians in armed conflict are also granted protection by International Humanitarian Law. Human rights law and international humanitarian law make no specific mention of IDPs whatsoever. And refugee law applies only to external displacement. In contrast to conventions dealing other vulnerable groups such as Convention on the Rights of the Child, documents applicable to IDPs either fail to comprehensively address the special needs and distinctive circumstance of IDPs or merely provide soft laws. Human Right Law lumps together IDPs with all other nationals without due consideration for the distinctive circumstances and needs of the former. Human Right Law is too general, applicable to all human beings and fails to specifically address the special protection and assistance needs of IDPs.

In the same vein, International Humanitarian Law treats IDPs in the same manner with other civilian in armed conflict without regard to the unique needs of IDPs. Applicable only during armed conflict, the most critical shortcomings of IHL lay on its narrow coverage to IDPs due to Conflict Induced Displacement and inapplicability during peacetime. International Humanitarian Law leaves other types of IDPs such as Development Induced Displacement, Natural Disaster Induced Displacement and Man-made Disaster Induced Displacement out of the protection ambit of International Humanitarian Law. While Human Right Law offers a comprehensive protection it fails to meet the specific protection needs of IDPs. Conversely, International Humanitarian Law neither covers all types of protection nor does it meet the distinctive needs of IDPs. Guiding Principles on Internal Displacement (GPID),³¹ which comprehensively addresses the distinctive needs of all types of IDPs, is, as its very name indicates, a toothless collection of guidelines devoid of claimable rights

Against this background, the ultimate aim of the Kampala Convention is, to end internal displacement when possible as well as reduce its negative consequences as a matter of urgency and necessity. It aims to offer a legal framework for a Pan-African prevention of internal displacement, protection to, and provision of aid for, IDPs, as well as to address the problem of IDPs durably through return, integration or relocation.

²⁸ UNGA (2009) *Climate change and its possible security implications: report of the Secretary-General*, 11 September 2009, A/64/350, available at: <http://www.unhcr.org/refworld/docid/4ad5e6380.html> (accessed 17 October 2010).

²⁹ The Convention on the Rights of the Child (CRC), GA res 44/25 UN Doc A/44/49 (1989) 1577 UNTS 3, entered into force 2 September 1990.

³⁰ See the Convention relating to the Status of Refugees which was adopted 28 July 1951, entered into force 22 Apr. 1954, 189 UNTS 150 and Protocol relating to the Status of Refugees adopted 31 January 1967 and entered into force 04 October 1967, 606 UNTS 267; and the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa adopted on 10 September 1969, entered into force on 20 June 1974, 1000 UNTS 46; and 1984 Cartagena Declaration on Refugees, adopted 19-22 November 1984, OAS/Ser.L/V/II.66.10.

³¹ United Nations Commission on Human Rights (1998) *Report of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1995/57. Compilation and analysis of legal norms*, UN Doc E/CN.4/1996/52/Add.2, 1996, available from <http://www.un-documents.net/gpid.htm> (21 March 2010).

Chaloka Beyani, one of the chief drafters of the Convention pointed out that “[f]ar more important than the issue of the numbers and location of internally displaced persons are such factors as the sheer gravity of their situation, their precarious existence and vulnerability, and the dimensions of the human rights and humanitarian law required to provide for their physical and material protection, including humanitarian assistance.” He added: “these factors call for the formulation of a comprehensive legal framework designed to codify the standards of protection, provide for the means and institutions of protection and assistance, and to serve as a legal basis for coordinating various regional and international actors and agencies involved in providing protection and assistance to internally displaced persons in Africa.”³² Accordingly, the specific objectives of the Kampala Convention can be categorized in the following four areas:

By setting the normative and legal framework for the governance of internal displacement, the Kampala Convention addresses the root causes of internal displacement and offers durable solutions to internal displacement and the situation of IDPs.³³ Generally speaking, the Kampala Convention has identified, considered the various causes and broadly defined the causes and consequences of internal displacement. Due to the nature of the causes of a specific internal displacement crisis, while prevention and perhaps elimination of the Conflict Induced Displacement, Man-made Disaster Induced Displacement, and Development Induced Displacement, is possible, mitigation applies mainly to the negative impacts of Natural Disaster Induced Displacement. For population that may be affected by Natural Disaster Induced Displacement, the options are limited. They have to retreat from areas affected by natural disaster, adapt or mitigate the impacts of Natural Disaster Induced Displacement.³⁴ By proscribing all kinds of action that may cause arbitrary displacement and imposing duties on actors who may come into contact with IDPs, the Kampala Convention aspires towards effective prevention of displacement as its main aim.³⁵

The second important objective of the Kampala Convention is to set the legal, policy and institutional mechanisms to protect and assist IDPs.³⁶ States Parties need to promulgate national legislation to give effect to the objectives of the Kampala Convention.³⁷ They are also required to take measures in several areas including designing strategies, and developing policies. Some of the provisions of the Kampala Convention apply to the treatment of, protection of, and assistance to IDPs, peace negotiations and agreements.³⁸ What is more, the creation of fund or budget allocation specifically dedicated to internal displacement and IDPs form part of these measures.³⁹ Such internal displacement funds would enable the national legislative organs to “establish an effective legal framework to provide just and fair compensation and other forms of reparations”.⁴⁰ At the heart of the Kampala Convention lays the establishment

³² Beyani, Chaloka (2006) ‘Recent developments the elaboration of a legal framework for the protection of internally displaced persons in Africa’, *Journal of African Law*, Vol. 50, 2, Pp. 189.

³³ Article 2(a) of the Kampala Convention.

³⁴ Core Writing Team, Pachauri, Rajendra and Reisinger, Andy (eds.) (2007) *IPCC Climate Change 2007: Synthesis Report, Summary for Policymakers, Contribution of Working Groups I, II and III to the Fourth Assessment*, IPCC, Geneva, Switzerland 104, Pp 515, available from <http://www.ipcc.ch/ipccreports/tar/wg2/pdf/wg2TARchap10.pdf> (accessed 12 July 2009).

³⁵ See Article 2(a), Article 3(1) of the Kampala Convention.

³⁶ Article 2(b) of the Kampala Convention.

³⁷ Article 3 (2) (a) of the Kampala Convention.

³⁸ Article 3 (2) (c) and Article 3 (2) (e) of the Kampala Convention.

³⁹ Article 3 (2) (d) of the Kampala Convention.

⁴⁰ Article 11 (2) of the Kampala Convention.

of the institutional framework through the creations of regional and national mechanisms such as the Conference of State Parties and joint inter-ministerial taskforces to coordinate response to internal displacement related issues. It stipulates the need to designate a focal ministry and to effectively deal with internal displacement crisis.⁴¹ Preparedness and response mechanisms including early warning form part of the normative and institutional measures.⁴² In general, the Kampala Convention builds the architecture for the prevention of internal displacement, protection of, assistance and durable solutions to, IDPs. This is done through both legislative and institutional components including laws, policies, strategic programmes, agency, fund, and compensation mechanisms.⁴³

Third, the Kampala Convention provides a set of rights of IDPs and corresponding duties and duty bearers during all phases of internal displacement. At the centre the bearers of the obligations are the States Parties. It offers an extensive catalogue of obligations of States Parties.⁴⁴ These obligations refer to the duties of States Parties to eliminate the causes of internal displacement, to prevent internal displacement, to protect and assist IDPs and to seek durable solution to internal displacement.⁴⁵ States Parties are not the only responsible bodies. Indeed, as shown in each provision of the Kampala Convention, the duties imposed on States Parties indirectly apply to non-state actors and armed groups. Thus, the Kampala Convention stipulates the obligations of other actors such as armed groups, NGOs, CSOs, international aid agencies and organizations and multilateral bodies of global governance.⁴⁶ This long list includes the duties of AU,⁴⁷ the obligations of armed groups,⁴⁸ the obligations of international organizations and humanitarian agencies including civil society organs,⁴⁹ as well as other private actors such as business companies particularly those involved in the extractive industry and private security firms.⁵⁰ More importantly, the Kampala Convention, in its several provisions, establishes strict criminal responsibility of individuals engaged or involved in arbitrary displacement.⁵¹

Fourth, the Kampala Convention furnishes not only the normative and legal framework but also institutions and mechanism to address the causes and consequences of internal displacement.⁵² At the national level, the Kampala Convention requires the establishment of an agency serving as a coordinator of preparedness and response to any crisis of internal displacement.⁵³ At the regional level, the institutional mechanisms such as Conference of States Parties are established with an objective of enhancing “solidarity, cooperation, promotion of durable solutions and mutual support” in the governance of internal displacement.⁵⁴ States Parties are expected to assist each other in

⁴¹ Article 3(2) (b) of the Kampala Convention.

⁴² Article 4 of the Kampala Convention.

⁴³ Article 9, Article 10, Article 11 and Article 7 of the Kampala Convention.

⁴⁴ Article 3, Article 4, Article 5, Article 10, Article 11, Article 12, and Article 13 of the Kampala Convention.

⁴⁵ Article 2(d) and 2(e) of the Kampala Convention.

⁴⁶ Article 2 (c) of the Kampala Convention.

⁴⁷ Article 8 and Article 14 of the Kampala Convention.

⁴⁸ Article 7 and Article 5 (11) of the Kampala Convention.

⁴⁹ Article 6, Article 13 and Article 4(3) of the Kampala Convention.

⁵⁰ Article 3(1) (h) and (i) of the Kampala Convention.

⁵¹ Article 3(1) (g) of the Kampala Convention.

⁵² See Article 14, Article 20, Article 22 of the Kampala Convention.

⁵³ Article 3(2)(b) of the Kampala Convention.

⁵⁴ Article 2 (e) of the Kampala Convention.

times of internal displacement crisis.⁵⁵ And they may request assistance from the AU, UN and other aid organizations including Non-Governmental Organizations and Civil Societies Organizations.⁵⁶ In addition, it stipulates robust collaboration mechanism with the African Commission on Human and Peoples Rights and African Court of Human and Peoples Rights, as well as African Court of Justice and Human Rights.⁵⁷ At the international level, the Kampala Convention stipulates the cooperation of State Parties with the UN, international organizations and aid agencies.⁵⁸

Fifth, behind these officially declared reasons, there were other additional external justifications for the adoption of the Kampala Convention. One reason, and perhaps the most important of such reasons, is the pressure from countries of destination and transit of refugees and asylum seekers. They consider that effective prevention of internal displacement and timely response to displacement crisis would significantly contribute to the reduction of refugees and asylum seekers, thereof, ease their burden. International efforts for the establishment of an IDP regime (parallel to the 1951 Refugee Regime to curb external displacement) facilitated the process towards the adoption of the Kampala Convention.⁵⁹ These efforts were partly based on the internal flight alternatives for IDPs.

Definitions and Causes of Internal Displacement under the Kampala Convention

In a series of consultations and treaty negotiation processes towards the Kampala Convention, there were some serious points of disagreement. These disagreements were also reflections of the debates at the global level. The differences and disagreements were raised either as alternative views, or as concepts with potential problems owing to discrepancies in interpretation, or problems related to the capacity of State Parties and legal standing of non-state actors to fulfil the duties. These included the definition of IDPs, as to who are internally displaced persons? What constitutes internal displacement? Whether 'lack of development' or 'large scale development project' could be a cause of internal displacement? Is it legally sound for migrants due to 'lack of development' or 'large-scale development projects' to be categorized as IDPs? As discussed below, the definitions part of the Kampala Convention is an outcome of a long, extensive and rough negotiation among the Member States of the AU.⁶⁰

Definition of IDPs

Prior to the Kampala Convention, there have been three major attempts to define IDPs and provide a legal framework for the governance of internal displacement. These are International Law Association, Guiding Principles on Internal Displacement and the Great Lakes Pact. In general terms, the definitions of IDP in the Guiding Principles on Internal Displacement, the Great Lakes Pact and the Kampala Convention are almost the same. Article 1(K) of the Kampala Convention defines IDPs as:

⁵⁵ Article 5 (2) of the Kampala Convention.

⁵⁶ Article 5(3) of the Kampala Convention.

⁵⁷ Article 8 (3) (e) and (f) of the Kampala Convention.

⁵⁸ Article 5(3), Article 5(6) Article 6 and Article 11 (3) of the Kampala Convention.

⁵⁹ Suhrke, Astri (1999) *Book Reviews, Refugee Survey Quarterly*, Vol. 21, No. 2, Washington DC, The John Hopkins University, Pp. 542.

⁶⁰ The 2008 meetings of the AU experts and ministries in charge of IDPs intensely discussed this part of the definition of IDPs. As a result the disagreements were so intense that very few articles of the draft took more days of the meeting than expected.

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.⁶¹

For a complete definition of IDPs under the Kampala Convention, Article 1(k) needs to be read in conjunction with Article 10 that specifically deals with Displacement Induced by Development projects and Article 5 (4) of the Kampala Convention which relates to Natural Disaster Induced Displacement and Man-made Disaster Induced Displacement including climate and environmental induced displacements.⁶² Under the Guiding Principle Induced Displacement, IDPs are “[P]ersons 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 generalised violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognised state border.”⁶³ The Great Lakes Pact adopts the definitions provided under the Guiding Principle Induced Displacement. According to International Law Association, IDPs are persons who are “obliged to flee...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”.⁶⁴

According to the Kampala Convention, internal displacement refers to “the *involuntary or forced movement, evacuation or relocation* of persons or groups of persons within internationally recognized state borders.”⁶⁵ For reasons discussed below, the word ‘involuntary’ is not quite correct to use it for internal displacement.⁶⁶ While internal displacement is always a forced movement of people, neither does absolute involuntary movement exist, for no migration is involuntary reflexive reaction.⁶⁷ Movements of all kind have, no matter how narrow, a margin of discretionary power of decision as to move or not, including the decision and choice to not move even in the face of serious danger.

⁶¹ Article 1 (k) of the Kampala Convention.

⁶² “Article 10 Displacement induced by Projects 1) States Parties, as much as possible, shall prevent displacement caused by projects carried out by public or private actors; 2) States Parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects; 3) States parties shall carry out a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.” Article 5 (4) states “[s]tates Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.”

⁶³ United Nations Commission on Human Rights (1998) *Report of the Representative of the Secretary-General, Mr. Francis M. Deng*, U.N. Doc. E/CN.4/1998/53/Add.2 (1998).

⁶⁴ Lee, Luke (2003) *London Declaration of International Law Principles on IDPs* ILA Newsletter 17 16/4/2003 London Declaration of International Law Principles on IDPs was drafted by International Law Association (ILA) and adopted in 2000; available from <http://www.ila-hq.org/download.cfm/docid/1C06FD45-EFEF-4908-A636034A0142C22B> (accessed 12 June 2009).

⁶⁵ Article 1(l) the Kampala Convention reads: “Internal displacement” means the *involuntary or forced movement, evacuation or relocation of persons or groups of persons* within internationally recognized state borders” (emphasis added).

⁶⁶ The term ‘forced displacement’ under of the Draft Convention was changed to ‘internal displacement’ under Article 2(1) (a) of Kampala Convention. This is an important revision as the word ‘forced’ would add nothing.

⁶⁷ Turton, David (2003) *Conceptualising Forced Migration*, Refugee Studies Centre Working Paper No. 12, Queen Elizabeth House, International Development Centre, University of Oxford.

Article 1(l) of the Kampala Convention needs to be construed to include all kinds of forced internal migration also referring to eviction, forced evacuation, forced relocation, forced resettlement programmes and population transfers. Indeed this provision—i.e., Article 1(l) of the Kampala Convention adds to specificity and clarity of definition of internal displacement.⁶⁸ These are different forms of internal displacement.⁶⁹ These kinds of displacement are widely applied by states and armed groups, and could be legally or arbitrarily practiced as the case may be. Evacuation concerns to the act and process of removing persons from a place designated as a dangerous or disaster area, for reasons of safety and protection for the evacuee.⁷⁰ Forced evacuations are most often arbitrary displacement in violation of human rights.⁷¹ Eviction commonly refers to the expulsion and dislodging of a person from a land, area or a building. It is a forced movement and often constitutes arbitrary displacement. Eviction pertains to the forced removal, eviction or expulsion from areas from where peoples have settled spontaneously constitutes. Relocation implies that the displaced persons are expected to move or be moved to a new place of destination, evictee in effect is not provided with a place of stay.⁷² People could be forced to resettlement projects. These entail violations of Human Rights Law such as freedom of movement, freedom of residence, the right to livelihood and property rights.⁷³ Consequently, illegal eviction, arbitrary forced relocations, forced resettlement programmes and population transfer could be arbitrary displacement unless conducted in accordance with international law⁷⁴ and produce IDPs. States Parties need to provide suitable alternative sites for their habitation when they evict or relocate people. Relocation has to be carried out in a peaceful manner to sites in satisfactory conditions of safety, nutrition, health, hygiene, and suitable or appropriate accommodation.⁷⁵

Causes of Internal Displacement under the Kampala Convention

The Kampala Convention recognizes three broad categories and major causes of internal displacement: 1) violent conflicts (Conflict Induced Displacement) which include ‘armed conflict, situations of generalized violence, violations of human rights’; 2) disasters both natural and human made (Natural Disaster Induced Displacement and Man-made Disaster Induced Displacement); and 3) development induced displacement.

The Draft Convention, for example, provided a much broader definition of internal displacement, which included displacement ‘due to lack of development’ and ‘large scale development projects’. It reads:

Internally Displaced Persons also means 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 *large scale development projects*,

⁶⁸ Article 1 (l) of the Kampala Convention states “internal displacement” means the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders.”

⁶⁹ See Article 1(l), Article 4(4) of the Kampala Convention.

⁷⁰ Random House Webster’s Unabridged Dictionary (2000) published by Random House, INC. New York, USA.

⁷¹ Article 4(4)(f) of the Kampala Convention.

⁷² Simons, Marco (2002) ‘The Emergence of a Norm against Arbitrary Forced Relocation’, 34. *Columbia Human Rights Law Review*, 95 Pp. 3-5.

⁷³ See also Maru, Mehari Taddele (2004) *Migration, Ethnic Diversity and Federalism in Ethiopia*, University of Oxford, Unpublished Dissertation, Refugee Studies Centre, Queen Elizabeth House; Simons, Marco (2002) ‘The Emergence of a Norm against Arbitrary Forced Relocation’, 34 *Columbia Human Rights Law Review*, 95 Pp 3-5.

⁷⁴ Article 1(l) of the Kampala Convention.

⁷⁵ Article 11 of the Kampala Convention.

or lack of development and who have not crossed an internationally recognized State border.⁷⁶

What is more, the Draft Convention has an article dedicated entirely to displacement induced by the lack of development.⁷⁷ Indeed, previous OAU/AU decisions identified broader root causes of internal displacement not only limited Conflict Induced, and Natural Disaster Induced Displacement, and Man-made Disaster Induced Displacement but also ethnic, religious and political intolerance, abuse of human rights, non respect for democratic principles, poverty, and interference.⁷⁸ However, Displacement and Development Induced Displacement was not mentioned as a cause. The same root causes are recently recognized by the AU as a major causes or aggravating factors of the situation of forced displacement.⁷⁹ The causes of internal displacement under the African Committee on the Rights and Welfare of the Child include 'breakdown of economic and social order'.⁸⁰ Similarly, Chaloka Beyani, the chief drafter of the Kampala Convention, categorizes the causes of IDPs into six groups, armed conflicts, generalized violence, violations, denial, and neglect of human rights, Displacement and Development Induced Displacement, or displacement induced by lack of development, Natural Disaster Induced Displacement or Man-made Disaster Induced Displacement, and any other comparable causes.⁸¹

Beyani and the drafting committee were in favour of adding the words, *displacement induced by lack of development*. The inclusion of *displacement due to lack of development* and *large-scale development projects* in the definition of IDPs was met with strong objection from the Member States of the AU. As a result, the definition part of the Kampala Convention became a source of serious contention, and it dragged down the whole negotiation process.⁸² With the exception of very few countries, the delegations of most MS raised strong opposition against the inclusion of 'lack of development' as a cause of IDPs.⁸³ Based on this many Member States of the AU expressed their concern over the inclusion of this broad and non-legal definition of IDPs in the draft. A long debate ensued on this broad definition of IDPs. Consequently, these terms were dropped in the final Draft of the Kampala Convention. Nonetheless, the debate on this point was

⁷⁶ Article 1(l) of the Draft Convention, emphasis added.

⁷⁷ Article 10 of the Draft Convention reads: "Displacement Induced by Lack of Development 1. States Parties shall prevent and mitigate conditions, which induce internal displacement owing to lack of development through the adoption and implementation of inclusive social and economic development policies and programmes. 2. States Parties shall ensure that public and private actors shall fulfil the economic, social and cultural rights of persons likely to be displaced by lack of development. 3. States Parties shall redress the inequality of well being of persons displaced by lack of development by ensuring that they have equitable access to, and benefit from fair distribution of, economic resources, social services and amenities. 4. States Parties shall ensure the protection of persons displaced by the lack of development from deprivation, hunger, starvation and extreme poverty. 5. States Parties shall safeguard persons displaced by the lack of development against forced removal, eviction or expulsion from areas in which they settled spontaneously. 6. States Parties shall undertake the social and economic rehabilitation of the victims of displacement induced by lack of development, and they shall find suitable alternative sites for their habitation. 7. States Parties shall ensure peaceful and orderly relocation to such sites in satisfactory conditions of safety, nutrition, health, hygiene, and suitable or appropriate accommodation."

⁷⁸ OAU, Resolution CM/Dec. 362 (LXVI)/Assembly Harare, Zimbabwe.

⁷⁹ AU, Decision on the Situation of Refugees, Returnees and Displaced Persons, Doc. EX.CL/254 (IX).

⁸⁰ "The provisions of this Article apply mutatis mutandis to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused."

⁸¹ Beyani, Chaloka (2006) 'Recent developments the elaboration of a legal framework for the protection of internally displaced persons in Africa', *Journal of African Law*, Vol. 50, 2, Pp. 189.

⁸² This was one of the articles that took more than half a day in the 2008 Expert Meeting and Ministerial Conference.

⁸³ Uganda officially supported such proposal to include 'displacement induced by lack of development' in the definition.

relevant and could be very useful not only for the clarity of the legislative intention of the AU different organs with the mandate to prepare and adopt the Kampala Convention, but it also remains an interesting point in the academic discourse on displacement. The next sub-section briefly discusses the debates on 'lack of development' as a cause of displacement.

Displacement due to Lack of Development

The Draft Convention not only put the definition of IDP as listed by the Guiding Principle Induced Displacement but also adds some new elements to the definition of IDPs. According to the Draft Convention internal migration 'due to lack of development' or 'as a result of or in order to avoid the effect of large scale development projects' constitutes internal displacement, and these migrants would be IDPs. The drafters argued that inequality of well-being and inability of States Parties to fulfil economic, social and cultural rights of residents produce displacement. Accordingly, individuals who internally migrate in search of better socio-economic living standard need to be specifically protected and assisted by States Parties.⁸⁴ Under the Guiding Principle Induced Displacement and the Great Lakes Protocol on IDPs; while referring to Development Induced Displacement, there is no mention of lack of development-induced displacement.⁸⁵ Clearly, the Guiding Principle Induced Displacement does not include such broad grounds in defining IDPs. Only 'armed conflicts, situations of generalised violence, violations of human rights or natural or human-made disasters' are the causes enumerated in the Guiding Principle Induced Displacement.⁸⁶ Unless an expansive interpretation is given for the above grounds, 'lack of development' does not fall under the causes of IDPs as defined by Guiding Principle Induced Displacement. Article 1 (l) of the Kampala Convention adds specific acts of state as internal displacement. The Great Lakes Protocol on IDPs, unlike the Kampala Convention, provides a separate provision for Development Induced Displacement. Article 1(5) of the Great Lakes Protocol on IDPs provides a definition of Development Induced Displacement as "persons or groups of persons 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 development induced displacement and who have not crossed an internationally recognized State border."⁸⁷

The inclusion of the "internal displacement due to lack of development" makes the definitions of IDPs and internal displacement conceptually flawed and legally difficult to implement and enforce. Conceptually, it is very difficult to offer a distinct layer of legal protection for residents of a country who migrates internally for whatever reason. With regard to the definition of 'lack of development', the first question that comes to mind is that is there a part of Africa that is not a victim of lack development. Even the relatively better developed countries of Africa have part that severely lack of development. Relatively developed areas attract internal migrants. Rural to urban

⁸⁴ Beyani, Chaloka (2006) 'Recent developments the elaboration of a legal framework for the protection of internally displaced persons in Africa', *Journal of African Law*, Vol. 50, 2, Pp. 196.

⁸⁵ Principle 6 of GPID, UN (1998) *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2, 11 April 1998, available from <http://www.un-documents.net/gpid.htm> (accessed 21 May 2010).

⁸⁶ UN (1998) *Guiding Principles on Internal Displacement*, UN Doc E/CN.4/1998/53/Add.2, 11 April 1998, available from <http://www.un-documents.net/gpid.htm> (accessed 21 May 2010).

⁸⁷ ICGLR (2009) *The Protocol on the Protection and Assistance to Internally Displaced Persons*, 30th November 2006, Bujumbura, Burundi, available from <http://www.icglr.org> (accessed 21 May 2010).

migration in search of better opportunity is common in Africa. And pastoralists communities spontaneous internal migrate as a way of life and coping mechanism.

Internal migrations for better opportunity and more income are not necessarily displacement. A person who has left his habitual residence for another locality in search of better opportunity (including higher pay or better education) is not necessarily owing to the 'lack of development' in his locality but due to a relatively better development somewhere else. This person should not be considered as an IDP. Needless to say, better opportunity is one of the pull-factors for migration. Clearly, better development elsewhere compared to local areas can be a cause of migration, but such persons are not necessarily forced to migrate due to lack of development. Such movement remains migration from less developed part to relatively developed area of a country for better opportunities and living standard. Towns and mining areas of Africa are the usual destinations for internal migrants, but most of them lack development in the major areas of services including housing, food, water, transportation, health etc.

All causes and grounds for IDPs in the Guiding Principle Induced Displacement are rather push-factors. The problem with the conception of 'lack of development' is compounded by the absence of a shared conception of the term—i.e., 'lack of development'. If "due to lack of development" was to be included in the definition of IDPs under the Kampala Convention, all people who leave one locality for a better income than their current income would fall under the categories of IDPs. Consequently, the definition would have been more of an economic or sociological rather than legal definition. According to this definition, all kinds of rural-urban migration due to lack of development or in search of a better opportunity would constitute internal displacement; thereof, all internal migrants would be IDPs. By treating all internal migrants as IDPs, the laws governing internal displacement including the Kampala Convention would offer a full protection and assistance to all internal migrants. Thus, State Parties and other actors who come into contact with internal migrants regardless of the causes of their migration would be required to protect and assist them. By equating all kinds of internal migration with internal displacement, such conceptualization of internal displacement diminishes the conceptual clarity and the legal efficacy of the definition of IDPs and internal displacement.

This expanded definition would sacrifice the conceptual neatness and legal effectiveness for comprehensiveness. By stretching the definition of IDPs to include all internal migrants due to pull and push-factors, the inclusion of 'lack of development' as a cause diminishes the effectiveness of the protection and assistance the Kampala Convention offers to IDPs. The effectiveness of a human rights convention depends on the degree to which the values of the convention are commonly shared; the acceptance and willingness of States Parties and others of the values in the convention; and the capacity of the States Parties to give effect to the implementation of such a convention. In turn the willingness and the capacity of States Parties and other actors to implement a treaty takes into account factors such as availability of resources necessary, in this case to, protect and assist IDPs. As a result, the force of a right is inversely related to the number of right-bearers and rights to be protected. Inclusion of all internal migrants as IDPs with legally claimable rights of protection and assistance reduces the force of the rights of much fewer IDPs would have. This is because States Parties may not have

enough resources to protect all internal migrants. By narrowing down the beneficiaries of the Kampala Convention to the most vulnerable of all internal migrants as a result of push-factors, the protective reaches of the Kampala Convention becomes more effective and enforceable.

Furthermore, treating all internal migrants as IDPs would reduce the idea of durable solutions to local integration because voluntary internal migrants may want to be integrated only locally in the areas of destination. In short, the inclusion of the 'lack of development' as a cause of internal displacement would reduce the vulnerability test and the factors that force people to migrate meaningless. The Kampala Convention becomes legally ineffective and practically impossible as States Parties would have to protect all internal migrants of all kind even those internally moving from place to place for a better in pay or education.

To be sure, famine and starvation, either as a result of man-made or natural disasters, are extreme forms of poor socio-economic development. Thus, famine and starvation do force people to migrate. Consequently, they are included in the definition as causes of internal displacement. State Parties have a general duty to prevent and mitigate conditions, which induce internal displacement. Needless to say ensuring local development is an important duty of States Parties. Nevertheless, the best means to address such conditions that induce unwanted migration, as clearly pointed out in the Migration Policy Framework for Africa, is to speed up socio-economic development.⁸⁸ The implementation of comprehensive and inclusive social and economic development policies and programmes as charted out under the Ouagadougou Declaration on Employment and Poverty Alleviation (Ouagadougou Declaration) in Africa helps in reducing voluntary migration due to lack of development at a local and a national level.⁸⁹

After an overwhelming opposition in the negotiation process, the provisions referring to 'displacement due to lack of development' was entirely scrapped. Member States were indeed right in rejecting such a proposal in the Draft Convention. Once the definition section was radically amended, other provisions were also revised accordingly. For instance, under Article 4(5) of the Draft Convention there were two additional types of arbitrary displacements: 'lack of development-induced displacements' and 'large scale development projects'. The former was dropped entirely and the latter was revised partially.⁹⁰

Large Scale Development Projects

Another area of contention in the definition of IDPs was related to persons who are displaced as a result of or in order to avoid the effect of large scale development projects. Article 10 of the Kampala Convention governs Development Induced Displacement. An outcome of serious and furious negotiations of Member States, it is a substantively revised version of Article 9 of the Draft Convention. Earlier versions of this

⁸⁸ Decision on the Draft Migration Policy Framework for Africa - Doc. EX.CL/276 (IX), Banjul Summit, 2006.

⁸⁹ AU Heads of States and Governments Extraordinary Summit on Employment and Poverty Alleviation in Africa – Ouagadougou, Burkina Faso, 8-9 September 2004; The Declaration on Employment and Poverty Alleviation in Africa – EXT/ASSEMBLY/AU 3 (III); Plan of Action for Promotion of Employment and Poverty Alleviation – EXT/ASSEMBLY/AU4 (III).

⁹⁰ Article 4(5) (f) of the Draft Convention: "Displacement in cases of large-scale development projects, which are not justified by compelling and overriding public interests; "and Article 4(5)(g): "Displacement induced by lack of development, inequality of well-being and neglect or inability to fulfil economic, social and cultural rights".

provision were entirely different both in substance and approach. To begin with, the title of Article 9 of the Draft Convention was 'Displacement induced by Development Projects'. As mentioned above, the adjective 'development' in the title of Article 9 of the Draft Convention was dropped. Similarly, under Article 4(5) of the Draft Convention, Development Induced Displacement was defined as 'large scale development projects'.⁹¹ Adjectives such as 'large scale' and 'development' were also dropped from this article. Some delegates of the Member States of AU argued that if 'development' is to remain in the provision, it should be qualified as sustainable.

Other sub-articles of Article 9 of the Draft Convention were also fundamentally amended after a series of revisions. For instance, in respect to the duty of States Parties to prevent Development Induced Displacement, Article 10 (1) stipulates that, "States Parties, *as much as possible*, shall prevent displacement caused by projects carried out by public or private actors."⁹² The term 'as much as possible' is a new addition that was not in the Draft Convention. In contrast, Article 9 (1) of the Draft Convention reads:

States Parties shall prevent displacement caused by development projects by public or private actors, *except where such displacement is due to the construction of large scale development projects that are justified by compelling and overriding public interest because of their contribution to the sustainable development of the country or because they are in the interest of the people, including persons or communities displaced by such projects.*⁹³

The problem related to 'internationally recognized state border'

IDPs are forced migrants within their country. They are displaced within an internationally recognized border of a country. Overwhelming majority of IDPs are citizens of the country where they are displaced, but they could be non-citizens. As per International Law Association, IDPs are persons 'who have not crossed an internationally recognized state border'.⁹⁴ The element of 'internationally recognized state border' was first brought up by the International Law Association in its definition of IDPs.⁹⁵ The Kampala Convention like the GPID and ILA included the term 'internationally recognized border' in the definition of IDPs.⁹⁶ According some writers such as Erin Mooney, the phrase 'internationally recognized border' is intended to exclude self-proclaimed states such as Somaliland or other rebel control part of an internationally recognized country.⁹⁷ In a situation of total collapse of central state such as Somalia, and the existence of units within the same state claiming statehood albeit not recognized internationally such as Somaliland is indeed problematic in the application of this definition. Somalis of origin from outside Somaliland would be treated as IDPs under the Kampala Convention as Somaliland is not 'internationally recognized' state. Nonetheless, the authorities in Somaliland are unwilling to recognize them as IDPs but

⁹¹ Ibid.

⁹² Article 10 (1) of the Kampala Convention (emphasis added).

⁹³ Article 9 (1) of the Draft Convention.

⁹⁴ Lee, Luke (2003) *London Declaration of International Law Principles on IDPs* ILA Newsletter 17 16/4/2003.

London Declaration of International Law Principles on IDPs was drafted by International Law Association (ILA) and adopted in 2000, available from <http://www.ila-hq.org/download.cfm/docid/1C06FD45-EFEF-4908-A636034A0142C22B> (accessed 02 May 2010).

⁹⁵ Lee, Luke (2003) *London Declaration of International Law Principles on IDPs* ILA Newsletter 17 16/4/2003

London Declaration of International Law Principles on IDPs was drafted by International Law Association (ILA) and adopted in 2000, <http://www.ila-hq.org/download.cfm/docid/1C06FD45-EFEF-4908-A636034A0142C22B> (accessed 02 May 2010).

⁹⁶ Article 1 (k) of the Kampala Convention.

⁹⁷ Mooney, Erin (2005) 'The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern', *Refugee Survey Quarterly*, Vol. 24, Issue 3 UNHCR, Pp 11-13.

only as refugees. On the contrary, international organization and the UN agencies reject such approach. While the purpose of such principle in international law is to oblige the state to ensure the protection of citizens of a country, the unintended consequence is that the protection of, and assistance to, IDPs and refugees is compromised and they are left in limbo without any kind of protection. Non-Somalis were able to get better protection as refugee. If we look at Somaliland as an example, we can see how the element of 'internationally recognized' could affect the provision of protection of and assistance to IDPs.

Natural Disaster Induced Displacement and Man-made Disaster Induced Displacement

As discussed in the above sections, natural and man-made disasters are increasingly becoming the cause of the majority of IDPs. Recognizing this fact and trend, the Kampala Convention under Article 1(k), Article 4(4) (f), Article 5 (4) and Article 12 (3) specifies Natural Disaster Induced Displacement and Man-made Disaster Induced Displacement as the major causes of internal displacement. Sub-article 4 of Article 5 of the Kampala Convention governs the protection and assistance necessary for IDPs due to Natural Disaster Induced Displacement and Man-made Disaster Induced Displacement including climate change. It reads "[s]tates Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including *climate change*."⁹⁸ This sub article was not in the Draft Kampala Convention. An important addition and improvement on the Draft Kampala Convention, it intends to ensure that States Parties do not neglect the IDPs that are victims of disaster and Natural Disaster Induced Displacement including natural, man-made and climatic and environmental crises that trigger displacement. The emphasis and particular mention of climate change induced displacement and prohibition of discriminating IDPs due to climate related displacement has a basis rooted in a longstanding and continued debate whether there are 'environmental' or 'climate' refugees in accordance with the 1951 Refugee Convention grounds. Despite this longstanding and continued debate, it is very difficult see how 'environmental' and 'climate' induced displaced persons are under fear of persecution, which an essential requites to be considered 'refugee'. Therefore, the definition of IDPs under the Kampala Convention does not only extend to environmental or climate induced IDPs, but also they are granted equal protection with other IDPs.

Furthermore, Article 12 (3) of the Kampala Convention imposes a special duty on a State Party that 'refrains from protecting and assisting internally displaced persons in the event of natural disasters.'⁹⁹ Unlike the Guiding Principles on Internal Displacement and the Great Lakes Protocol on IDPs, the Kampala Convention offers a unique protection to all kinds of displacement, particularly those that are not traditionally protected under international law.

The Definition of IDPs and Pastoralism

Despite the attempt of the Kampala Convention to concisely define IDP, there is still lack of clarity when it comes to some communities in Africa. African pastoralist communities move around in search of water and grazing land as well as for security reasons. They move as part of their life style as pastoralist communities. They have no single home or place of habitual residence. Life, in general, is not attached with the space they are in;

⁹⁸ Article 5 (4) of the Kampala Convention (emphasis added).

⁹⁹ Article 12 (3) of the Kampala Convention.

rather mobility is the defining element of their life. Pastoralist migration is one of the several survival mechanisms that enable them to use several environs and ecology in a year. Such migration is rather a means to reduce vulnerability in their livelihood, and displacement is a coping survival mechanism. As the main marker for distinction of IDPs from other kinds of internal migration; pastoralism does not always and necessarily increase vulnerability. Under their normal seasonal movement, pastoralists are not IDPs. What is more, pastoralists do not identify themselves as victims even if they are in some cases. When they are faced with natural and man-made adversities, they move and in such a situation they can be considered as IDPs. Therefore, it is only when their movement increases their vulnerability that the full protection of the Kampala Convention should be extended to pastoralist communities. The Kampala Convention as it currently does not make such distinction. This could be considered as a shortcoming of the Kampala Convention.

The Duty to Prevent Displacement

The major responsibilities of State Parties are stipulated under Article 3 of the Kampala Convention, which lists general obligations of State Parties. Apart from Article 4, Paragraph 12 of the Preamble and Article 5(1) specify that States Parties have the primary responsibility to respect, protect and fulfil the rights of IDPs specified under the Kampala Convention.¹⁰⁰ Article 5 relates to the obligations of States Parties in providing and facilitating the protection. It further stipulates the duties of relief work of global institutions of governance such as AU and UN and international organizations such as ICRC. Generally speaking responsibilities of the States Parties under the Kampala Convention could be summarized as “primary responsibility and commitment to respect, protect and fulfil the rights to which internally displaced persons are entitled”.¹⁰¹ This is coherent with the usual classifications of human rights obligations of States Parties such as the obligation to respect, the obligation to protect, and the obligation to fulfil.¹⁰² The ‘obligation to respect’ mainly requires States Parties to refrain from actions that could cause internal displacement. This is a negative duty of the States Parties not to violate the Kampala Convention. Accordingly, Article 3(1) (a) of the Kampala Convention obliges States Parties to “prohibit and prevent arbitrary displacement of populations.” It obliges States Parties to “refrain from ...arbitrary displacement of populations.”¹⁰³ This sub-article was rather an outcome of intense debate and negotiation among Member States of the AU.¹⁰⁴ In the Kampala Convention, prevention mainly means the prohibition, effective deterrence, and avoidance of arbitrary population displacements. In other words, it refers to the freedom from arbitrary displacement and the obligation of states and the international community to eliminate when possible and reduce the causes of displacement, and mitigate their negative impact when they occur. As the old wisdom dictates ‘prevention is better than cure’, thus addressing the root causes of displacement constitutes the most important and effective measure to prevent displacement from occurring.

¹⁰⁰ Article 4(4) (a) of the Kampala Convention.

¹⁰¹ Paragraph 12, Preamble of the Kampala Convention.

¹⁰² UN (1999) Substantive Issues Arising in the Implementation of the ICESCR: General Comment 12, The Rights to Adequate Food, Committee on Economic, Social and Cultural Rights, Economic and Social Council, Geneva, Doc ECOSOC E/C. 12/1999/5, available from www.unhchr.ch (accessed June 12, 2010).

¹⁰³ Article 3(1) (a) of the Kampala Convention.

¹⁰⁴ The Article 3(1) (b) of the Draft Convention rather referred to ‘prevent, suppress and repress’ the root causes. It was substantively revised.

Article 3 of the Kampala Convention concerns mainly the prevention of Conflict Induced Displacement, and Development Induced Displacement, while Article 4 governs Conflict Induced Displacement, Development Induced Displacement and Man-made Disaster Induced Displacement as it mainly focus on prevention of internal displacement. It also refers to some extent to Man-made Disaster Induced Displacement, and to a lesser extent to Natural Disaster Induced Displacement as neither protection from, nor prevention of, natural disasters is always possible or successful in cases such as earthquakes and volcanoes. Natural Disaster Induced Displacement may not be entirely under the prevention capability of States Parties. In general, however, it requires States Parties to take measures to prevent and eliminate situations that may lead to 'arbitrary displacement'.¹⁰⁵ As the main causes, States Parties are capable of changing the situation.¹⁰⁶ Thus, if States Parties take seriously their duty to prevent internal displacement, most Conflict Induced Displacement, Development Induced Displacement and Man-made Disaster Induced Displacement would be significantly reduced. Accordingly, several provisions of the Kampala Convention reaffirm the prohibition of any kind of discrimination and put a special focus on the duties of States Parties.¹⁰⁷

In the same vein, both from a human rights perspective and efficacy, prevention is the most preferred option. It is also probably more cost effective than protection and provision of assistance to IDPs, as well as return, repatriation, local integration and resettlement. Anchored in the human rights-based approach to address forced migration at its root, the duty of States Parties to prevent displacement takes a pride of place in the Kampala Convention. As provided under the *UN Human Rights Committee - General Comment No. 27*; forced migration is best prevented by ensuring that freedom of movement and residence are fully respected and protected.¹⁰⁸ The Inter-American Human Rights Court asserted that freedom of movement and residence is the core principle upon which the prevention of internal displacement is dependent.¹⁰⁹ In *Malawi Association and others v. Mauritania*, the African Commission on Human and People's Rights decided that Mauritania failed in its responsibility to respect freedom of movement and residence of citizens by failing to prevent displacement.¹¹⁰ Thus, the OAU recommended Member States to effectively prevent internal displacement by ensuring human security. The OAU Declaration on Refugees, Returnees and Internally Displaced Persons (the Khartoum Declaration) pointed out the need to focus on the prevention of internal displacement as the best tool to address problems of protracted displacement.¹¹¹

Prohibition of arbitrary displacement constitutes prevention of internal displacement. By the same reasoning, the bedrock principle for the Kampala Convention

¹⁰⁵ Article 1(d) "Arbitrary displacement means arbitrary displacement as referred to in Article 4 (4) (a) to (h). This definition was newly added on the Draft Convention.

¹⁰⁶ Simons, Marco (2002) 'The Emergence of a Norm against Arbitrary Forced Relocation', 34 *Columbia Human Rights Law Review*, 95.

¹⁰⁷ See paragraph 12 of the Preamble, Article 3, Articles 4(4) (a), Article 5(1), Article 9(1) (a), and Article 9(2) of the Kampala.

¹⁰⁸ UNHRC (1994) *General Comments 27*, 2-54 in UN Doc. HRI/GEN/1/Rev.3, emphasis added available from [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?Opendocument) (accessed 22 May 2010).

¹⁰⁹ *Mapiripan Massacre v. Colombia*, Inter-American Court of Human Rights, Judgement, 15 September 2005

¹¹⁰ *Malawi Association and others v. Mauritania*, (2000), Communication 54/91, AHRLR 149, Pp 21-23.

¹¹¹ OAU, Decision on the Report of the Secretary-General on the Thirtieth Ordinary Session of the OAU Commission on Refugees, on the Situation of Refugees, Returnees and Displaced Persons in Africa, CM Dec.459 (LXX).

and particularly its provisions on the prevention of internal displacement is freedom of movement and residence. This freedom encompasses the right to move and reside and also the right to remain in the place of one's choice. It includes the freedom 'not to move' and not to be evicted. It is about freedom from forced migration. Freedom of movement and residence is a protection against forced displacement and unlawful eviction.¹¹² Therefore, freedom of movement and residence has three aspects; 1) the right to move, 2) the right to be free from any internal or external displacement, and 3) the right to select a place of residence and remain legally in a place of choice. Consequently, internal displacement violates fundamental rights, mainly freedom of movement and residence but also property rights as well as the right to peace and livelihood.¹¹³

Article 3 particularly sub article 1 (b) of the Kampala Convention outlines the conditions that may cause displacement. It states "political, social, cultural and economic exclusion and marginalisation that are likely to cause displacement of populations or persons by virtue of their social identity, religion or political opinion." The Guiding Principles on Internal Displacement does not make any reference to 'political, social, cultural and economic exclusion and marginalisation' as a root cause of internal displacement. The phrase 'social identity, religion or political opinion' covers most of the illegitimate grounds for discrimination. Nonetheless, ethnicity and race constitute the most notorious and commonly employed grounds for persecution and discrimination. Consequently, the provision should have included race and ethnicity as a root cause of displacement. The phrase 'that are likely to cause displacement' indicates other factors unknown at the time of the adoption of the Kampala Convention that need to be considered as causes of internal displacement.¹¹⁴

Thus, Article 3 requires a liberal interpretation to give it a maximum effect. Taking many of the protracted conflicts in Africa such as the Darfur and Southern Sudan, political, social, cultural and economic exclusion and marginalization of local populations at the hand of government in Khartoum are considered as the major causes of Conflict Induced Displacement.¹¹⁵ The conflict in Southern Sudan, for example, started as a quest for an end to economic, social and political exclusion and marginalization. Later on discrimination based on religion domination added fuel to the civil war when the Government of Sudan imposed Sharia law as an official law of the entire Sudan including the Christian population of Southern Sudan. This civil war has claimed more than 2 million lives and displaced more than 3 million people.

Article 4(4) lists factors created by state or non-state actors that produces 'arbitrary displacement'. This list is not by any means exhaustive but illustrative. For this reason, Article 4 (4) (h) is a catch-all clause and includes other types of arbitrary displacements. It reads "[d]isplacement caused by any act, event, factor, or phenomenon of comparable gravity to all of the above and which is not justified under international

¹¹²UNHRC (1994) *General Comments* 27, 2-54 in UN Doc. HRI/GEN/1/Rev.3, available from [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/6c76e1b8ee1710e380256824005a10a9?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/6c76e1b8ee1710e380256824005a10a9?OpenDocument) (accessed 12 June 2010).

¹¹³ Beyani, Chaloka (2000) *Human rights standards and the free movement of people within state*, Oxford, Oxford University Press, Pp 57.

¹¹⁴ See Article 3(1) (b) of the Kampala Convention.

¹¹⁵ Report of the Chairperson of the Commission on the Situation in the Darfur Region of the Sudan, Peace and Security Council of the AU, PSC/AHG/4 (XXIII), 23rd meeting, 10-11 January 2005; Report of the International Commission of Inquiry on Darfur to the UN Secretary- General, 25 January 2005, Geneva, submitted pursuant to the UN Security Council Resolution 1564 (2004).

law, including human rights and international humanitarian law.” Accordingly, in this provision too, a liberal interpretation is needed. For preventive measures to be effective, States Parties need to avoid, deter and punish any of these causes of arbitrary displacement. While Article 4 in general governs the duties of States Parties to protect their population from arbitrary internal displacement, its sub-article 4 identifies the major situations and conditions constituting arbitrary displacement. The main factors of arbitrary displacement are discussed below.

Policies of Discrimination

As discussed above, Article 3 (1) (d) of the Kampala Convention states that the principle of non-discrimination and equality treatments of persons constitute pillars in the prevention of arbitrary displacement. As a result discrimination is broadly defined under Article 4 (4) (a) of the Kampala Convention. It refers to “displacement based on policies of racial discriminations or other similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the population”.¹¹⁶ A Non-governmental Organizations called, IDP Action, is of the opinion that the Kampala Convention could have benefited from verbatim copying of the definition of discrimination under Guiding Principles on Internal Displacement. Principle 4 of Guiding Principles on Internal Displacement, which lists examples of unacceptable grounds of discrimination, includes *race, colour, sex, language, religion or belief, political or other opinion, national, ethnic or social origin, legal or social status, age, disability, property, or birth*.¹¹⁷ Indeed, the Guiding Principles on Internal Displacement definition is broader than the definition given under Article 4(4) (a) of the Kampala Convention. Nonetheless, the phrase “other similar practices” of sub-article 4(a) of Article 4 of the Kampala Convention could be construed to include other illegitimate bases of discrimination. This would allow for a broader construal of what constitutes discrimination. Since the definition grounds are illustrative not exhaustive, other grounds such as political or other opinions, social origin, property etc., could perfectly fit in this definition as far as the aim of discriminatory policies and actions against standards set by International Law, Human Right Law, International Humanitarian Law or the object and purpose of the Kampala Convention.

Conflict-Induced Displacement (CID)

Conflict Induced Displacement refers to all conflict-related cause as stipulated under Article 4(4) (d) of the Kampala Convention. It includes ‘armed conflict, situations of generalized violence and violations of human rights.’¹¹⁸ The term ‘armed conflict’ refers to civil war, where as “situation of generalized violence” seems to refer to riot and unrest. Situations of generalized violence are cases, which fall below the threshold required for the application of the common Article 3 of the Geneva Convention and Additional Protocol II. Thus, International Humanitarian Law does not apply in “situation of generalized violence”. Wars between states do produce IDPs, but wars between states are not directly covered under the definitions provided in the Kampala Convention. In order to extend the application the Kampala Convention to displacement due to inter-states, we need define ‘armed conflict’ to mean both International Armed

¹¹⁶ Article 4 (4) (a) of the Kampala Convention.

¹¹⁷ IDP ACTION (2009) *From Voluntary Principles to Binding Standards*, Friday, 09 January 2009 00:00, Available from www.idpaction.org/index.php/en/news/16-principles2standards (accessed 12 June 2010).

¹¹⁸ See Para 13 of the Preamble of the Kampala Convention, and Article 1 (k) of the Kampala Convention.

Conflicts and Non-International Armed Conflicts. This is another limitation of the Kampala Convention.

Forced Evacuation

Evacuation is a form of displacement widely applied by states. It relates to the act and the process of removing persons from a place designated as a dangerous place or disaster area, for reasons of safety and protection.¹¹⁹ Evacuation could be legal and arbitrary. Conjoined reading of Article 4(4) (b) and 4(4) (f) of the Kampala Convention specifies the exceptional circumstances when forcible evacuation may be justified. Evacuation is a permissible form of population transfer during armed conflicts, natural or man-made disaster emergencies.¹²⁰ Under International Humanitarian Law “[p]arties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless *the security of the civilians involved or imperative military reasons so demand.*”¹²¹ These justifications are 1) security of civilians, 2) health of civilians, and 3) military imperatives. Human Rights Law also provides similar stringent requirements for permissible displacements. Consequently, evacuation is admissible if the safety and health of people affected by Manmade Disaster Induced Displacement or Natural Disaster Induced Displacement requires such an action.¹²² There are three general requirements for evacuation to be legal. These are: 1) substantive requirements, 2) planning requirements, and 3) legal and procedural requirements.

Eviction and Relocation

Eviction commonly refers to the removal and dislodging of a person from land, an area or a building. It is a forced movement and may constitute arbitrary displacement if carried out illegally. Relocation can take different forms including any forced transfer of population to another location, or forced resettlement.¹²³ While relocation implies that the displaced persons are expected to move or be moved to a new place of destination, an evictee in effect is not provided with a place to stay in. Evacuation is different from relocation and eviction, as it is carried out for the security and safety of the evacuees. Evacuation, eviction and relocation produce IDPs, but for different purposes. These entail violations of international human rights such as freedom of movement, freedom of residence, the right to privacy and property rights.¹²⁴ As a “catch-all” clause, Article 4 (4) (h) enables the inclusion of other forms of forced movements of population as arbitrary displacement.

Displacement as a Collective Punishment

Arbitrary displacement could be carried out to punish a group collectively. States and armed groups displace a given population as a punishment for political resistance. For

¹¹⁹ Random House Webster’s Unabridged Dictionary (2000) published by Random House, INC. New York, USA.

¹²⁰ Arzt, Donna (1999) *Compensation as Part of a Comprehensive Solution to the Palestinian Refugee Problem*, Paper Presented for the International Development Research Centre’s Workshop on Compensation for the Palestinian Refugees, Ottawa, July 14-15, 1999, Pp 4-5.

¹²¹ ICRC (2005) ‘List of Customary Rules of International Humanitarian Law’, *Customary Law, International Review of the Red Cross*, Vol. 87, No. 857, available from www.icrc.org/eng/review (October 06, 2010, emphasis added).

¹²² Article 4 (4) (f) of the Kampala Convention.

¹²³ Simons, Marco (2002) ‘The Emergence of a Norm against Arbitrary Forced Relocation’, *Columbia Human Rights Law Review*, 95, Pp. 3-5.

¹²⁴ See also Maru, Mehari Taddele (2004) *Migration, Ethnic Diversity and Federalism in Ethiopia*, University of Oxford, Unpublished Dissertation, Refugee Studies Centre, Queen Elizabeth House; Simons, Marco (2002) ‘The Emergence of a Norm against Arbitrary Forced Relocation’, 34 *Columbia Human Rights Law Review*, 95, Pp 3.

example, since 1996, the Ugandan government has forced people to move to IDP camps, nearby towns and military camps in order to carry out its anti-LRA campaign without any inhibition on the conduct of war. IDP camps and movements of peoples within and from the insurgency areas was part of a military strategy to deny rebel groups a popular support of any kind.¹²⁵ As discussed earlier, the state order has no military or security imperatives. As part of civil war strategy, people of Northern Uganda were forced to be in camps. In these camps, the death rate was close to 72,000 per annum per a camp.¹²⁶ This is an emergency death rate by any standard. This was indeed a violation of not only freedom of movement but also violation of the right of IDPs to security, health and food as a result of overcrowding and lack of adequate provisions of assistance. Similar cases have occurred in many countries.¹²⁷ A combined reading of sub-Article (g) and (c) of Article 4 shows that when displacement is “intentionally used as a method of warfare”, to collectively punish a population, it constitutes arbitrary displacement.¹²⁸

Harmful Practices

Harmful practices could induce arbitrary displacement. Under the Kampala Convention, harmful practices are defined in Article (1) (j) as “all behaviour, attitudes and/or practices which negatively affect the fundamental rights of persons, such as but not limited to their right to life, health, dignity, education, mental and physical integrity and education.” Under Article 1(g) of the Protocol on the Rights of Women in Africa, harmful practices mean all behaviour, attitudes and/or practices which negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.” ICRC defines ‘harmful practices’ in a very similar manner including all behaviour, attitudes and practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity.¹²⁹ For example, more than 28 countries in Africa extensively exercise Female Genital Mutilation (FGM). Every year more than 2 million girls risk Female Genital Mutilation.¹³⁰ As the UNHRC, in its General Comments No. 28, made it clear, Female Genital Mutilation, culture of cattle rustling and raids, burning of widows, dowry and honour killing, forced abortion and sterilization, abduction of children to make them soldiers are harmful practices in violation of IL. In many African countries, perpetrators also attack very young girls, including babies, through the mistaken belief that raping a virgin provides protection from or cures HIV infection.¹³¹ These are some of the violations of fundamental human rights demanding the obligation of state to protect these groups as victims of harmful practices.

As discussed earlier, internally displaced families headed by women move independently of spouses or partners. Women account for half of all IDPs. With the increasing feminisation of internal displacement as an important emerging trend in the

¹²⁵ ‘Gen. Aronda’s Admission on Camps Exposes Crime Against Humanity’, The Independent, Kampala, December 08, 2009 available from <http://allafrica.com/stories/200912090424.html> (accessed 25 July 2010).

¹²⁶ Ibid.

¹²⁷ Kymlicka, Will (2003) ‘Current Trends in Accommodating Ethnic Diversity in Liberal Democracies’ in Paper delivered at 2003 Summer Institute *Legal and Social Realities of Forced Migration*, Asch Center for Study of Ethno-political conflicts, University of Pennsylvania, June 10- August 8 2003, Pp1-8; (Emphasis supplied).

¹²⁸ Article 4 (4) (g) of the Kampala Convention.

¹²⁹ ICRC (2001), *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, The International Committee of the Red Cross, Pp. 7-8.

¹³⁰ The African Child Policy Forum (2006) *Born to High Risk Violence Against Girls in Africa*, The African Child Policy Forum, Pp. 16, available from www.africanchildforum.org (accessed 23 April 2010).

¹³¹ ICRC (2001), *Women Facing War: ICRC Study on the Impact of Armed Conflict on Women*, The International Committee of the Red Cross.

present forced migration landscape, harmful practices particularly women and children need to be addressed using all legal means. Vulnerabilities of internally displaced women to exploitation are also highlighted by the frequently abusive conditions under which they live, especially in the context of domestic service and sex industries in which they are trafficked. The particular focus of the Kampala Convention on harmful practices as a cause of displacement is well placed.

Development-Induced Displacement (DID)

Article 10(1) of the Kampala Convention, in principle, compels States Parties to entirely avoid projects that may produce IDPs. As provided under Article 10 of the Kampala Convention, States Parties are also required to prevent Development Induced Displacement by non-state actors. The inclusion of projects carried out by 'private actors' and their Development Induced Displacement under the preview of the States Parties offers an important emphasis which is not the case in Guiding Principles on Internal Displacement and the Great Lakes Protocol on IDPs.

While, this formulation of Article 10 of the Kampala Convention that prohibits any project that may lead to displacement altogether is an excellent one, nonetheless, it allows for broad interpretation. As discussed earlier, it may open a room for abuses by States Parties to justify their Development Induced Displacement, because States Parties are required only 'as much as possible' to prevent Development Induced Displacement. Such proviso may weaken the duty imposed on States Parties regarding Development Induced Displacement.

It is clear from Article 10 that the Kampala Convention prohibits any arbitrary Development Induced Displacement. Movement of population conducted in accordance with International Law standards and according to procedures set by a constitution of specific country does not constitute arbitrary displacement. States Parties could have justifiable developmental needs and in some cases such needs are met only by 'development project'. As far as there is judicial or other constitutional means of oversight and review of decisions, 'development project' that end up displacing people should not be prohibited.

The Great Lakes Protocol on IDPs is different from Kampala Convention as it recognizes almost all people affected by *large scale development* projects as IDPs. Article 5 of the Great Lakes Protocol on IDPs focuses on 'large-scale development projects'.¹³² Compared to the Great Lakes Protocol on IDPs, the Kampala Convention treats Development Induced Displacement lightly, and did not directly include it as arbitrary displacement. Detailed substantive and procedural safeguards are not provided under the Kampala Convention. It lacks the necessary stringent substantive and procedural requirements related to the prevention of Development Induced Displacement that may end up as arbitrary. In the same style to the Great Lakes Protocol on IDPs, the Draft Convention focused on 'large-scale development projects', which was dropped from the last version of the Kampala Convention. However, the question 'how large should a large-scale development project be?' would have been a cause of controversies and discrepancies in interpretation. As noted earlier, adjectives such as 'large-scale',

¹³² Article 5 of the Protocol on the Protection and Assistance to Internally Displaced Persons, 30th November 2006, Bujumbura, Burundi, available from <http://www.icglr.org> (accessed 21 May 2010).

‘development’ and requirements such as ‘a compelling and overriding public interest’ were dropped from the Draft Convention in the negotiation process.

Article 10 of the Kampala Convention sets out only four major requirements for Development Induced Displacement to be carried out legally. These include: 1) socio-economic and environmental assessment, 2) consultations with the stakeholders particularly the people affected by the project, 3) well informed consent of those to be displaced by such project, and 4) exhaustion of all other feasible alternatives. While Environmental and Social Impact Assessments constitutes an important aspect of ensuring projects are feasible, however, such assessment is very limited in the context of the cultural, historical and religious rights and consideration of the human rights of inhabitants. Environmental and Social Impact Assessments are not comprehensive enough to cover all human rights issues. As discussed below, Human Right Impact Assessment is more comprehensive and advanced form of feasibility appraisal of project and its impact on human rights in general including socio-economic and environmental aspects. Thus, the Kampala Convention could have benefited from a direct referral to the Human Right Impact Assessment.

Article 10 (2) of the Kampala Convention requires States Parties and stakeholders to exhaust other alternatives by conducting feasibility assessment of the project and carrying out mandatory consultation processes with the people who will be potentially affected by the project.¹³³ Indeed, the States Parties are further obliged to make sure that they explore all reasonable and possible options for carrying out their projects in a manner that they can avoid Displacement Induced Displacement or reduce the number of IDPs. This obligation of States Parties extends to the private actors. States Parties has the duty to ensure that private actors explore alternative options of projects with minimum Development Induced Displacement. When such options do not exist, then the obligation of States Parties would be to mitigate and minimize the negative impacts of such projects. When displacement is unavoidable, relocation to a better location with the basic necessities for the IDPs need to be ensured. Furthermore, States Parties needs to consider alternatives to the projects, and compensate when there is no alternative at all.

Article 10 of the Kampala Convention does not mention the requirement of ‘compelling and overriding public interest’. Sub-Article 3 of Article 9 of the Draft Convention which has the requirement of *compelling and overriding public interest*, was dropped entirely. Only in the case of the projects to be carried out in areas of communities with special attachment to, and dependence on, land, the Kampala Convention makes use of the requirement of a ‘compelling and overriding public interest.’ These include ‘compelling and overriding public interest’ and including the interest of the people and communities that would be affected by the project. Article 4(5) reads “States Parties shall endeavour to protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands, except for compelling and overriding public interests.”¹³⁴ By not applying such requirement on all Development Induced Displacement, the Kampala Convention weakens the protection of people from arbitrary displacement due to projects. This is a serious weakness on the part of the Kampala

¹³³ Article 10 (2) of the Kampala Convention.

¹³⁴ Article 4(5) of the Kampala Convention.

Convention. The absence of a provision for a mandatory requirement for judicial review of all Development Induced Displacement related decisions counts as another major weakness of the Kampala Convention.

Communities with Special Attachment on Land and Other Natural Resources

Ethno-cultural communities and indigenous people attach high value to their land, rivers, forest and other symbolic areas as sources of identity, livelihood and social status. Indeed, as noted earlier, for some ethno-cultural communities their existence is solely dependent on their land and its resource (such as forests, mountains and river).¹³⁵ Displacement from their land could amount to extinction as a community. Those indigenous and ethnic minority communities whose identity is based on the territory they traditionally occupied are particularly vulnerable to the disruptive and impoverishing effects of development projects and forced resettlement programmes.¹³⁶

For this reason, it is also not unusual to grant constitutional protection for ethno-cultural communities, including legal prohibition of projects that may displace from areas they consider homeland. Particularly, displacement of ethno-cultural communities that have traditional and land-dependent modes of production and cultures are serious violation of the right to life and identity.¹³⁷ In addressing these concerns, the Kampala Convention offers strong protection to communities with special attachment to, and dependency, on land from displacement. Such protection is not an absolute one; displacement of such communities from their land could be legal carried out when there are 'compelling and overriding public interests'.¹³⁸ The Draft Convention did not allow any exceptions but the obligation imposed on States Parties was rather weaker as it refers to Conference of States Parties '*endeavour* to protect communities with special attachment to, and dependency, on land due to their particular culture and spiritual values from being displaced from such lands.'¹³⁹ Article 4(5) of the Kampala Convention reads: "[s]tates Parties shall take all appropriate measures, whenever possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities' return, reintegration, and reinsertion." This should be read in conjunction with Article 11 (5) that deals with the obligation relating to sustainable return, local integration and relocation.

Protection of IDPs

During displacement phase, the main duty of States Parties is the protection of and assistance to IDPs wherever they are. Article 9 deals with both the protection of and provision of assistance to IDPs. Sub-article 1 of Article 9 of the Kampala Convention focuses on the protection of IDPs, while sub-article 2 deals with the assistance of IDPs during displacement. Reading between the lines, Article 9 emphasizes the need for the protection of IDPs due to Conflict Induced Displacement, Development Induced Displacement and Man-made Disaster Induced Displacement. It does not, however, adequately address protection during Natural Disaster Induced Displacement. Article 9

¹³⁵ Maru, Mehari Taddele (2004) *Migration, Ethnic Diversity and Federalism in Ethiopia*, University of Oxford, Unpublished Dissertation, Refugee Studies Centre, Queen Elizabeth House.

¹³⁶ Inter-American Development Bank (2003) *Involuntary resettlement Operational Policy and Background Paper*, Pp 3, available from www.iadb.org/sds/doc.pdf (accessed on 02 June 2010).

¹³⁷ Maru, Mehari Taddele (2004) *Migration, Ethnic Diversity and Federalism in Ethiopia*, University of Oxford, Unpublished Dissertation, Refugee Studies Centre, Queen Elizabeth House.

¹³⁸ Article 4(5) of the Kampala Convention.

¹³⁹ Article 4 (6) of the Draft Convention (emphasis added).

reaffirms that the responsibility of protection of IDPs falls primarily on States Parties within their territory and jurisdiction.¹⁴⁰

Protection refers to the security of life both physical and mental safety of IDPs. For the Inter-Agency Standing Committee (IASC) protection concerns to “all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law.”¹⁴¹ For the United Nations High Commissioner for Refugees (UNHCR) “all actions aimed at ensuring equal access to and enjoyment of the rights of women, men, girls and boys of concern to UNHCR, in accordance with the relevant bodies of law (including international humanitarian, human rights and refugee law)” are protection measures.¹⁴² According to the ICRC, protection implies “preserving victims of conflicts who are in the hands of an adverse authority from the dangers, sufferings and abuses of power to which they may be exposed, defending them and giving them support.”¹⁴³ These descriptions of protection commonly share the view that protection relates to the preservation of physical security as well as the respect and fulfilment of human rights of IDPs. All measures and interventions designed to ensure equal protection of the fundamental human rights of IDPs in various displacement situations, constitute protection. Consequently, protection includes security and safety of all civilian and IDPs in or outside of conflict areas.

Provision of Assistance during Displacement

Under the Kampala Convention, provision of assistance is the third most important responsibility of States Parties following prevention of internal displacement and protection of IDPs during displacement phase.¹⁴⁴ More importantly, assistance has to be provided adequately and on time. The Conference of States Parties are required provide these assistance “to the fullest extent practicable and with least possible delay”.¹⁴⁵ Thus, the duty to provide such assistance depends on the capability of the Conference of States Parties. The formulation regarding timely provision of assistance is in negative—i.e. ‘least possible delay’, instead of the words ‘quickly’ or ‘immediately’. While the primary responsibility to provide the basic assistance to IDPs fall on the State Party affected by internal displacement, such provision would depend on the capacity of the State Party. When the resources available for Conference of States Parties are inadequate to respond to the IDPs crisis, the Conference of States Parties have the duty to seek regional or international assistance and cooperate with international organizations and humanitarian agencies and Civil Societies Organizations.¹⁴⁶ More specifically, a State Parties or Conference of States Parties could request assistance from States Parties, the AU, the UN, or other international organizations and humanitarian agencies, civil society organizations, and other relevant actors, when States Parties lack the capability to

¹⁴⁰ Article 5 (1) of the Kampala Convention.

¹⁴¹ IASC (2008) *Protecting Persons Affected by Natural Disasters, IASC Operational Guidelines on Human Rights and Natural Disasters*, IASC, available from [www.reliefweb.int/rw/lib.nsf/db900sid/YAOI-6UH5QQ/\\$file/Protecting%20Persons%20Affected%20by%20Natural%20Disasters.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/YAOI-6UH5QQ/$file/Protecting%20Persons%20Affected%20by%20Natural%20Disasters.pdf?openelement) (accessed on May 02, 2010).

¹⁴² UNHCR (2009) *The Protection Induction Programme Handbook*, UNHCR, available from www.unhcr.org/44b5021d2.pdf (accessed on May 02, 2010).

¹⁴³ The ICRC (1978) ‘The League and the Report on the re-appraisal of the Role of the Red Cross (III): Protection and assistance in the event of armed conflict’, *International Review of the Red Cross*, 18, pp 205-209 (accessed on May 02, 2010).

¹⁴⁴ Article 3 and Article 5 of the Kampala Convention.

¹⁴⁵ Article 9 (2) (b) of the Kampala Convention.

¹⁴⁶ Article 5 (6) the Kampala Convention.

provide the necessary protection and assistance.¹⁴⁷ Such request for assistance of a State Party could be made by the concerned SP or the Conference of States Parties.¹⁴⁸ Article 5(6) which read “[s]tates parties shall provide sufficient protection and assistance to internally displaced persons, and *where available resources are inadequate to enable them to do so*; they shall cooperate in seeking the assistance of international organizations and humanitarian agencies, civil society organizations and other relevant actors. Such organizations *may offer* their services to all those in need.”¹⁴⁹ The phrase “where available resources are inadequate to enable them to do so” could be construed by States Parties to restrict aid from international community or as pretext to relegate their responsibility to provide assistance. Similarly international organizations, humanitarian agencies and civil society organizations as well as other relevant aid actors are not obliged to offer their protective and aid services. However, if this provision (Article 6(5)) is read in conjunction with Article 5(7) which requires States Parties to “allow rapid and unimpeded passage of all relief consignments, equipment and personnel to internally displaced persons... it should also enable and facilitate the role of local and international organizations and humanitarian agencies, civil society organizations and other relevant actors, to provide protection and assistance to [IDPs]”, there is strong reason to argue that international organizations, humanitarian agencies and Civil Societies Organizations have not only the rights but also the duty to protect and assist IDPs.¹⁵⁰

States Parties have the duty to refrain from hampering the provision of humanitarian aid. More importantly, for provision of assistance to be effective, States Parties are required to ensure the security of aid workers, aid materials and resource deployed to IDPs. Attacks do not only target IDPs but also humanitarian workers and peacekeepers working in and around IDP camps.¹⁵¹ To this effect, Article 5 (10) specifies that “[s]tates Parties shall respect, protect and not attack or otherwise harm humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons.” An important part of the draft version of this sub-article was dropped. Article “States Parties shall respect, protect and not attack or otherwise harm humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons; *and not destroy, confiscate or divert such material.*”¹⁵² However, Article 7 (5) (h) which refers to armed groups includes the prohibition destruction, confiscation, and diverting of aid. It is a well recorded fact that rebel groups do divert aid resources for their own use. Consequently, the draft includes the provision: “[a]ttacking or otherwise harming humanitarian personnel and resources or other materials deployed for the assistance or benefit of internally displaced persons and shall not destroy, confiscate or divert such materials.” Members of armed groups are prohibited not only from carrying out arbitrary displacement but also from hampering the provision of protection and assistance to IDPs and restricting the movement of IDPs. States Parties have the obligation to organize an effective humanitarian relief response including for host communities.¹⁵³ Article 3

¹⁴⁷ Article 9 (3) of the Kampala Convention.

¹⁴⁸ Article 5 (2) of the Kampala Convention.

¹⁴⁹ Article 6 (5) of the Kampala Convention (emphasis added).

¹⁵⁰ Article 5 (7) of the Kampala Convention,

¹⁵¹ IDMC (2009) *Internal Displacement, Global Overview of Trends and Developments in 2008*, Norwegian Refugee Council, Geneva, Switzerland, Pp. 39, available from www.internal-displacement.org (accessed 03 November 2009).

¹⁵² Article 6(6) Draft Convention (emphasis added).

¹⁵³ Article 9 (2)(b) of the Kampala Convention.

(1) (j) stipulates: “[e]nsure assistance to internally displaced persons by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access [to IDPs] by humanitarian organizations and personnel.”

Protection, therefore, relates also to the security of humanitarian assistance and safety of aid workers of IDPs. It also concerns securing and ensuring unimpeded access to IDPs as well as security of aid and relief workers.¹⁵⁴ The obligations of States Parties include ensuring that the government and its units do not engage in any act of obstructing access to IDPs by humanitarian organizations and other mandated institutions of governance.¹⁵⁵ As per Article 3(1) (f) States Parties are duty bound to refrain from violating “the humanitarian and civilian character” of the works of humanitarian organizations related to protection and provision of assistance to IDPs.¹⁵⁶

The Protective Duties of Member States and the African Union

One of the objectives of the Kampala Convention is to “provide for the respective obligations, responsibilities and roles of armed groups, non-state actors and other relevant actors, including civil society organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons.”¹⁵⁷ The objectives of the Kampala Convention stipulate the obligations of actors who may come in contact with IDPs. Non-state actors not only have obligation to respect, but also ensure respect and facilitate assistance. Albeit with different degrees, in terms of right-holders and duty-bearers, while IDPs are the right holders, the duty-bearers according to the Kampala Convention not only states but also rebel groups, non-state actors including companies, aid organizations, institutions of regional and global governance such as the AU and the UN, as well as all those who come into contact with IDPs.

With regard to protection, another historical contribution of the Kampala Convention relies on its success to combine the principles of state sovereignty as a responsibility to protect nationals, and international solidarity to assist states with internal displacement crises. These duties stipulated under the Kampala Convention entail some form of responsibility of intervention by the international community. This is particularly correct with regard to the mandate of the AU to intervene in a MS when an internal displacement crisis constitutes grave circumstances namely, war crimes, genocide or crimes against humanity. By and large, protracted displacements, particularly Conflict-Induced Displacement, indicate the failure of the state in fulfilling its responsibility to protect its citizens from harm to life, livelihood and safety. Hence, the need for a comprehensive but separate legal instrument dealing with IDPs follows the same logic that when a state fails to discharge its responsibilities, the international community, and in this case mainly the AU, has the duty to provide back-up protection to the citizens of that state.¹⁵⁸ Consequently, under the Kampala Convention, the responsibility of addressing the plight of IDPs is placed on all states. In line with the principle of the responsibility to protect, the intervention role of international and regional mechanisms such as the AU is clearly stipulated. In accordance with the

¹⁵⁴ IDMC (2009) *Internal Displacement, Global Overview of Trends and Developments in 2008*, Norwegian Refugee Council, Geneva, Switzerland, Pp. 16-17.

¹⁵⁵ Article 3(1) (j), Article 9 (2) (i) of the Kampala Convention.

¹⁵⁶ The Kampala Convention.

¹⁵⁷ Article 2(e) of the Kampala Convention

¹⁵⁸ Goodwin-Gill, Guy (1996) *The refugee in international law*, Oxford, Clarendon Press, Second Edition, PP. 4-5.

principle of subsidiarity, the Kampala Convention empowers the AU to intervene for protection purpose, and in a compatible manner with the AU Constitutive Act and International Law. While concentrating on the duties of the States Parties, the Kampala Convention lists specific roles and imposes wide-ranging duties on all international and regional, state and non-state actors who come into contact with IDPs. The legal duties imposed by the Kampala Convention are not limited to States Parties but extend to the AU and the international community at large. The Kampala Convention thoroughly formulates and specifies the role and responsibilities of institutions of global and regional governance such as the UN, Regional Economic Communities, and international organizations and aid agencies.

Moreover, the Kampala Convention sets the considerations under which the right of the AU to intervene in Member States could be utilized for the protection of IDPs. By imposing the primary responsibility on States Parties and reasserting the subsidiary role of the international community, the responsibility to protect rejects the license to interfere in a state on the pretext of protecting nationals. Intervention differs from interference. While the responsibility to protect primarily rests on the state, intervention remains an exception. Another important enabling environment for the development of the Kampala Convention came from the shift of mission that accompanied the transformation of the OAU to the AU. With this shift of mission, the principle of non-interference— the organizing principle of the OAU that characterized its work until the dawn of the new century— changed to the principle of non-indifference. New mandates and institutions marked a serious departure of the AU from the OAU. Subsequently, the AU officially approved the principle of the responsibility to protect.¹⁵⁹

As per Article 2(e), some obligations are imposed on armed groups and non-state actors. The formulations of obligations of armed groups provided under Article 6 of the Draft Convention were fundamentally changed in the Kampala Convention. Article 7 of the Kampala Convention, which speaks about armed conflicts and armed groups, does not impose a direct responsibility on armed groups but on members of the armed groups individually. Nonetheless, Article 2(e) and Article 5 (11) still refer to the obligations of armed groups.¹⁶⁰ Under Article 6 and Article 7, the Kampala Convention did not refer to armed groups directly. These articles were not reworded following Article 7. It incorrectly refers to the obligations on armed groups.

The Kampala Convention prohibits recruitment of children and forcible recruitments of persons to be soldiers, forcing or allowing children to take in any hostilities, and trafficking in human beings, hostage taking, and abduction of IDPs.¹⁶¹ Arbitrary displacement and crimes committed against IDPs entail criminal responsibility of individuals involved in forcibly displacing people. Article 3(1) (g) reasserts the responsibility of individuals for their acts of arbitrary displacements determined under the Kampala Convention. Article 4 (6) requires States Parties to “declare as offences punishable by law acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity.” The protective role of States Parties and mandated

¹⁵⁹ ACHPR Resolution on Strengthening the Responsibility to Protect in Africa, Brazzaville, Republic of Congo, 28 November 2007, ACHPR/Res.117 (XXXXII) 07.

¹⁶⁰ Article 5 (11); “States Parties shall take measures aimed at ensuring that armed groups act in conformity with *their obligations* under Article 7” (emphasis added).

¹⁶¹ Article 7 (d), (e), and (f) of the Kampala Convention.

multilateral organizations like the UN, the AU, and Regional Economic Communities extends to the investigation and prosecution of perpetrators of internal displacement, genocide, crimes against humanity, war crimes and other violations of human rights and International Humanitarian Law by state and non-state actors.¹⁶²

However, the accountability of non-state groups in armed conflicts is not adequately addressed under international law. The Kampala Convention under 3(1) (g) states that one of the general obligations of States Parties concerning internal displacement is ensuring “individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law.” Moreover, members of armed groups, officers, security personnel, managers and executive bodies and board of directors of companies could be held criminally accountable under the Kampala Convention.¹⁶³ The obligation of States Parties to ensure criminal responsibility refers also to the accountability of “non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement.”¹⁶⁴ In a nutshell, the protective duties of States Parties extend to ensuring accountability of criminals implicated in an arbitrary displacement, genocide, war crimes and crimes against humanity as well as other violations of human rights.

The obligation of States Parties to ensure respect for the duties requires the States Parties to make certain that the provisions of the Kampala Convention are not violated by non-state actors. Non-state actors include armed and non-armed elements such as companies, private security firms, and other actors who are not officially attached to the state.¹⁶⁵ Thus, States Parties are required to protect the rights of persons from arbitrary displacement by non-state actors and promote the rights of IDPs. They have also the duty to respect and ensure respect for the provisions of Human Rights Law and International Humanitarian Law related to IDPs. Therefore, States Parties are also expected not only to refrain from violating the Kampala Convention, but also to comply with its provisions and defend them from violation by non-state actors.¹⁶⁶

The obligation of States Parties to prevent displacement includes the duty to defend indigenous people and communities from arbitrary displacement by non-state actors. States Parties could do this by ensuring accountability of non-state organs. This involves ensuring that the activities of non-state actors do not cause or aid to cause arbitrary displacement. The Kampala Convention particularly focuses on the accountability of ‘multinational companies and private military or security companies’.¹⁶⁷ Indeed, when read in conjunction with Article 3(1) (i), this particular emphasis on the duty of States Parties to ensure the accountability of ‘multinational companies and private military or security companies’ is based on the history of many companies involved in the exploration and exploitation of economic and natural resources. As discussed earlier the notorious involvement of non-state actors in

¹⁶² ‘Accountability Key to Protecting Civilians in Conflicts, Security Council’, UN NEWS Centre, New York, July 07, 2010, available from <http://www.un.org/apps/news/story.asp?NewsID=35255&Cr=civilians&Cr1=armed+conflict> (accessed 18 July 2010).

¹⁶³ See Article 7 (4), Article 9, Article 5 (11), Article 15 (2), Article 2 (f) of the Kampala Convention.

¹⁶⁴ Article 3(1)(i) of the Kampala Convention.

¹⁶⁵ Article 1 (n) of the Kampala Convention.

¹⁶⁶ Article 3(1) (c) of the Kampala Convention.

¹⁶⁷ Article 3(1)(h) of the Kampala Convention.

displacing people in violation of international and national laws is taken seriously in the Kampala Convention.

Article 14 of the Kampala Convention creates an institutional mechanism for monitoring compliance and follow-up of implementation of the Kampala Convention. One component of the mechanism for monitoring and follow-up is the Conference of State Parties.¹⁶⁸ The Conference of State Parties is mandated to oversee the compliance of State Parties, interpretation and adjudication of disputes, and enhancing cooperation. However, for the convention to enter into force, it requires ratification by fifteen countries and announcement by the AU to this fact.¹⁶⁹ Even if more than seventeen countries have signed the Kampala Convention, so far only one country Uganda has ratified it. The Kampala Convention will have to wait for fourteen more ratification instruments and thirty days as required under Article 17. In relation to new treaties like the Kampala Convention, the AU Executive Council decided that new conventions shall be ratified within one year of adoption.¹⁷⁰ Given the number of high number of signature within short time, and if the Member States of AU meet the terms of the decision of the Executive Council. Consequently, it is hoped that the Kampala Convention may enter into force in 2011. In this regard, foreseeable challenges with regard to new treaty on IDPs are reservations and inconsistent interpretation by States Parties.¹⁷¹ The Kampala Convention allows denunciation¹⁷² and reservations¹⁷³ by States Parties.

Regarding dispute on the interpretation and application of the Kampala Convention, Article 22 stipulates three steps of dispute settlement namely; 1) amicable settlement through direct consultation between States Parties concerned,¹⁷⁴ 2) when such consultation fails, SP may present their difference to Conference of States Parties which decide by consensus or by two-third majority vote may decide the case; and when operational the African Court of Justice and Human Rights will have the adjudicatory powers.¹⁷⁵ Under its saving clause, the Kampala Convention asserts that the provisions of the Kampala Convention should be construed in a compatible way with the other international and African human rights instruments and International Humanitarian Law. It should not be interpreted as means to deny IDPs to seek asylum and protected as refugee.¹⁷⁶

Durable Solutions

As pointed out in the preceding parts, protection and provision of aid is an immediate and temporary intervention. Paragraph 5 of the Preamble of the Kampala Convention states that one of the objectives, and perhaps the second important one next to prevention, is to search durable solutions to protracted displacement and situations of

¹⁶⁸ Article 14 (1) of the Kampala Convention.

¹⁶⁹ Article 17 of the Kampala Convention.

¹⁷⁰ AU (2009) Decision on the Status of Signature and Ratification of OAU/AU Treaties and the Harmonization of Ratification procedures – Doc.EX.CL/458 (XIV).

¹⁷¹ Bushra, Ali Gouda (2009) *Internal Displacement Law and Policy: Analysis of International Norms and Domestic Jurisprudence*, Vandepas Publishing, USA: Lake Mary, Pp 3-4

¹⁷² Article 19 of the Kampala Convention

¹⁷³ Article 21 of the Kampala Convention

¹⁷⁴ Article 22 (1) of the Kampala Convention.

¹⁷⁵ Article 22 (2) of the Kampala Convention.

¹⁷⁶ Article 20 of Kampala Convention.

IDPs.¹⁷⁷ Unless IDPs regain their livelihood and the cause of their internal displacement ceases, and their status as IDPs in need of a special protection and assistance would continue for long time, thus becoming a protracted displacement without a foreseeable end. As temporary as they are protection and provision of aid need to be conducted with long-term vision and efforts to ensure that the status of IDPs comes to an end at some point. Thus, a long-term solution is required to end internal displacement. This is what is called durable solution. The Kampala Convention provides three kinds of sustainable ending of internal displacement. These are: sustainable return to their areas of origin, integration into the local areas of destination, or relocation to another area of settlement (resettlement).¹⁷⁸ These choices parallel to what are traditionally recognized durable solutions under the Refugee Regime. As part of the freedom of movement and residence and the capability of the IDPs to earn their livelihood and re-establish their normal lives, durable solutions to internal displacement takes a form of long-term intervention by States Parties. Durable solution is then best understood as part of the human rights of nationals to freely move and reside in any part of a country, and to regain their livelihood.

Another serious weakness of the Kampala Convention is that it lacks a clear cessation clause on IDPs status for non-criminal cases. In fact, the Kampala Convention provides cessation clause for IDPs who committed grave crimes such as genocide. The protection benefits offered by States Parties and the international community to IDPs does not exempt the criminal responsibility of those IDPs implicated in the crimes of genocide, crime against humanity and war crimes.¹⁷⁹ It reads: “[t]he provisions of this Convention shall be without prejudice to the individual criminal responsibility of internally displaced persons, within the framework of national or international criminal law and their duties by virtue of the African Charter on Human and Peoples’ Rights.” Protection provided for IDPs is not shield for criminals from prosecution by court of law. Individuals who have participated serious crimes are excluded from protection as IDP. The concept is well recognized in the Refugee Law. In the same vein, Article 1F(a) of the 1951 Refugee Convention excludes asylum seekers implicated in crimes against peace, war crimes, and crimes against humanity from benefit of protection as refugee.¹⁸⁰ However, the Refugee Law also provides for an end to the protection as refugee once the cause of refuge ceases to exist in the country of origin. However, apart from the above criminal case related cessation of protection as IDP, the Kampala Convention provides no other grounds warranting withdrawing protection and assistance as IDP. In some IDP camps aid agencies have been providing food aid since 1990s. The absence of such clear cessation clause may contribute to protracted presence of IDPs even when the cause ceases to exist.

Conclusion

In conclusion, one can say that the Kampala Convention is a path-breaking instrument that aspires to fill the protection gap, described above, that exists in International Law. It goes a long way in addressing the causes and consequences of internal displacement. In a bare outline form, the achievements of the Kampala Convention include the following

¹⁷⁷ Paragraph 5 of the Preamble of the Kampala Convention reads: “committed to sharing our common vision of providing durable solutions to situations of internally displaced persons by establishing an appropriate legal framework for their protection and assistance.”

¹⁷⁸ Article 11 of the Kampala Convention.

¹⁷⁹ Article 20 (3) of the Kampala Convention

¹⁸⁰ Goodwin-Gill, Guy (1998) *The Refugee in International Law*, 2nd edition, Oxford: Oxford, University Press Pp.95-97.

points. The Kampala Convention transforms the guiding principles, set under Guiding Principles on Internal Displacement, to treaty provisions with robust claimable rights and corresponding far-reaching duties on large numbers of actors. By so doing, it bridges the gap between the long-standing and urgent need for protection and the critical lacuna that existed in international law. It is the first ever binding regional instrument governing all phases of internal displacement that comprehensively protects IDPs by granting wide-ranging claimable rights and imposing all-inclusive obligations on an extensive list of national, regional and international state and non-state actors. It positions IDPs and the phenomenon of internal displacement at the centre of regional mechanism for the protection of human rights.

What is more important, the Kampala Convention provides a conceptually clear and morally principled definition of IDPs by drawing a line around internal displacement and internal migration, employing the *push and pull factors conceptual framework of migration*.¹⁸¹ The Kampala Convention adopts a carefully negotiated definition that avoids the dangers of too liberal and too narrow definition of IDPs. By so doing, it enhances comprehensiveness of its coverage of all types of IDPs without sacrificing clarity in conceptualization and efficacy in application.

Even if many of the provisions of the Kampala Convention are heavily drawn from Guiding Principles on Internal Displacement, International Humanitarian Law, Human Rights Law and Refugee Law by analogy, which have also many norms of the customary International Law, the Kampala Convention, as a single self-contained treaty law dealing with internal displacement and IDPs, carries more weight in the hierarchy of international law. A more far-reaching contribution of the Kampala Convention, thus, comes from its effective application of recently emerging norms and new concepts through skilful reformulation of these norms and concepts to adapt to internal displacement. As noted by the President of the ICRC, the Kampala Convention, beyond filling the protection gap, has improved International in many ways and areas.¹⁸²

By employing a human-rights approach, the Kampala Convention confers legal standing to IDPs to demand the obligations to be fulfilled by all actors that come into contact with them. It introduces new rights that are claimable catering for the specific needs of IDPs for protection and assistance. To mention a few of these newly introduced rights of IDPs: the rights of IDPs to return to their areas of origin; to claim compensation; to request assistance through peacefully demonstration etc. The Kampala Convention exceptionally focuses on duties of the States Parties to prevent internal displacement.¹⁸³ A significant improvement on the Guiding Principles on Internal Displacement, early warning, preparedness and response mechanisms to internal displacement crisis marks a key departure of the Kampala Convention from reactive measures stipulated by many international treaties.

Unusual in international law, the Kampala Convention strictly and comprehensively regulates the conduct of non-state actors particularly that of armed

¹⁸¹ The *push and pull factors conceptual framework of migration* discussed in Lee, Everett (1996) *A Theory of Migration*, University of Pennsylvania, available from <http://www.jstor.org/pss/2060063> (accessed 18 July 2009).

¹⁸² Kellenberger, Jakob (2009) Root Causes and Prevention of Internal Displacement: the ICRC perspective, Statement to the Special Summit on Refugees, Returnees and IDPs in Africa, 23 October 2009, Kampala, Uganda, available, <http://www.icrc.org/Web/Eng/siteeng0.nsf/htmlall/displacement-statement-231009> (accessed 07 April 2010).

¹⁸³ Article 4(2) of the Kampala Convention.

groups and business companies in relation to internal displacement. In a clever manner, it detailed the responsibilities of armed groups and their members. With regard to violations of human rights by companies, International Law governs the actions of businesses indirectly through States Parties.¹⁸⁴ In contrast; the Kampala Convention directly stipulates the obligations of companies in relation to their business and their impact on local populations.¹⁸⁵ By reasserting the re-conceptualization of state responsibility as a shadow that always follows the sovereignty of a state, the Kampala Convention has legally anchored the protection and assistance of IDPs on the principle of the responsibility to protect. Seen in context, the development of the Kampala Convention should be viewed in conjunction with two major transformations. While the first one related to the re-conceptualization of state sovereignty as responsibility to protect, the second concerns the institutional transformation of the OAU to AU.

For reasons related to capacity or will, states do not practice what they preach. The gap between law and implementation is visible everywhere and much more clearly in Africa. The principles of sovereignty and state responsibility to protect rest on the propensity—i.e., the will and capability— of state to fulfil enormous obligations specified under International Law. Despite many changes, the States still remains the bedrock in international law. Hence, the principles of responsibility to protect and national sovereignty and for that matter international law are designed to enhance the state capacities of implementation and also fulfilling their responsibilities including in the governance of internal displacement. In this context, the Kampala Convention aims at capacitating the states to be accountable under International Law as this researcher argued elsewhere, international law “does not aim at weakening or destroying states; it try to make states accountable but at the same time capable of dealing with the problems their populations face.”¹⁸⁶ Indeed, by designing protective layers of obligations on States Parties and institutions of regional and global governance, the Kampala Convention has attempted to bridge this gap between norms and practice in international law.

Additional contribution of the Kampala Convention is its compliance monitoring and follow-up mechanisms. Employing new institutional setups such as the Conference of States Parties, the Kampala Convention seeks to offer a peer review mode of monitoring compliance.¹⁸⁷ It empowers the African Court of Justice and Human Rights and the African Commission on Human and Peoples Rights to promote compliance of the States Parties and other responsible actors and adjudicate cases related to the Kampala Convention.¹⁸⁸ Thus one can safely argue that, since the interpretation of the provisions of the Kampala Convention has to be compatible and consistent with international and African legal instruments, any weakness of the Kampala Convention could be removed through international standard interpretation.

¹⁸⁴ Ruggie, John (2007) Prepared Remarks at Clifford Chance, London, 19 February 2007, Pp. 3-4.

¹⁸⁵ See the Kampala Convention Article 3 (1) (h), Article 10 of the Kampala Convention.

¹⁸⁶ Maru, Mehari Taddele (2009) 'African Union and Its Policies on Voluntary and Forced Migration', Fischer, Clara and Vollmer, Ruth, Brief 39, *The Security-Migration Nexus I: Migration and Displacement in Sub-Saharan Africa*, Pp. 84-94, Bonn International Center for Conversion (BICC), Bonn, BICC ISSN 0947-7322, also available at <http://www.bicc.de/uploads/pdf/publications/briefs/brief39/brief39.pdf> (accessed on 07 October 2009).

¹⁸⁷ Article 14 of the Kampala Convention.

¹⁸⁸ Article 22 (2) of the Kampala Convention.

Finally, the Kampala Convention is ultimately expected to contribute to the overall global and African efforts to ensure that migration remains only voluntary and legal act of a person. Voluntary in order to, ensure that persons are not forced to flee due to push factors. States, accordingly, have the duty to ensure that people are not compelled to migrate by eliminating when possible and preventing when necessary all push factors. And legal because migrants have to respect the laws of the country to which they migrate.

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