Denver Journal of International Law & Policy

Volume 39
Number 2 *Spring*

Article 5

January 2011

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Flavia Zorzi Guistiniani

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Keywords
Human Rights Law, United Nations, International Law: History, Soft Law

NEW HOPES AND CHALLENGES FOR THE PROTECTION OF IDPS IN AFRICA: THE KAMPALA CONVENTION FOR THE PROTECTION AND ASSISTANCE OF INTERNALLY DISPLACED PERSONS IN AFRICA

FLAVIA ZORZI GIUSTINIANI*

I witnessed the historic moment of the adoption of the Convention on the Protection and Assistance of Internally Displaced Persons in Africa. The importance of this Convention cannot be underestimated. Building on the UN Guiding Principles on Internal Displacement it is the first legally binding IDP-specific treaty covering an entire continent. The Convention is a tremendous achievement and a beacon of hope for the almost 12 million people in Africa internally displaced by conflict and the many more internally displaced by natural disasters, and hopefully serves as a model for other regions, too.

I commend the African Union for its leadership in developing this Convention. I urge all African States to ratify it and implement its provisions, and I call on the international community to seize this momentum and to lend all support needed to its implementation.[1]

INTRODUCTION

One of the most pressing challenges the international community is experiencing today in the context of population movements is the problem of internal displacement. While not being a new phenomenon, it reached worrying dimensions after the end of the Cold War. Today, the sheer number of internally displaced persons (IDPs) in the world coupled with the human rights violations that they face show at once the dimension and the gravity of the problem. Situations of mass displacement generally put considerable stress on affected communities and negatively impact the overall stability and development of the

* Lecturer in international law (International Telematic University UNINETTUNO), PhD Degree in International Law (University of Teramo), Diploma in International Humanitarian Law from the International Committee of the Red Cross, Political Science Degree *magna cum laude* (University of Florence). She may be contacted at f.zorzigiustiniani@uninettunouniversity.net An earlier draft was presented at the International Conference "Protecting people in conflict and crisis. Responding to the challenges of a changing world", held at the Refugee Studies Centre at the University of Oxford on September 22th- 24th, 2009.

1. Walter Kälin, *The Human Rights of Internally Displaced Persons*, THE BROOKINGS INSTITUTION (Oct. 26, 2009), http://www.brookings.edu/speeches/2009/1026 _internal_displacement _kalin.aspx.

territorial State.[2] In some cases, displacement may also fuel tensions and conflict and consequently, if not properly addressed, frustrate peace building efforts.[3]

Unlike refugees, who fall under the protection of international instruments such as the 1951 UN Convention relating to the Status of Refugees and the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, and who have a specific UN agency – the UNHCR – to assist them, IDPs cannot rely on comparable standards or mechanisms for their protection.[4] Their own State, while having the primary responsibility to assist and protect, is often unable or unwilling to fulfil its duty and, owing to sovereignty concerns, hampers international actors from acting in its place.[5]

In order to come up with a solution to this problem the UN Commission on Human Rights in 1992 entrusted an independent expert, the Special Representative of the Secretary-General on IDPs, Mr. Francis Deng, to examine existing international standards of human rights, humanitarian and refugee law, and their application to the protection of internally displaced persons.[6] The outcome of the work conducted by Deng with a team of international legal experts was a thorough compilation and analysis of legal norms pertaining to internally displaced persons.[7]

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2. *See Addressing Internal Displacement in Peace Processes, Peace Agreements and Peace-Building*, THE BROOKINGS INSTITUTION (Sept. 2007), http://www.brookings.edu/~/media/Files/rc/reports/2007/09peaceprocesses/2007_peaceprocesses.pdf.

3. Khalid Koser, *Introduction: Integrating Displacement in Peace Processes and Peacebuilding*, 28 REFUGEE SURVEY Q., no. 1, 2009, 5.

4. André-Michel Essoungou, *Africa's Displaced People: Out of the Shadows*, AFRICA RENEWAL, Apr. 2010, at 6, *available at* http://www.un.org/ecosocdev/geninfo/afrec/vol24no1/displaced-people.html.

5. In fact, as was aptly recognized by C. Phuong, the notion of protection for IDPs is "inherently contradictory" since it involves both "a strengthening of the capacities of the State" to live up to its basic responsibilities toward its citizens and alternatively the possibility of some kind of an international protection (*Cf.* CATHERINE PHUONG, THE INTERNATIONAL PROTECTION OF INTERNALLY DISPLACED PERSONS 220 (2004).

6. Special Adviser for the Prevention of Genocide and Mass Atrocities, *Rep. of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to Commission on Human Rights Resolution 1993/95*, Commission on Human Rights, para. 14, U.N. Doc. E/CN.4/1994/44 (Jan. 25, 1994). As was explained by the Representative of the Secretary-General on Internally Displaced Persons: "Without prejudicing the issue of whether or not new normative standards are needed, it is generally recognised that even though the existing law appears to be adequate for the needs of internal displacement, a consolidation and evaluation of existing norms would be of value and would provide the basis for filling whatever gaps may exist. Building on the knowledge acquired from the practical experience on the ground, as well as the expertise of scholars with expertise in this area of the law, the proposed project would aim at the development of ideas for normative standards based on principles of existing international instruments. The goal would be to develop a doctrine of protection specifically tailored to the needs of the internally displaced. This requires first a compilation/commentary of the existing norms and a further elaboration of the relevant standards . . . and eventually a declaration or other authoritative document."

7. *See generally* Special Adviser for the Prevention of Genocide and Mass Atrocities, *Rep. of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57*, Commission on Human Rights, U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995); Special Adviser for the Prevention of Genocide and Mass Atrocities, *Rep. of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on*

The study's conclusion was that "[w]here the analysis shows that the needs of internally displaced persons are insufficiently protected by existing international law, it is important to restate general principles of protection in more specific detail and to address clear protection gaps in a future international instrument."[8]

In response to a request by the Commission on Human Rights to develop an appropriate framework for the protection of the IDPs,[9] the Representative submitted a non-binding document in January 1998: the Guiding Principles on Internal Displacement.[10] The Principles are based on existing international humanitarian law, human rights law, and refugee law, and they seek to clarify the gaps of the law as codified with the overall aim of protecting the internally displaced in all three phases of displacement (i.e. before, during and after displacement).[11] They were meant to provide guidance to State authorities, international organizations, and all other relevant actors in providing assistance and protection to IDPs.[12]

At the time of their elaboration, the option of adopting a hard law instrument was rejected for a variety of reasons, the most weighty probably being that the drafting of a treaty would be a time-consuming process and the expected opposition of many States toward such an enterprise.[13] The choice of a non-binding document, strongly supported by Deng, proved to be the most practicable solution, and over time this choice has undeniably contributed to the acceptance of the Principles by many States.[14] However, to the extent that the Principles do not

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Human Rights resolution 1995/39, Commission on Human Rights, U.N. Doc. E/CN.4/1998/53/Add.1 (Feb. 11, 1998).

8. Special Adviser for the Prevention of Genocide and Mass Atrocities, *Rep. of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1995/57*, Commission on Human Rights, para. 413, U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995).

9. CHR Res. 1996/52, E/CN.4/RES/1996/52 (Apr. 14, 1996).

10. Special Adviser for the Prevention of Genocide and Mass Atrocities, *Rep. of the Representative of the Secretary-General, Mr. Francis M. Deng, submitted pursuant to Commission on Human Rights resolution 1997/39, Addendum: Guiding Principles on Internal Displacement*, Commission on Human Rights, intro. para. 2, U.N. DOC. E/CN.4/1998/53/Add.2 (Feb. 11, 1998) [hereinafter Guiding Principles]; *see also* Robert K. Goldman, International Committee of the Red Cross, *Codification of International Rules on Internally Displaced Persons*, 324 INTERNATIONAL REVIEW OF THE RED CROSS 463 (Sept. 30, 1998), *available at* http://www.icrc.org/eng/resources/documents/misc/57jpg8.htm; Walter Kälin, GUIDING PRINCIPLES ON INTERNAL DISPLACEMENT: ANNOTATIONS 1 (American Society of International Law, Studies in Transnational Legal Policy No. 32, 2000) (indicating the legal sources that provide the basis of the principles), *available at* www.asil.org/pdfs/study_32.pdf.

11. Guiding Principles, *supra* note 10, paras. 9-10.

12. *Id.*

13. Roberta Cohen, *The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting*, 10 GLOBAL GOVERNANCE 459, 464-65 (2004), *available at* http://www.unhcr.org/refworld/pdfid/4c51531f2.pdf.

14. It bears noting in this respect that States Members of the United Nations at the Millennium U.N. Summit of 2005 solemnly recognized the Guiding Principles as an "important international framework for the protection of internally displaced persons." General Assembly, *Integrated and Coordinated Implementation of and Follow-Up to the Outcomes of the Major United Nations Conferences and Summits in the Economic, Social and Related Fields: Follow-up to the Outcome of the*

merely reproduce existing norms, States are not formally bound by them. To make the Principles effective, governments must incorporate them in national domestic laws and policies on displacement.[15]

General Remarks on the AU Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa

Against this background, the recent initiative taken by the African Union (AU) to draft the *Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa* is an important development because it demonstrates the continued progress and support for IDPs in the region. The AU Executive Council decided to draft a treaty focused specifically on the internally displaced in 2004.[16]

Following the meeting of a Group of experts in Addis Ababa from April 11-13, 2006, a draft text was discussed and finalized in June 2008. After some major amendments, the text was ultimately signed on October 23, 2008, at the end of a Special Summit of the AU held in Kampala, Uganda.[17] This achievement has been warmly welcomed by the UN Special Representative for IDPs, Walter Kälin,[18] as well as by other humanitarian organisations. The Convention sends an important message to the international community; the drafting of this text shows that Africa intends to deal with internal displacement in a much more serious and proactive manner.[19]

The problem of internal displacement is particularly acute in Africa, which hosts approximately 11.6 million IDPs – almost half (45%) of a global total of

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Millennium Summit, ¶ 132, A/60/L.1 (Sept. 15, 2005). Several international organizations, such as OAU, ECOWAS and OSCE, have also acknowledged the Principles and/or called on their Member States to disseminate and apply them. *See* Walter Kälin, *The Voting Rights Of Internally Displaced Persons*, THE BROOKINGS INSTITUTION (Apr. 21-22, 2005), http://www.brookings.edu/fp/projects/idp/rsgstatement_votingrights.pdf; Roberta Cohen, *The Role of Regional Organizations, ECOWAS*, THE BROOKINGS INSTITUTION (Sept. 30, 2002), http://www.brookings.edu/speeches/2002/0930humanrights_cohen.aspx.

15. *See* Walter Kälin, Khalid Koser, Andrew Solomon, and Rhodri C. Williams, *Incorporating the Guiding Principles on Internal Displacement in Domestic Law: Issues and Challenges*, THE BROOKINGS INSTITUTION (Jan. 2010), http://www.brookings.edu/papers/2010/0119_internal_displacement.aspx (since the development of the Guiding Principles the efforts of the Special Representative for IDPs have mainly focused on their incorporation into national legislation).

16. *See* Executive Council of the African Union, *Decision on the Situation of Refugees, Returnees and Displaced Persons*, Doc. EX/CL/44 (III), http://www.africa-union.org/Official_documents/council%20of%20minsters%20meetings/Maputo/EX_CL_Dec%2046.pdf (last visited Nov. 15, 2010).

17. African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), *adopted on* Oct. 23, 2009, 49 I.L.M. 86, *available at* http://www.internal-displacement.org/8025708F00.4BE3B1/%28httpInfoFiles%29/0541BB5F1E5A133BC12576B900547976/$file/Convention%28En%29.pdf [hereinafter Kampala Convention].

18. U.N. General Assembly, *Report of the Representative of the Secretary-General on the Human Rights of Internally Displaced Persons*, ¶ 85, U.N. Doc. A/63/286 (Aug. 28, 2008).

19. *NRC and IDMC Welcome African Union Convention on IDPs*, INTERNAL DISPLACEMENT MONITORING CENTRE (Oct. 23, 2009), http://www.internal-displacement.org/80257 08F004BE3B1/%28httpInfoFiles%29/DDA13FFEE36B220CC12576580032001D/$file/PR_AU-IDPs_Oct09.pdf.

around 26 million.[20] The gravity and urgency of the problem were one again brought to the fore by recent events in Sudan, a country which unfortunately boasts the largest population of IDPs in the world (around 5 million).[21] Last year in Darfur, a region that already had a population of 2.7 million IDPs, the situation dramatically deteriorated when 317,000 more people were displaced, and the Sudanese government expelled 13 international aid agencies operating in the region.[22]

The Kampala Convention is not the first step taken by the African Union to tackle the problems of population movements in Africa. In 1969, the Organization for African Unity made the first attempt by drafting the Convention Governing the Specific Aspects of Refugee Problems in Africa.[23] This treaty, which codifies a broad definition of the term "refugee,"[24] inaugurated the era of the "open door policy."[25] In the wake of liberation struggles and the subsequent eruption of wars of secession, various African States, moved by a strong ideological call for pan-African solidarity, accepted and gave shelter to significant numbers of refugees fleeing from those conflicts.[26]

During the 1970's and 1980's, changing attitudes toward refugee protection and the proliferation of violent internal conflicts produced a dramatic increase in the population of internally displaced persons, which in turn led to a shift in focus from external to internal population movements. Because uncontrolled groups of IDPs began causing serious internal instability during this time, threatening the peace and security of villages, countries, or even entire regions, African institutions were prompted to devise legal frameworks to protect IDPs.[27] The solutions that were created during this time mostly corresponded to the "African

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20. Miriam Mannak, *Africa Home to Half of World's Internally Displaced People*, DIGITAL JOURNAL (Oct 21, 2009), http://www.digitaljournal.com/article/280802. IDPs vastly outnumber refugees in Africa. In just 10 out of 18 countries in East and central Africa, there are more than 10 million IDPs, according to the UN Office for Coordination of Humanitarian Affairs (OCHA), with Sudan (4M), the DRC (2.12M) AND Somalia (1.55M) heading the list. In the same region, there are refugees in 16 countries, totalling just less than 2M, according to OCHA. *Analysis: African IDP Convention Fills A Void in Humanitarian Law*, IRIN HUMANITARIAN NEWS AND ANALYSIS (Oct. 27, 2009), http://www.irinnews.org/report.aspx?ReportId=86762.

21. Alan Boswell and Maram Mazen, *Southern Sudanese Start Registering for January Referendum on Independence*, BLOOMBERG (Nov. 15, 2010), http://www.bloomberg.com/news/2010-11-15/southern-sudanese-start-registering-for-january-referendum-on-independence.html.

22. Rob Crilly, *A Million Face Starvation as Sudan Shuts Down*, THE SUNDAY TIMES, Mar. 6, 2009, http://www.timesonline.co.uk/tol/news/world/africa/article5854944.ece.

23. Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45, *available at* http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/Refugee_Convention.pdf.

24. *Id.* art. 1.

25. James Schneider, *The Refugee Crisis in Southern and Central Africa*, THE JOURNAL OF HUMANITARIAN ASSISTANCE (Apr. 1, 1999), http://www.jha.ac/articles/a050.htm.

26. *Id.*

27. *See* Regional Meeting on Refugees and Internally Displaced Persons in the Southern African Development Community (SADC): Seminar on Internal Displacement (Aug. 24-26, 2005), *available at* http://www.brookings.edu/fp/projects/idp/conferences/sadcpaper.pdf.

solutions to African problems" approach.[28]

The next major step taken to prevent internal displacement was made at the sub-regional level during the International Conference on the Great Lakes Region. With a goal of ending the endemic conflicts and consequences thereof prevailing in the region, the eleven Member States of this conference signed a Pact on Security, Stability, and Development in December 2006.[29] As far as displacement is concerned, the Pact acknowledges that policies addressing the plight of refugees and IDPs are integral to restoring peace and stability, and includes two protocols specifically dedicated to the protection of IDPs: the Protocol on the Protection and Assistance to Internally Displaced Persons[30] and the Protocol on the Property Rights of Returning Persons.[31] By signing this instrument, the Great Lakes States, (including three of the countries with the most significant IDP populations on the continent: Sudan, Uganda, and Democratic Republic of Congo)[32] committed themselves to adopting and implementing the Guiding Principles at the national level. The Protocol also endeavours to adapt the Guiding Principles to the characteristics of internal displacement in the region by precisely establishing the scope of the responsibilities of States and by setting up a regional mechanism for monitoring the protection of IDPs.

Compared to the Great Lakes experience, the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa, otherwise known as the Kampala Convention, represents even further progress. Through its adoption, the African Union, while acknowledging the continuing relevance and role of the Guiding Principles, devised a completely distinct and binding legal framework that takes into account African specificities in internal displacement.[33] At a time when the main challenge to internal displacement is still the inability or the unwillingness of the majority of States affected to take on their responsibilities, the importance of such a development cannot be understated. Firstly, the Kampala Convention represents the first time States are directly involved in drafting a whole set of standards regarding IDPs.[34] In fact, it bears remembering that the Guiding

28. *Id.*

29. The eleven signatories States are the following: Angola, Burundi, Central African Republic, Chad, Democratic Republic of Congo, Republic of Congo, Rwanda, Sudan, Tanzania, Uganda, and Zambia.

Pact on Security, Stability and Development in the Great Lakes Region, INTERNAL DISPLACEMENT MONITORING CENTRE, http://www.internal-displacement.org/greatlakes (last visited Nov. 29, 2010).

30. Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons, Nov. 30, 2006, *available at* http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/29D2872A54561F66C12572FB002BC89A/$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf [hereinafter Great Lakes Protocol].

31. Great Lakes Protocol on the Property Rights of Returning Persons, Dec. 15, 2006, *available at* http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/84E06BF26DBB 560BC125 72FB002C02D6/$file/Final%20protocol.PropertyRights%20-En%20r.pdf.

32. *See* Internal Displacement in Africa, INTERNAL DISPLACEMENT MONITORING CENTRE, http://www.internal-displacement.org (follow "Countries" hyperlink; then follow "Africa" hyperlink) (last visited Nov. 15, 2010).

33. Kampala Convention, *supra* note 17, pmbl.

34. Nonetheless, borrowing from the experience of the International Conference on the Great

Principles were not negotiated by States, but rather were elaborated by an international team of experts.[35] Secondly, the Kampala Convention signals the acknowledgement by African States that internal displacement can become an issue of legitimate international concern if it is not dealt with adequately at the national level.[36] In this regard, the Convention assigns the African Union the specific responsibilities of supporting States Parties and protecting and assisting the internally displaced. The Convention also reaffirms the AU's right to intervene in cases where international crimes are committed against IDPs.[37] In conclusion, this treaty could serve both as a model and an incentive for other continents and regions to opt for a binding regional instrument on internal displacement.

The Notion of Displacement

The Convention essentially aims to establish a legal framework for preventing or mitigating internal displacement, protecting and assisting internally displaced persons, and promoting durable solutions and mutual support among the States Parties. Internally displaced persons are defined as:

> "persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border."[38]

Lakes Region, the treaty-making process also involved the participation of civil society organizations, including human rights and humanitarian NGOs. In October 2009, at the Special Summit on Refugees, Returnees and IDPs convened by the African Union in Kampala, civil society organizations presented to the Heads of States a document in which they raised questions on some issues, such as which statelessness, birth registration and enforcement of existing international and African standards, which they considered as not adequately dealt with in the Convention. Recommendations of the Civil Society Meeting on African Union mechanisms and the Protection of Refugee, IDP and Citizenship Rights (Oct. 19-20, 2009), http://www.citizenshiprightsinafrica.org/Publications/2009/communique .102209.pdf. Civil society organizations will be also involved in monitoring and evaluating progress on implementing the Convention and the ensuing AU Action Plan.

35. *See* Andrew Solomon, *An African Solution to Internal Displacement: AU Leaders Agree to Landmark Convention*, Brookings-Bern Project on Internal Displacement (Oct. 23, 2009), *available at* http://www.brookings.edu/papers/2009/1023_african_union_solomon.aspx.

36. *See* Kampala Convention, *supra* note 17, pmbl.

37. Kampala Convention, *supra* note 17, art. 8. The African Union's right to intervene in a State Party in certain grave circumstances is enshrined in art. 4(h) of its Constitutive Act. Organization of African Unity, Constitutive Act of the African Union, art. 4, para. h, July 11, 2000, 2158 U.N.T.S. I-37733.

38. *Id.* art. 1(k).

This definition mirrors the one enshrined in the Guiding Principles[39] and, as such, is not a legal definition but, in the words of Special Representative Kälin, "a descriptive identification of the category of persons whose needs are the concern of the Guiding Principles."[40] The term in fact merely describes the situation of an individual being displaced within one's country of habitual residence. In conformity with the approach first espoused by the Guiding Principles,[41] the Kampala Convention does not create a new special legal status for IDPs, but rather strives to ensure that the currently recognized needs are adequately addressed. As a consequence, recognizing that IDPs are individuals who are entitled to the whole range of rights attributed to them by international human rights and humanitarian law instruments, the Convention judiciously declares that the protection it provides is not prejudiced.[42] Accordingly, it also requires States to refrain from and prevent discrimination against IDPs "in the enjoyment of any rights or freedoms on the grounds that they are internally displaced persons."[43]

Of course, the list of causes of displacement contained in the above-mention definition is not exhaustive, and the definition allows for circumstances other than those listed to be taken into account. Indeed, the Convention devotes specific

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39. *See* Guiding Principles, *supra* note 10. An alternative definition has been offered by the International Law Association (ILA) in the London Declaration of International Law Principles on Internally Displaced Persons, adopted at the 69th Conference of the International Law Association in 2000: IDPs are "persons or groups of persons who have been forced to flee or leave their homes or places of habitual residence as a result of armed conflicts, internal strife or systematic violations of human rights, and who have not crossed an internationally recognized State border." International Law Association, London Declaration of International Law Principles on Internally Displaced Persons, art. 1, July 29, 2000, *reprinted in* 12 INT'L J. OF REFUGEE L. 672, 674 (Oct. 2000).

40. Walter Kälin, *supra* note 10, at 1.

41. In fact, as was explained by Kälin:

> It is important to stress that paragraph 2 is not a legal definition of internally displaced persons. Becoming displaced within one's own country of origin or country of habitual residence does not confer special legal status in the same sense as, say, becoming a refugee does. This is because the rights and guarantees to which internally displaced persons are entitled stem from the fact that they are human beings and citizens or habitual residents of a particular state. Those rights and guarantees emanate from the peculiar vulnerability and special needs that flow from the fact of being displaced. By locating the description of "internally displaced persons" in their introductory section rather than in their main body, the Guiding Principles seek to highlight the descriptive and non-legal nature of the term "internally displaced persons." Internally displaced persons need not and cannot be granted a special legal status comparable to refugee status. Rather, as human beings who are in a situation of vulnerability they are entitled to the enjoyment of all relevant guarantees of human rights and humanitarian law, including those that are of special importance to them. This does not rule out the possibility of administrative measures such as registration on the domestic level to identify those who are displaced and need special assistance. However, lack of such registration would not deprive internally displaced persons of their entitlements under human rights and humanitarian law.

Id. at 2-3.

42. Kampala Convention, *supra* note 17, art. 20, para. 2.

43. *Id.* art. 9, para. 1(a).

attention to development-induced displacement even though this cause of displacement was removed from the final version of the list.

Today, development projects are undoubtedly one of the main causes of displacement. In fact, the number of people uprooted by development projects is estimated to be much higher than those displaced by conflict.[44] According to the World Bank, the global total of IDP's reached the astonishing number of 200 million people during the last two decades of the 20th century.[45] Development-induced displacees are also far more numerous than the world's current refugee population, and the steady pace of development means that this group's population is still growing.[46] Moreover, forced displacement caused by development projects can trigger a vicious circle: internal displacement produces internal strife over control of land and natural resources and, in the end, additional forced population movements.

Despite these issues, there is a tendency to overlook the problems associated with displacement caused by development projects.[47] The Global IDP Project found that the plight of development-induced IDPs "remains largely unnoticed and they often receive even less support from their government and/or international aid agencies than people displaced by conflict or natural disasters."[48] As a matter of fact, "[t]he dominant perspective is... that the positive aspects of development projects, the public interest, outweigh the negative ones, the displacement or sacrifice of a few."[49] Unfortunately, the "few" all too often correspond to the most vulnerable and marginalized segments of the population, such as minorities and indigenous peoples.

Encouragingly, the Kampala Convention reverses this trend and directly addresses the issue of displacement due to development. Article 10, entitled "Displacement Induced by Projects," provides as follows:

> 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

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44. NORWEGIAN REFUGEE COUNCIL, INTERNAL DISPLACEMENT: GLOBAL OVERVIEW OF TRENDS AND DEVELOPMENTS IN 2004 35 (Global IDP Project 2005).

45. Michael M. Cernea, *Development-induced and conflict-induced IDPs: bridging the research divide*, FORCED MIGRATION REV., Dec. 2006, at 25, 26.

46. *Id.*

47. Cernea also notes the existence of a corresponding divide in research literature on internal displacement. *Id.* at 25.

48. NORWEGIAN REFUGEE COUNCIL, *supra* note 44, at 36.

49. Internal Displacement Monitoring Centre, *Training on the protection of IDPs: Development-induced displacement*, at 2, *available at* http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/C753862FA2CF8B7CC1257115004752ED/$file/Protection%20from%20module%20handout%20development%20displacement.pdf.

project.[50]

When this final text is compared to the draft text, the positive refinements of this article are apparent.[51] Particularly important is the fact that it refers to projects irrespective of their scale, while both the corresponding draft article and the Guiding Principles only considered large-scale development projects.[52] Furthermore, the reference to a "compelling and overriding public interest" as a legitimate ground to carry out a project was deleted. These changes are crucial because they avoid the impression, created by the draft text, that persons displaced by justifiable and lawful projects or by smaller-scale development projects are not internally displaced.

As already noted, the draft text envisaged development in the list of causes of displacement, specifically referring to those "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, [or lack of development] and who have not crossed an internationally recognized State border."[53] Such a provision did not survive in the final text. This is unfortunate because, due to the widespread reluctance to consider development projects as a cause of displacement, the reference would have avoided the misunderstandings connected to the lack of an analogous provision in the Guiding Principles.

In contrast, the elimination of all references to displacement caused by lack of development is appropriate. In fact, while at first sight such references would seem very progressive, this is not actually the case. The notion of internal displacement, while a flexible one, is based on the contextual presence of two core elements: (1)

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50. Kampala Convention, *supra* note 17, art. 10.

51. The corresponding draft article so provided:

> 1. 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.
>
> 2. States parties shall ensure that the planning and management of the relocation of persons displaced by large scale development projects shall be undertaken, as far as possible, with their full information, consultation and cooperation.
>
> 3. States parties shall ensure that public or private actors shall explore all feasible alternatives before any development project is undertaken in order to avoid forced displacement altogether. States parties shall take all measures necessary to minimize and mitigate the adverse effects of displacement where no alternatives exist.
>
> 4. States parties shall carry out, or cause to be carried out, a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project.
>
> Organization of African Unity, African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Draft), June 2008 (on file with author) [herinafter Draft Kampala Convention], art. 9

52. *See* Draft Kampala Convention, *supra* note 51; Guiding Principles, *supra* note 10, sec. II, princ. 6, para. 2(c).

53. Draft Kampala Convention, *supra* note 51.

being within one's borders, and (2) the involuntary nature of the movement. In most cases, when people leave undeveloped villages, they do so willingly, seeking opportunities in other places. Thus, this sort of population movement does not fit the second element of the definition of displacement.[54] Moreover, the draft text did not provide any guidance on the definition of lack of development in this respect, nor did it fix a threshold to limit its scope. In fact, the reference to lack of development is similar to proposals advanced from time to time with the objective of including in the IDP definition to those who migrate because of extreme poverty or other economic problems.[55] The Guiding Principles do not refer to lack of development as a cause of displacement, probably out of concern that doing so would overstretch the concept of internal displacement, blur the distinction between economic migrants and IDPs, and undermine the protection for all those who migrate.[56]

Obligations of State Parties and the Role of the African Union

The conventional framework for the protection and assistance of IDPs is based on the assumption – undisputed under international law – that States bear the primary responsibility to respect, protect, and fulfil the rights to which the internally displaced are entitled, without discrimination of any kind.[57] Accordingly, the text of the Convention establishes a series of obligations on State Parties during all the different phases of displacement.

Foremost among these obligations are those to prohibit and prevent arbitrary displacement, to respect and ensure respect and protection of IDPs' human rights, to ensure individual criminal responsibility and the accountability of non-State actors involved in activities causing or contributing to displacement, and to maintain the civilian and humanitarian character of the protection and assistance of IDPs.[58]

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54. *See* ROBERTA COHEN & FRANCIS M. DENG, MASSES IN FLIGHT: THE GLOBAL CRISIS ON INTERNAL DISPLACEMENT 17-18 (Brookings Inst. 1998).

55. Erin Mooney, *The Concept of Internal Displacement and the Case for Internally Displaced Persons as a Category of Concern*, 24 REFUGEE SURVEY Q., no. 3, 2005, at 9, 13. In 2002, States members of the ECOWAS, at the time of developing a glossary of migration terms for the West African region, recommended that development should be explicitly added among the causes of displacement in the IDP definition. *Id.*

56. In this respect it bears noting that Bahame Tom Nyanduga, Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa, in its report to the 44th Ordinary Session of the African Commission on Human and Peoples' Rights, stressed the inadequacies of many African States' national policies in providing compensation for development-induced IDPs. Report of Activities by the Special Rapporteur on Refugees, Asylum Seekers, IDPs and Migrants in Africa for the Intersession Period May to November 2008, 44th Ordinary Session of the African Commission on Human and Peoples' Rights (Nov. 10-24, 2008), http://www.achpr.org/english/Commissioner%2527s%2520Activity/44th%2520OS/Special%2520Rapporteurs/IDPs.pdf.

57. Kampala Convention, *supra* note 17, pmbl., para. 11. *See also* Kampala Convention, *supra* note 17, art. 2, para. d, (enumerating among the Convention's objectives that of "provid[ing] for the obligations and responsibilities of States Parties, with respect to the prevention of internal displacement and protection of, and assistance, to internally displaced persons").

58. Kampala Convention, *supra* note 17, art. 3, para. 1(a, d, f-i). Importantly, States Parties are also required to register IDPs. This requirement is designed to address situations where governments

Mindful that the primary bearers of obligations often coincide with the same subjects who directly or indirectly cause displacement, State Parties have also assigned a special role to the African Union. The responsibilities of the AU are outlined in Article 8, which conceives of the organization as both a coordination mechanism and, in exceptional circumstances such as when a State is unable or unwilling to cope with a displacement crisis in its territory, as a major support or substitute for State action.[59] As far as coordination is concerned, the African Union shall support the State Parties in assisting and protecting IDPs, in particular by strengthening the Union's institutional framework and capacity, coordinating the mobilization of appropriate resources, and collaborating directly with relevant stakeholders with respect to the measures to be taken to protect and assist the displaced.[60] The AU shall also share information with the African Commission on Human and People's Rights on the situation of displacement and collaborate closely with the Special Rapporteur for Refugees, Returnees, IDPs and Asylum Seekers in addressing issues of internally displaced persons.[61]

In relation to its role as a support or substitute for State action, the Convention's Constitutive Act[62] provides for the right of the African Union to intervene in the territory of a member State when international crimes are committed. The Constitutive Act also gives member States the right to request intervention from the AU[63] to "restore peace and security... and thus contribute to the creation of favourable conditions for finding durable solutions to the problem of internal displacement."[64]

The Responsibilities of Armed Groups and Other Non-State Actors with Respect to Displacement

The Convention lists among its objectives that of "provid[ing] for the respective obligations, responsibilities and roles of armed groups, non-State actors and other relevant actors, including non-governmental organizations, with respect to the prevention of internal displacement and protection of, and assistance to, internally displaced persons."[65] Among these non-State entities, particular attention is devoted to armed groups. This reflects the nature of displacement in Africa, where the root cause of many displacements can undoubtedly be traced to domestic

minimise or otherwise manipulate numbers of IDPs or make it difficult for them to access assistance or social services. Article 13(1) in fact provides that "State Parties shall create and maintain an up-dated register of all internally displaced persons within their jurisdiction or effective control." Kampala Convention, *supra* note 17, art. 13, para. 1. Instead, the Guiding Principles do not require that States institute an IDP registration system. Guiding Principles, *supra* note 10, princ. 20, para. 2 (providing only that "the authorities concerned shall issue to [IDPs] all documents necessary for the enjoyment and exercise of their legal rights, such as passports, personal identification documents, birth certificates and marriage certificates").

59. Kampala Convention, *supra* note 17, art. 8.
60. Kampala Convention, *supra* note 17, art. 8, para. 3(a-d).
61. Kampala Convention, *supra* note 17, art. 8, para. 3(e-f).
62. Constitutive Act of the African Union, *supra* note 37, art. 4, para. h.
63. *Id.* art. 4, para. j.
64. Kampala Convention, *supra* note 17, art. 8, para. 2.
65. Draft Kampala Convention, *supra* note 51, art. 2(e).

conflict situations. This issue represents another area where the final approved text is dramatically different from the proposed draft text.

For example, the draft contained a clause, entitled "Obligations of Armed Groups Relating to Protection and Assistance,"[66] which would have been a complete novelty in treaty law. The clause was strongly criticized by non-governmental organizations[67] and in fact raised a number of dilemmas from both a legal and a pragmatic point of view.

Armed groups, as parties to an internal armed conflict, are addressees of international obligations under international humanitarian law, and in particular those contained in Common Article 3 to the four Geneva Conventions and Additional Protocol II of 1977 to the Geneva Conventions.[68] The minimum standards of protection espoused in Common Article 3 have to be guaranteed by "each Party to the conflict" and are applicable in each case of armed conflict not of international character occurring in the territory of one of the contracting Parties.[69] In contrast, Protocol II requires a higher threshold for applicability both with respect to the intensity of the fighting and the characteristics of armed opposition groups. According to Article 1(2), non-State Parties to the conflict are (1) required to be under responsible command, and (2) must be able to exercise control over territory such that they are in a position to carry out military operations while implementing the guarantees in the Protocol.

In contrast to international humanitarian law, human rights law has not developed the same applicability toward non-State actors. In fact, a review of international practice shows that the question whether non-State entities such as armed groups can commit human rights violations and whether they can be held accountable under international human rights law for these violations is a highly divisive issue among both States and international law scholars. A cautious approach to the matter is recommended by Zegveld, who observes:

> International practice is... ambiguous on the question of conditions for accountability of armed opposition groups for violations of human rights law. There is some authority for the proposition that human rights instruments could govern armed opposition groups exercising

66. *Id.* art. 5

67. AMNESTY INT'L, FÉDÉRATION INTERNATIONALE DES DROITS DE L'HOMME, I.D.P. ACTION, INSTITUTE FOR HUMAN RIGHTS AND DEVELOPMENT IN AFRICA & LAWYERS FOR HUMAN RIGHTS, SOUTH AFRICA, THE AFRICAN UNION CONVENTION FOR THE PREVENTION OF INTERNAL DISPLACEMENT AND THE PROTECTION OF AND ASSISTANCE TO INTERNALLY DISPLACED PERSONS IN AFRICA: N.G.O. COMMENTARY § 3, *available at* http://www.fidh.org/IMG/pdf/IDPconventionAUngo Comments.pdf (2008).

68. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Protocol II]; Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; MICHAEL N. SCHMITT, CHARLES H.B. GARRAWAY, YORAM DINSTEIN, INT'L INST. OF HUMANITARIAN LAW, THE MANUAL ON THE LAW OF NON-INTERNATIONAL ARMED CONFLICT § 1.1.1 (2006).

69. Geneva Convention Relative to the Treatment of Prisoners of War of Aug. 12, 1949, *supra* note 68, art. 3.

> governmental functions. However, this conclusion is mitigated by practice holding armed opposition groups apparently lacking any effectiveness accountable for human rights violations.[70]

Even if the conflicting legal positions just referenced were resolved, it seems unlikely that armed groups would consider themselves bound by obligations which they took no part in developing, and did not accept.[71] Moreover, in the final text of the Convention the direct attribution of responsibility to armed groups has been substituted with the agreement of States Parties to hold members of armed groups criminally responsible "for their acts which violate the rights of internally displaced persons under international law and national law."[72] A specific provision then enumerates a number of acts that members of armed groups – here considered as single individuals and not collectively – are prohibited from undertaking, starting with the carrying out of arbitrary displacement.[73] More constructively, the

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70. LIESBETH ZEGVELD, ACCOUNTABILITY OF ARMED OPPOSITION GROUPS IN INTERNATIONAL LAW 151 (2002).

71. "[W]hy should armed groups abide by norms they have had no part in developing? From the human-security perspective it may be obvious why armed groups should abide by core human rights and humanitarian norms: to protect the victims of violence. Yet many armed groups reject this notion, on the grounds that these are state-based instruments that simply do not apply to them. Not all groups hold this view, to be sure, but it is common enough to pose a significant dilemma for those who expect that the most serious obstacles to engaging armed groups are likely to come from states. In many cases, armed groups themselves are likely to resist the very premise of engagement." Pablo Policzer, *Will an Agreement on Respect for Human Rights and International Humanitarian Law Forged Between Governments and Nonstate Actors Promote Human Security?*, 21 Kasarinlan: Philippine J. of Third World Stud., no. 1, 2006 at 184, 188.

72. Kampala Convention, *supra* note 17, art. 7, para. 4.

73. The draft text provides as follows:

> 1. Armed groups shall, in accordance with international law, refrain from arbitrary displacement and bear responsibility for providing protection and assistance to internally displaced persons in areas under their effective control, without discrimination of any kind.
> 2. Armed groups shall respect and ensure respect for international humanitarian law and refrain from committing acts that impair the enjoyment of human rights of internally displaced persons.
> 3. Armed groups shall take necessary measures to ensure that internally displaced persons are received without discrimination of any kind and live in satisfactory conditions of dignity, security, sanitation, food, water, health, and shelter; [and that members of the same family are not separated.]
> 4. Armed groups shall not restrict the freedom of movement of internally displaced persons within and outside areas under their effective control.
> 5. Armed groups shall in no circumstances recruit children or require or permit them to take part in hostilities.
> 6. Armed groups shall also allow and facilitate passage of all relief consignments, equipment and personnel to internally displaced persons in areas under their effective control.
> 7. Armed groups 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.
> 8. Armed groups shall respect and ensure the civilian and humanitarian character of the places where internally displaced persons are sheltered and shall not

Convention encourages State Parties "to incorporate [their] relevant principles... into peace negotiations and agreements for the purpose of finding sustainable solutions to the problem of internal displacement."[74]

The solution finally envisaged appears more consistent with the general reluctance showed by States to consider non-State actors, and in particular armed groups, as addressees of international obligations. This position reappears in two saving clauses contained in the Convention which, in almost identical wording, affirm that the treaty provisions "shall not, in any way whatsoever, be construed as affording legal status or legitimizing or recognizing armed groups."[75]

A State-centric approach to displacement also emerges in other provisions concerning non-State actors. In particular, as far as multinational companies and private military or security companies are concerned, they are considered only as addressees of the State's repressive powers insofar as they are directly responsible or complicit in acts of arbitrary displacement.[76]

Protection and Humanitarian Assistance to IDPs

The obligations of State Parties relating to protection and humanitarian assistance are dealt with in Article 5 of the Convention. This article is unprecedented in human rights treaty law. In fact, as is well known, detailed provisions regarding humanitarian assistance and, in particular, the contentious issue of humanitarian access, can be found only in the law of armed conflict.[77]

With regard to international conflicts, international humanitarian law conventions stipulate *inter alia* that States are bound to accept humanitarian assistance if the civilian population under their control is not sufficiently provided for[78] and to allow the rapid and unimpeded passage of all relief consignments, equipment, and personnel, subject to verification and supervision.[79] The obligation

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infiltrate such locations.

9. Nothing in the present Convention shall be construed as affording legal status or legitimizing or recognizing armed groups and its provisions are without prejudice to the individual responsibility of their members under domestic or international criminal law.

Id. art. 6.

74. *Id.* art. 3, para. 2(e).

75. *Id.* art. 7, para. 1 & art. 15, para 2.

76. *Id.* art. 3, para. 1(h-i).

77. *See, e.g.*, FLAVIA ZORZI GIUSTINIANI, LE NAZIONI UNITE E L'ASSISTENZA UMANITARIA (2008); ASSISTING THE VICTIMS OF ARMED CONFLICTS AND OTHER DISASTERS 92-94, 101-104, 181, 207 (Frits Kalshoven, ed., 1989); PETER MACALISTER-SMITH, INTERNATIONAL HUMANITARIAN ASSISTANCE: DISASTER RELIEF ACTIONS IN INTERNATIONAL LAW AND ORGANIZATION 22-34, 52 (1985); Denise Plattner, *Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law*, 32 INT'L REV. OF THE RED CROSS, no. 288, 1992 at 249, 249.

78. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 70, para. 1, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 23, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention].

79. Protocol I, *supra* note 78, art. 70, paras. 2-3; Fourth Geneva Convention, *supra* note 78.

to accept external relief when needed is even more exacting with respect to the population of an occupied territory.[80] As far as relief personnel is concerned, Protocol I provides that it must be protected and assisted to the maximum extent possible, even though its participation in relief activities is subject to the approval of the party controlling the territory where those activities are being carried out. Restrictions on the movement or the activities of relief personnel can be applied, on a temporary basis, only when dictated by imperative military necessity.[81]

In relation to internal armed conflicts, humanitarian action is much more limited. Apart from Common Article 3 to the Geneva Conventions affirming that "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict," the only explicit provision in this regard is found in Additional Protocol II. Here it is established that relief actions shall be undertaken when civilians are suffering undue hardship, subject to the consent of the government in power.[82] The latter clause gives an undeniable advantage to the State Party to the conflict, whose consent would be required even when the assistance is directed to civilians under the effective control of the insurgents. Nevertheless, a systematic reading of the Conventions as well as the principle of effectiveness suggest that if the relief does not have to go through territories controlled by the government, the latter's consent is not necessary.[83] In any case, in both international and non-international conflicts, rules on humanitarian access have to be read in conjunction with the absolute prohibition to use starvation as a method of warfare.[84]

Under international human rights law, analogous obligations to accept humanitarian assistance do not exist.[85] Nevertheless, the obligations imposed on States by human rights treaties to guarantee the basic needs of the individuals under their jurisdiction would require them to allow access to external relief that is

80. *See* Protocol I, *supra* note 78, art. 69, para. 1; Fourth Geneva Convention, *supra* note 78, art. 55, para. 1 & art. 59, para. 1.

81. Protocol I, *supra* note 78, art. 71, para. 3.

82. Protocol II, *supra* note 68, art. 18, para. 2.

83. MICHAEL BOTHE, KARL JOSEF PARTSCH & WALDEMAR A. SOLF, NEW RULES FOR VICTIMS OF ARMED CONFLICTS: COMMENTARY ON THE TWO 1977 PROTOCOLS ADDITIONAL TO THE GENEVA CONVENTIONS OF 1949 at 696-97 (1982).

84. This prohibition is established in arts. 54 of the First Additional Protocol and 14 of the Second Additional Protocol. Protocol I, *supra* note 78, art. 54; Protocol II, *supra* note 68, art. 14. In this respect the ICRC study on the rules of customary international humanitarian law affirms that: "consent must not be refused on arbitrary grounds. If it is established that a civilian population is threatened with starvation and a humanitarian organization which provides relief on an impartial and non-discriminatory basis is able to remedy the situation, a party is obliged to give consent." INTERNATIONAL COMMITTEE OF THE RED CROSS, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL. 1: RULES 197 (Jean-Marie Henckaerts & Louise Doswald-Beck eds. 2005), *available at* http://www.icrc.org/eng/resources/documents/publication/pcustom.htm.

85. An exception in this respect is to be found in the African Charter on the Rights and Welfare of the Child, which explicitly sets forth the obligation to ensure that a child receives appropriate protection and humanitarian assistance. Organization of African Unity, African Charter on the Rights and Welfare of the Child, art. 23, paras. 1, 4, July 11, 1990, O.A.U. Doc. CAB/LEG/24.9/49, *available at* http://www.africa-union.org/official_documents/Treaties_%20Conventions_%20Protocols/a.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf (1990).

indispensable for the survival of the population.[86] Reference can be made, in particular, to the obligations arising from the International Covenant on Economic, Social and Cultural Rights.[87] This instrument requires State Parties "to take steps, individually and through international assistance and cooperation, especially economic and technical," to ensure the enjoyment of the rights contained therein.[88] The Committee on_Economic, Social and Cultural Rights has interpreted such provision, read in conjunction with the rights to food, health and an adequate standard of living, to also mean that State Parties have a joint and individual responsibility to provide "disaster relief and humanitarian assistance in times of emergency, including assistance to refugees and internally displaced persons."[89]

All this notwithstanding, it bears noting that so far States have been extremely reluctant to assume explicit obligations in this regard. In times of natural disasters and similar emergency situations they have *only* agreed on some soft law instruments on humanitarian assistance, and in particular on three General Assembly resolutions (43/131, 45/100, 46/182).[90] These resolutions affirm the primary responsibility of the territorial State to take care of the victims and the need of its consent for external assistance, and recognize that the abandonment of the victims "without humanitarian assistance constitutes a threat to human life and an offence to human dignity."[91]

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86. "Affected States [i.e. the States where humanitarian assistance is needed] are under the obligation not arbitrarily and unjustifiably to reject a *bona fide* offer exclusively intended to provide humanitarian assistance or to refuse access to the victims. In particular, they may not reject an offer nor refuse access if such refusal is likely to endanger the fundamental human rights of the victims . . ." SIXTEENTH COMM'N, INST. OF INT'L LAW, HUMANITARIAN ASSISTANCE RESOLUTION § VIII(1), Resolution (2003), *available at* http://www.idi-iil.org/idiE/resolutionsE/2003_bru_03_en.PDF. *See also* Ruth Abril Stoffels, *Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps*, 86 INT'L REV. OF THE RED CROSS, no. 855, 2004 at 515, 517 ("This duty to take positive action implies that States have a duty to ensure that the population affected by a crisis is adequately supplied with goods and services essential for its survival and, if they are unable to do so or their efforts fail, to allow third parties to provide the required relief.").

87. International Covenant on Economic, Social and Cultural Rights, art. 2, para. 1, Dec. 16, 1966, 993 U.N.T.S.

88. *Id.*

89. *See* United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 15: The Right to Water, para. 34., U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003); United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 14: The Right to the Highest Attainable Standard of Health, para. 40, U.N. Doc. E/C.12/2000/4 (Nov. 8, 2000); United Nations, Economic and Social Council, Committee on Economic, Social and Cultural Rights, General Comment No. 12: The Right To Adequate Food, para. 38, U.N. Doc. E/C.12/1999/5 (Dec. 5, 1999).

90. *See generally* G.A. Res. 46/182, U.N. Doc. A/RES/46/182 (Dec. 19, 1991); G.A. Res. 45/100, U.N. Doc. A/RES/45/100 (Dec. 14, 1990); G.A. Res. 43/131, U.N. Doc. A/RES/43/131 (Dec. 8, 1988) (reaffirming the importance of humanitarian assistance and state sovereignty; urging affected states, states in proximity to affected states, and nongovernmental and intergovernmental organizations to coordinate with one another in the facilitation and implementation of humanitarian assistance for internally displaced persons; and implementing the annex establishing the guiding principles, roles of relevant actors, and general procedures for coordination of humanitarian assistance).

91. G.A. Res. 46/182, *supra* note 89, annex, para. 3; G.A. Res. 45/100, *supra* note 89, pmbl., para. 2; G.A. Res. 43/131, *supra* note 89, pmbl., para. 2.

It therefore comes as no surprise that the former UN Representative on Internally Displaced Persons, Mr. Francis Deng, considered the obligation of States to accept offers of assistance for IDPs as one of the areas where international law is not sufficiently developed.[92]

Against this background, the reading of Article 5 of the Kampala Convention leaves mixed impressions. On the one hand, it spells out in clearest terms the need for States to mutually support each other in protecting and assisting IDPs; to facilitate relief action and rapid and unimpeded passage of all relief consignments, equipment, and personnel; and to respect humanitarian principles as well as the independence of humanitarian actors.[93] Moreover, contrary to the draft text, paragraph 6 now explicitly provides that States shall seek the assistance of humanitarian organizations and other relevant actors each time they cannot provide sufficient assistance themselves, and not just where the *maximum* available resources are inadequate.[94]

On the other hand, these welcomed provisions are counterbalanced by others that are inspired more by sovereignty concerns than humanitarian needs. I refer in particular to the clause on the so-called humanitarian initiative. In this respect paragraph 6, drawing directly from Common Article 3 to the Geneva Conventions, provides that humanitarian agencies and other relevant actors "may offer their services."[95] This reference to humanitarian initiatives is not accompanied, though, by the important addition made to the First Additional Protocol that offers of relief "shall not be regarded as interference... or as unfriendly acts."[96] The final clause of Article 5 instead states that "[n]othing in this Article shall prejudice the principles of sovereignty and territorial integrity of states."[97] These provisions therefore leaves the impression that States Parties want to maintain a considerable degree of discretion in deciding whether outside action is required in order to protect and assist IDPs.

Generally, aid is provided in camps that are expressly set up to deliver humanitarian services to civilians in need. Yet the ever-growing tendency to concentrate humanitarian activities in such artificial agglomerates brings with it serious problems. In the first place, IDP camps provide the displaced with services of higher quality than those available to civilians who remain in their place of

92. *See* Representative of the U.N. Secretary-General on Internally Displaced Persons, *Internally Displaced Persons: Report of the Representative of the Secretary-General, Mr. Francis M. Deng, Submitted Pursuant to Commission on Human Rights Resolution 1995/57, Compilation and Analysis of Legal Norms*, paras. 380, 415(q), U.N. Doc. E/CN.4/1996/52/Add.2 (Dec. 5, 1995) (discussing the lack of recognition, under international law, of an affected state's corresponding duty to accept humanitarian assistance from international actors when the state is unable or unwilling to provide the assistance to its own people and the need for an international instrument addressing this duty to accept aid and facilitate free passage and distribution of relief).

93. Kampala Convention, *supra* note 17, art. 5, paras. 2, 7-8.

94. *Id.* art. 5, para. 6.

95. *Id.*; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, para. 2, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135

96. Protocol I, *supra* note 78, art. 70, para. 1.

97. Kampala Convention, *supra* note 17, art. 5, para. 12.

residence.[98] On the one hand, this creates dependency because those in camps have no incentive to go back to their homes and, on the other hand, it worsens the plight of poor local communities, which are left without sufficient resources to cope with the displacement crisis. Consequently, camps contribute to the perpetuation of the emergency situation, rendering difficult or impeding *tout court* the transition toward restoration and development. In addition, camps are often a sort of autarchic community ruled by "camp sheiks"[99] and infiltrated by militia groups.[100] The camps dilemma was recently put again to the fore in the report released by the ICRC on "Internal displacement in armed conflict", which observed:

"Not all IDPs flee to or stay in camps. Camps deflect the world's attention from the harsh truth of internal displacement. They may be a last resort but more often than not they are in accessible places, away from frontlines, near towns, perhaps, or at least a short drive from an airstrip. Donors and media are flown in and out and what they find becomes high profile. The consequence is that for far too long the debate on IDPs has focused on those who are in camps to the detriment of those who are not."[101]

The Kampala Convention appears to take account of these problems in various respects. Apart from the important reaffirmation of States' primary duty to provide protection and assistance "to internally displaced persons within their territory or jurisdiction *without discrimination of any kind*,"[102] article 5.5 also calls upon States to extend their assistance to host communities.[103] Host communities are often the most neglected group during displacement crises, even though the host may not have lesser needs and the burden of supporting displaced people can be extremely heavy and expensive. The said provision is also a progressive element with respect to the Guiding Principles – which does not address the issue – and draws inspiration from a similar provision of the Great Lakes Protocol on the Protection and Assistance to Internally Displaced Persons[104]. Moreover, with

98. *See* Dennis Warner, Moral Dilemmas in Disaster Response 5 (Mar. 4, 2006) (unpublished manuscript), *available at* http://www.eng.umd.edu/ewb/files/moral.doc) (explaining the higher standard of living in camps may discourage those in camps from return to their "uncertain prospects" at home and that better living conditions in camps may create jealousy and anger among people living in adjacent areas).

99. *See* Alex de Waal, *Making Sense of Sudan: Do Darfur's IDPs Have an Urban Future?*, SOC. SCI. RES. COUNCIL BLOGS (Mar. 31, 2009, 2:02 PM), http://blogs.ssrc.org/darfur/2009/03/31/do-darfurs-idps-have-an-urban-future/.

100. Press Release, Refugee Law Project, *Transitional Justice is key to addressing the challenge of mass displacement in Africa* (Oct. 18, 2009), http://refugeelawproject.org/press_releases.php (follow "Transitional Justice is key to addressing the challenge of mass displacement in Africa" hyperlink).

101. INT'L COMM. OF THE RED CROSS, INTERNAL DISPLACEMENT IN ARMED CONFLICT: FACING UP TO THE CHALLENGES 13-14 (2009).

102. Kampala Convention, *supra* note 17, art. 5, para. 1 (emphasis added).

103. *Id.* art. 5, para. 5; *see also id.* art. 3, para. 2(c) (requiring State Parties to "adopt other measures as appropriate, including strategies and policies on internal displacement at national and local levels, taking into account the need of host communities").

104. *See* Great Lakes Protocol *supra* note 31, art. 4, para. 1(e), (providing that Member States should "[e]xtend protection and assistance, according to need, to communities residing in areas hosting internally displaced persons).

respect to the security of IDP camps or settlements, States' parties endeavour to "respect and maintain the civilian and humanitarian character of the places where internally displaced persons are sheltered and safeguard such locations against infiltration by armed groups or elements and disarm and separate such groups or elements from internally displaced persons."[105] Again, this is a welcome development vis-à-vis the Guiding Principles, which is limited to the assertion that IDPs "shall be protected... against... attacks against their camps or settlements,"[106] merely reaffirming what was previously, and more extensively, stated in the Great Lakes IDPs Protocol.[107]

The Need for Durable Solutions

Internal displacement could not be adequately dealt with in the absence of a genuine and vigorous effort to foster durable solutions. AU leaders meeting in Uganda in October 2009, realized the need for durable solutions and noted: "refugees and internally displaced persons are sometimes unable or unwilling to return to their homes immediately after their displacement and as a result, spend many years or even decades in camps and therefore require durable solutions to their displacement situation."[108] The need for a special regime of protection disappears only once normal conditions are restored.[109]

The endeavour to seek lasting solutions to displacement is enshrined in Article 11 of the Kampala Convention, entitled Obligations of States Parties relating to Sustainable Return, Local Integration or Relocation. The article starts by providing for the promotion and the creation of "satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity."[110] The second paragraph then affirms that "State Parties shall enable internally displaced persons to make a free and informed choice on whether to return, integrate locally or relocate by consulting them on these and other options and ensuring their participation in finding sustainable

105. Kampala Convention, *supra* note 17, art. 9, para. 2(g).

106. Guiding Principles, *supra* note 10, princ. 10, para. 2(d).

107. *See* Great Lakes Protocol, *supra* note 31, art. 3, paras. 9, 4(g) (providing that "Member States shall safeguard and maintain the civilian and humanitarian character of the protection and location of internally displaced persons in accordance with international guidelines on the separation of armed elements" and must also "[e]nsure the safe location of internally displaced persons, in satisfactory conditions of dignity, hygiene, water, food and shelter, away from areas of armed conflict and danger, and having regard to the special needs of women and children").

108. African Union [AU], *Draft Kampala declaration on refugees, returnees and internally displaced persons in Africa*, pmbl., para. 6, Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1 (Oct. 23, 2009), *available at* http://www.reliefweb.int/rw/rwb.nsf/db900sid/SNAA-7X73N7?OpenDocument.

109. *See* Representative of the Secretary-General on the human rights of internally displaced persons, *Protection of and assistance to internally displaced persons: Report of the Representative of the Secretary-General on the human rights of internally displaced persons, transmitted by note of the Secretary-General*, para. 29, U.N. Doc. A/64/214 (Aug. 3, 2009) (recognizing that "[t]he achievement of [durable] solutions is a process through which the need for specialized assistance and protection gradually diminishes until an internally displaced person no longer has specific needs that are directly linked to his or her having been displaced).

110. Kampala Convention, *supra* note 17, art. 11, para. 1.

solutions."[111] This latter provision establishes that return has to be voluntary, and, accordingly, that the individuals concerned need to be involved in decisions regarding durable solutions.

The right to return to one's own country is a well-known and explicitly recognized provision of international law[112] and can be considered a counterpart to the right to expel non-nationals.[113] In particular, as far as refugees are concerned, the right to voluntary return is a corollary of the principle of non-refoulement enshrined in Article 33 of the 1951 Geneva Convention Relating to the Status of Refugees.[114] Under the principle of non-refoulement States cannot return an asylum seeker to a situation where he or she would face persecution.[115] Similarly, conventions such as the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa explicitly provide that "[t]he essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will"[116].

In contrast, the right for those internally displaced to return to their home or place of residence has not gained an analogous recognition by States. However, because both universal and regional instruments for the protection of human rights recognize the right to move freely within a State and to choose one's place of residence[117], the right of voluntary return could be deduced implicitly. This deduction is supported by affirmations of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, in the Principles on Housing and Property Restitution of Refugees and IDPs (the so-called Pinheiro Principles, which were elaborated by drawing on existing human rights and humanitarian law norms) which state that "all refugees and displaced persons have the right to return voluntarily *to their former homes, lands or places of habitual residence.*"[118] As of yet, to our knowledge, the only case in which this right has been recognized in a binding international instrument is that of the Dayton Peace Accord[119], signed by Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia which

111. *Id.* art. 11, para. 2.

112. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), art. 13(2).

113. *See* G. Goodwin-Gill, *The Right to Leave, the Right to Return and the Question of a Right to Remain, in* THE PROBLEM OF REFUGEES IN THE LIGHT OF CONTEMPORARY INTERNATIONAL LAW ISSUES 100 (V. Gowlland-Debbas ed. 1996).

114. Geneva Convention Relating to the Status of Refugees, art. 33, Jul. 28, 1951, *available at* http://www.unhcr.org/3b66c2aa10.html.

115. J.C. Hathaway, THE RIGHTS OF REFUGEES UNDER INTERNATIONAL LAW 915-16 (Cambridge University Press 2005).

116. *See* OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Assembly of Heads of State and Government at its Sixth Ordinary Session, art. 5, Sept. 10, 1969, U.N.T.S. 14691.

117. Universal Declaration of Human Rights, *supra* note 111.

118. *See* Pinheiro Principles, art. 10.1, Aug. 11, 2005, *available at* http://www.unhcr.org.ua/img/uploads/docs/PinheiroPrinciples.pdf (emphasis added).

119. Dayton Peace Accord, art. 7 annex 7, Dec.14, 1995, *available at* http://www.state.gov/www/regions/eur/bosnia/bosagree.html.

sought to put an end to the Bosnian conflict.[120] This Agreement in fact declared that all those displaced by the conflict should have the right to "*return to their homes of origin.*"[121]

The Kampala Convention does not limit itself to affirming the principle of voluntary return, but also indicates the modalities of such a return. In the first place, it provides that the territorial State should protect the displaced "against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk."[122] With similar terms, article 11 of the Kampala convention enshrines the undertaking of AU member States to seek lasting solutions by promoting and creating conducive conditions for voluntary return, local integration or relocation on a sustainable basis and in the circumstances of safety and dignity."[123] Furthermore, Article 11 provides for the need to "cooperate, where appropriate, with the African Union and international organizations or humanitarian agencies and civil society organizations, in providing protection and assistance in the course of finding and implementing solutions for sustainable return, local integration or relocation and long-term reconstruction."[124] To sum up, according to the Convention a durable solution to internal displacement requires that return be voluntary, realised in conditions of safety and dignity and – last but not least – organized. These characteristics, which are similar to the regime already existing for refugees, are closely interconnected, mutually reinforcing, and crucially ensure that IDPs can resume their lives. Voluntary return is necessary to avoid prematurely sending IDPs back to their area of origin before prevailing conditions are sufficiently safe and stable.[125] A forcible return could in fact jeopardize the safety and dignity of the internally displaced individuals. Furthermore, by using voluntary return standards to coordinate with other actors and organizations involved, the territorial State can organize the return process to appropriately manage the impact that the flux of returning people could have on the life of the local population.

Following return (or resettlement), the mechanisms of redress and compensation play an indispensable part of the recovery process for IDPs. In fact, as Special Representative Kälin observed, "experience shows that the successful return of IDPs and refugees to their homes and former places of habitual residence is based on three elements: ensuring the safety of returnees; returning property to the displaced and reconstruction of their houses; and creating an economic, social and political environment that sustains return."[126] In particular, persistent property-

120. *Id.*

121. *Id.* (emphasis added).

122. Kampala Convention, *supra* note 17, art. 9 (2)e.

123. *Id.* art. 11.

124. *Id.*

125. *See generally* UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Voluntary Repatriation*, EC/GC/02/5 (Apr. 25, 2002).

126. Kälin, *The Great Lakes Protocol on Internally Displaced Persons: Responses and challenges*, SYMPOSIUM ON INTERNATIONAL LAW IN POST CONFLICT SITUATIONS: THE GREAT LAKES PROCESS (Sept. 27, 2007), *available at* http://www.brookings.edu/speeches/2007/0927_africa_kalin.aspx (last visited Nov. 23, 2010).

related disputes can hinder reconciliation and undermine the security and stability in the country.[127] Despite the potentially devestating consequences, States have scarcely recognized the property rights issue, and it was only with the adoption of the Pinheiro Principles, in 2005, that international standards specifically and comprehensively addressing property restitution rights were agreed upon.[128]

In this respect, Article 12, entitled Compensation, enjoins States *inter alia* to provide appropriate forms of reparation for arbitrary displacement, as well as for damages incurred as a result of displacement.[129] As far as property rights and lands are concerned, Article 11 requires the establishment of: "appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of internally displaced persons"[130] and of "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."[131] These provisions are significant insofar as they demonstrate an effort on the part of the States Parties to specifically address sensitive property-related problems issues. Guiding Principle 29,[132] also provides protection of property rights, but its application is not limited to those IDPs who choose to return to their place of origin. At the same time though, the Convention lacks the essential assertion – contained in the Guiding Principles and reaffirmed in the Great Lakes Property Protocol – that States should only resort to compensation when recovery of property and possessions is not possible.[133] Hopefully, State Parties will not decide to prioritize compensation, and in particular monetary compensation, because such a decision could have a very negative impact on the living conditions of returned IDPs. In fact, empirical research proves that reliance upon cash compensation leads to new poverty among the displaced population.[134]

CONCLUSION

The African Convention is a very significant development in the field of internal displacement and brings renewed hope for IDPs in Africa. As is often the case in pioneering enterprises, the Convention is not perfect. In this article I

127. *Id.* This was also recognized by the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which affirmed that "the adoption or application of laws by States which are designed to or result in the loss or removal of tenancy, use, ownership or other rights connected with housing or property, the active retraction of the right to reside within a particular place, or laws of abandonment employed against refugees or internally displaced persons pose serious impediments to the return and reintegration of refugees and internally displaced persons and to reconstruction and reconciliation." Housing and property restitution in the context of the return of refugees and internally displaced persons, Sub-Commission resolution 1998/26, para. 3.

128. *See* Pinheiro Principles, *supra* note 118.

129. *See* Kampala Convention, *supra* note 17, art. 12.

130. *Id.* art. 11.

131. *Id.*

132. *See* Guiding Principles, *supra* note 10, princ. 29.

133. *Id.*; Great Lakes Protocol, *supra* note 31, art. 4.

134. Scott Leckie, *Conclusions – Best practices to guide future housing and property restitution efforts, in* HOUSING AND PROPERTY RESTITUTION RIGHTS OF REFUGEES AND DISPLACED PERSONS: LAWS, CASES, AND MATERIALS Chapter 14, (Scott Leckie, ed. 2003).

highlighted some critical points which deserved a deeper or different treatment. Nonetheless, the final text made considerable improvements over the previous drafts.

The Convention will enter into force once it has been ratified by fifteen member States of the African Union. To date, twenty-nine countries have signed the Convention and two countries have ratified it (namely Uganda and Sierra Leone).[135] After the entry into force, the crucial issue will be compliance. Mr. Nyanduga, the Special Rapporteur on Refugees, Asylum Seekers, and Internally Displaced Persons in Africa, remarked in unequivocal terms: "[u]nless African states address the gap between assumption of international legal obligations, their implementation and domestication, adoption of additional instruments, including those related to IDPs, will not alleviate human rights violations"[136]. In this same vein, it should be noted that the monitoring mechanisms envisaged by the Convention are not particularly strong, and are limited to periodic meetings of the Conference of States Parties and the submission of reports by States to the African Commission on Human and Peoples' Rights. The Convention assigns important responsibilities to the African Union, and perhaps this organization will be able to engage in monitoring and reporting. The AU is meant to assume a leading role in coordinating States' efforts and, in extreme cases, to take their place in protecting and assisting IDPs.[137] Hopefully the AU will prove to be up to the task.

135. Michel Gabaudan, *African Leaders Must Follow Through on Kampala Convention*, THE HUFFINGTON POST (Oct. 27, 2010, 2:19pm), http://www.huffingtonpost.com/michel-gabaudan/african-leaders-must-foll_b_774844.html.

136. T.B. Nyanduga, *The Role of the African Commission on Human and Peoples' Rights in Addressing Internal Displacement*, COAL. FOR AN EFFECTIVE AFRICAN CT. ON HUMAN AND PEOPLES RIGHTS, 12 (Apr. 26, 2006), *available at* http://www.africancourtcoalition.org/content_files/files/SEMINARONINTERNALDISPLACEMENTINTHEECOWASREGION.doc.

137. ABOUT THE AFRICAN UNION, http://www.africa-union.org/About_AU/fmuaenbref.htm (last visited Nov. 23, 2010).