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The narrative of vulnerability and deprivation in protection regimes for the internally displaced persons (IDPs) in Africa: An Appraisal of the Kampala Convention

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1 INTRODUCTION

Prior to the 1990s, the phenomenon of internal displacement did not attract much attention from the international community. Most states, suspicious of the external interests in what they considered to be a purely internal matter were not keen to expose difficulties or suffering of their displaced citizens. And insistence on protection of the internally displaced by international organisations was seen as

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an affront to sovereignty. But attitudes have considerably changed, especially after the cold war.¹ The rise in internal ethnic and sectarian conflicts has elevated the phenomenon from a mere social and economic upheaval to a major threat to political cohesion in many African states. In the Great Lakes region for example, widespread displacement has been a source of increasing insecurity.² Likewise in Sudan, a country reputed to have the largest number of IDPs in the world, displacement has been very much a factor of the bitter armed struggle between the north and south, and may have resulted in the fragmentation of the sites of resistances to the political hegemony of Khartoum.³ Thus, apart from the humanitarian crises that it engenders, internal displacement is viewed as posing serious political risks and may also undermine peace efforts.⁴ And because of the absence of mechanisms for protection within the existing normative framework, the attention of regional governments as well as that of the international community has been, for over a decade now, drawn towards establishing new sets of standards to deal with it, as opposed to merely seeking reliance on the already existing international legal frameworks.⁵ However, the process of creating norms has not been without pitfalls. Since 1998 when the United Nations Guiding Principles on Internally Displaced Persons was promulgated, several regional instruments have emerged, building on its foundation and expanding regimes for the protection and assistance of IDPs. These instruments have increased the leverage of international standards over national regimes with antiquated attachment to sovereignty.

However, the benefit of this normative project has been minimal because national processes have been slow to adopt and enforce international and regional standards.⁶ All throughout Africa, domestic legal systems have proved incapable of providing protection to internally displaced persons (IDPs) to the level warranted by international and regional standards. This article suggests that one of the reasons for this anomaly is that international and regional protection regimes respond to the

¹ See e.g. Tigere P and Amukhobu R “The African Union’s Institutional Framework for responding to forced displacements in Africa” (2006) *African Union Policy Review* 53.

² See Phuong C *The International Protection of the Internally Displaced Persons* (2004), 7.

³ Displacement in Sudan is widespread and patterns follow sites of greater instability and armed conflicts such as Darfur, Abyei and Eastern Sudan. See IDMC, Durable solutions elusive as southern IDPs return and Darfur remains tense, 23 December 2010. In Sudan, the phenomenon of displacement is not just a mere consequence of an armed conflict, but a military and economic strategy as well. See Johnson D *The Root Causes of Sudan’s Civil War* (2004) 151-153.

⁴ See Koser K “Introduction: Integrating displacement and peace building” (2009) 28(1) *Refugee Survey Q.* 5; Klopp J *et al* “Internal displacement and local peace building in Kenya: Challenges and innovations”, USIP Special Report 251 (2010), <http://www.usip.org/files/resources/SR251%20-%20Peace%20building%20in%20Kenya.pdf> (accessed 21 May 2011).

⁵ Already, the international standards relating to status and rights of refugees had been established in the UN Refugee Convention 1951 and even the OAU Convention Governing Specific Aspects of Refugee problem in Africa 1969. But IDPs cannot rely on these frameworks for protection and assistance. See Essoungou A “Africa’s displaced people: Out of the shadows” *Africa Renewal*, April 2010, at 6, <http://www.un.org/en/africarenewal/vol24no1/displaced-people.html> (accessed 21 May 2011).

⁶ See Levitt J “Conflict prevention, management, and resolution: Africa—regional strategies for the prevention of displacement and protection of displaced persons: The cases of OAU, ECOWAS, SADC and IGAD” (2001) 11 *Duke J. Comp. & Int’l. L.* 39.

narrative of vulnerability and deprivation more positively than the domestic systems. This is because domestic systems are underwritten by rigid constitutions with a positivist orientation and are therefore less susceptible to the fluidity and flexibility that the narrative portends. In addition, these systems often succumb to elite manipulation, corruption and political gerrymandering. This article, therefore, argues that whereas the gap between international normative standards and domestic ones is not unique to IDP protection, the phenomenon provides an opportunity for infusing the notions of vulnerability and deprivation into the normative transformation/change debate engendered by the current state of most political systems in Africa. To illustrate this theoretical postulation, it examines the propriety of the recently passed AU Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa⁷ against the domestic systems of IDP management and protection in regions with higher incidence of displacement, such as Uganda and Kenya, and suggests that one of the ways in which the gap could be bridged is by re-conceptualising the narrative so that it becomes a tool for synthesis of international and domestic approaches to IDP protection and assistance. This approach, the article suggests, places the narrative at the centre of legal reform and constitutional change, and emboldens the quest for improving IDP protection regimes across the continent.

2 CONTEXTUALISING THE NARRATIVE OF DEPRIVATION AND VULNERABILITY

In 2011, the total number of people internally displaced the world over stood at 26.4 million.⁸ Africa still had the largest regional share of about 9.7 million people, with Sudan, DRC and Somalia having more than a million people each. Although Africa's disproportionate share of IDPs is perhaps a reflection of how normative institutions have failed to moderate competing claims to power, the numbers tell a different story: that of millions of people uprooted from their homes through no fault of their own and destined to a life of misery in camps and other displacement facilities.⁹ Thus, the narrative that IDP phenomenon engenders is really that of deprivation and vulnerability, and that is why the phenomenon now attracts considerable attention from international organisations and human rights bodies. The IDPs are deprived of normalcy in their lives, property and cultural citizenship just as much as they become vulnerable to physical and mental abuse, political manipulation, human rights abuse and several other vices. Francis Deng, the UN Secretary General's Representative on

⁷ African Union, Convention for the Prevention of Internal Displacement and the Protection of and Assistance to Internally Displaced Persons in Africa, *adopted* on 23 October, 2009, 49 I.L.M. 86, (hereinafter Kampala Convention) (Available at <http://www.unhcr.org/refworld/docid/4ae572d82.html> (accessed 21 May 2011)).

⁸ Internal Displacement Monitoring Centre (IDMC) *Internal Displacement: Global Overview of Trends and developments 2011*, Geneva IDMC, April 2012, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/081F7B080CF6371AC12579E40046EDA9/\\$file/global-overview-2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/081F7B080CF6371AC12579E40046EDA9/$file/global-overview-2011.pdf) (accessed 15 May, 2012).

⁹ See Beyani C "The elaboration of a legal framework for protection of internally displaced persons in Africa" (2006) 50 (2) *J. Afr. L.* 187, 189.

Internally Displaced Persons, on the occasion of the inauguration of UN Guiding Principles on Internal Displacement, summarised the challenge that this narrative poses as that of “ensuring protection for persons forcibly up-rooted from their homes by violent conflict, gross violation of human rights and other traumatic events, but who remain within borders of their own countries” and, who “suffer from severe deprivation, hardships and discrimination”.¹⁰ Deng’s view has been echoed by many scholars around the world, some of whom view current responses to the plight of IDPs as unsatisfactory.¹¹ In my view, the narrative of deprivation and vulnerability conditions the range of normative as well as institutional responses that states and non-state entities could generate towards protecting IDPs. This is because the narrative provides a prism through which the positive effects of an existing legislative framework and the ranges of human rights protection mechanisms could be analysed relative to the need at hand. Further, the narrative reflects the folly of addressing the needs of the displaced without putting in place mechanism that would eliminate conditions that cause displacement.

2.1 Vulnerability

The term “vulnerability” is not easy to define because of the varying meanings it acquires from the different “epistemological orientations and methodological practices.”¹² In sociological approaches, vulnerability is used by professionals as a tool for characterising a community in the face of adversity.¹³ Heijmans, for example, views it as the perception by outsiders, especially of aid agencies, that a community is lacking even when the community may have no concept of vulnerability themselves.¹⁴ From my perspective, however, individual vulnerability indicates the objective status of a person thrust to the mercy of public protection, with no recourse to their own ability to claim rights. To be vulnerable is to exist in a state of “intrinsic predisposition to be affected or to be susceptible to damage”.¹⁵ Key in this conceptualisation is the powerlessness and

¹⁰ See UN Guiding Principles on Internal Displacement, UN Doc E/CN 4/1998/53/Add2 (1998), noted in Comm. Hum. Rts. Res. 1998/50 (Hereinafter “UN Guiding Principles”), available at <http://www.unhcr.org/43ce1cff2.html> (accessed 15 May 2011). Deng was appointed in 1992 by the former UN Secretary General, Boutros Boutros Ghali, on request of Commission on Human Rights.

¹¹ See e.g. Ahlbrandt T “The protection gap in the international protection of internally displaced persons: The case of Rwanda” (Université de Genève Institut Universitaire de Haute Etudes Internationales, July 1996); Cohen R “Protecting the internally displaced” *World Refugee Survey 1996* (US Committee for Refugees, Washington DC: Immigration and Refugee Service of America, 1996); Human Rights Watch, *Failing the Internally Displaced: The UNDP Displaced Persons Programme in Kenya* (1996).

¹² See Weichselgartner J “Disaster mitigation: the concept of vulnerability revisited” (2001) 10(2) *Disaster Prevention & Management* 87.

¹³ See Downing T “Vulnerability to hunger and coping with climatic change in Africa” (1991) 1 *Global Environmental Change* 365.

¹⁴ Heijmans A “Vulnerability: A matter of perception”, a paper presented at the international work-Conference on Vulnerability in Disaster Theory and Practice, Winnipeg Disaster Studies, 29-30 June, 2001, available at <http://www.abuhrc.org/Publications/Working%20Paper%204.pdf> (accessed 21 May 2011).

¹⁵ Cardona O “The need for rethinking the concepts of vulnerability and risk from a holistic perspective: A necessary review and criticism for effective risk management” in Bankoff G et al eds., *Mapping Vulnerability: Disasters, Development and People* (2001), 1 at 2.

diminished agency of the individual.¹⁶ The lack of agency could be attributed to paucity of resources, physical impairment, isolation, and even psychological constraints. Vulnerability is also an indicator of the loss of security. The idea that a person relocates from his home to find safety elsewhere automatically resonate with the need for protection that has become pervasive in situation of displacement. IDPs fear loss of their lives, torture and all kinds of inhuman and degrading treatment that are decreed by international human rights instruments. Moreover, the vulnerability of IDPs is rendered acute by the fact that their social, cultural ties are cut off.¹⁷ Thus, vulnerability is not just a measure of one's insularity against rights abuse or any other form of infringement, but a powerful indicator of the responsibility that states have towards a section of the population that are at the mercy of public protection. States must seek the vulnerable and accord them rights. The focus should be on misery that individuals suffer and their inability to access the normative assets that could otherwise be available to them.

Vulnerabilities will differ and so will the responsibility of states in this regard. Indeed, it is more acute in conditions of conflict and on women and children. In places such as northern Uganda, where the war between Ugandan forces and the Lord's Resistance Army (LRA) has raged for years, patterns of abuse of displaced children have become evident.¹⁸ Likewise, the Kenyan IDP population has a majority of women and children. The narrative of vulnerability has important implications for ways in which international, regional and domestic normative responses to the plight of IDPs are constructed. For example, in 2001, the UN Security Council adopted a resolution calling upon parties to an armed conflict to "provide protection and assistance to refugees and internally displaced persons, the majority of whom are women and children, in accordance with applicable international norms and standards".¹⁹ Similarly, article 50 of the IV Geneva Conventions (1949) decrees protection for children during an armed conflict. The relevance of the narrative to the protection of IDPs is solidified in the UN Guiding Principles and the Kampala Convention.²⁰ But as this article will show, international and regional regimes respond to vulnerability in a more discerning way than domestic regimes. Whereas circumstances do often arise in domestic law where vulnerable people are singled out for special protection,²¹ the logic of the "rule of law"

¹⁶ See Furedi F "From narrative of the blitz to the rhetoric of vulnerability" (2007) 1 (2) *Cultural Sociology* 235.

¹⁷ Goldman R and Kälin W "Legal framework" in Cohen R & Deng F eds., *Masses in Flight: Global Crisis of Internal Displacement* (1998), 73.

¹⁸ Olaa A "Uganda: The Resilience of Tradition and the displaced Acholi in Kitgum" in Vincent M & Sorensen B eds., *Caught between Borders: Responses Strategies of the Internally Displaced* (2001) 99, 104.

¹⁹ UNSC Res. 1379 of 2001, Para 8 (b). See also Kastberg N "Strengthening the response to displaced children" (2002) 15 *Forced Migration Review* 4.

²⁰ The UN Guiding Principles characterise displacement as "the most tragic phenomenon of contemporary world" because it generates conditions of severe hardships and suffering (Para 1). Similarly, the Kampala Convention, in its preamble captures this narrative by referring to the "suffering and specific vulnerabilities" of IDPs.

²¹ See e.g. article 21(3) of the Kenyan Constitution 2010. See also the Prevention of Illegal Eviction from Unlawful Occupation Act 19 of 1998 (South Africa), section 6 which requires that courts take into

has been slow to catch up with the emerging vulnerabilities in society. This narrative enables society to establish a normative framework that cuts through the veil of positivism and widens the scope for intervention and dealing with new and emergent problems that are associated with the IDP phenomenon.

2.2 Deprivation

Deprivation on the other hand, depicts the state of detachment, not only from all property legally owned, but from all viable economic engagements that had sustained the person and his/her household prior to the displacement. When violence erupts people are forced to flee. As a result, they lose their houses, land, animals, personal belongings and even their families. Cast in socio-economic terms, loss of property, especially of land, suggest that deprivation affects more than just the possessory rights.²² This is because land is not just a property but a mark of status and identity and in some cases, a link to the spiritual life of the individual or community.²³ Thus, when displacement occurs and the benefits of ownership are obliterated, the deprivation becomes acute and the law is put to test. Recognising that deprivation of property constitute a major challenge to the IDP protection agenda, the UN Guiding Principles decrees against the arbitrary deprivation of property and provides for protection of property against pillage, indiscriminate attack or violence, reprisal and destruction as a form of collective punishment.²⁴ The principles also provide that property left behind by IDPs “should be protected against destruction and arbitrary and illegal appropriation, occupation or use”.²⁵ And as shall be discussed here, the Kampala Convention has similar provisions for protection of property rights as well.

In domestic law, deprivation has legal significance if the acts or omission that lead to it bear a mark of illegality and the persons or entities responsible have capacity to attract legal sanctions. The assumption would therefore be that deprivation can be redressed through established procedural and substantive norms. But as we have seen, deprivation in the context of displacement has a much wider connotation than just a mere act of illegality. Its manifestations go beyond those aspects of societal behaviour that can be regulated through straightjacket approaches of positive law existing in domestic systems. From a property perspective, it bears the element of detachment from the means of survival which can have both physical and emotional consequences. And these may affect national pursuit of economic development. For example, scholars have identified risks that prolonged displacement pose to economic development.²⁶ In Eastern DRC, displacement is now listed as one of the main causes of food insecurity in

account “all necessary circumstances including the elderly, children, disabled persons and households headed by women” before ordering an eviction.

²² See e.g. Juma L “Normative and institutional approaches to the protection of property rights of IDPs in Kenya’s Rift Valley province” (2012) 20 (2) *Afr. J. Int’l. & Comp. L.* 251.

²³ See Kamungi P “The politics of displacement in multiparty Kenya” (2009) 27 (3) *Journal of Contemporary African Studies* 345.

²⁴ UN Guiding Principles, (fn 10 above) principle 21.

²⁵ *Ibid*, principle 21 (3).

²⁶ See generally Weiss T and Korn D *Internal Displacement: Conceptualisation and Its Consequences* (2006).

the area.²⁷ They reason that displacement contributes to capability deprivation—the inability of IDPs to exercise their agency in engaging in useful economic ventures.²⁸ Obviously, when people are forced to flee and are later confined in camps, their freedoms are severely curtailed and their options for traditional livelihood are grossly undermined. In Uganda for example, where relocation into camps have taken place for over a decade due to the on-going conflict, IDPs have experienced “occupational deprivation” which has acutely affected their well-being.²⁹ Whiteford defines occupational deprivation as:

A state in which a person or group of people are unable to do what is necessary and meaningful in their lives due to external restrictions. It is a state in which the opportunity to perform those occupations that have social, cultural, and personal relevance is rendered difficult if not impossible.³⁰

This form of deprivation is much more than just “the loss of physical acts of doing, it is the loss of meaning, purpose, identity, control, value and potential”.³¹ This deprivation points to a much wider sense in which the narrative could be perceived. The question though, is whether “occupational deprivation” and other forms of deprivation discussed here, that IDPs suffer, can inform national frameworks on protection and assistance. The point being made here is that the narrative of deprivation encompasses all forms of loss that a displaced person suffers. And although in the recent past, normative responses have tended to focus on physical loss of property, the scope for protection and assistance for internally displaced persons is much broader.

3 NORMATIVE RESPONSE TO INTERNAL DISPLACEMENT

Normative development in response to the phenomenon of internal displacement began as a tentative project. This was partly because of the inertia generated by the confidence the international community had invested in the 1951 Refugee Convention. The fear was that the focus on internal displacement may divert attention from the refugee problem.³² Moreover crafting a new treaty was thought to be unsuited at that moment and rather time consuming.³³ The other inhibition was the lack of certainty within the United Nations as to which agency or institution would be responsible for matters of

²⁷ See IDMS, Democratic Republic of Congo: IDPs need further assistance in contexts of continued attack and insecurity’ 14 Sept., 2011, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/111D01A00B251BE0C125790B002DFC4C/\\$file/DRC-Overview-Sept2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/111D01A00B251BE0C125790B002DFC4C/$file/DRC-Overview-Sept2011.pdf) (accessed 15 May 2012).

²⁸ See Sen A *Commodities and Capabilities* (1999); “Human rights and capabilities” (2005) 6 (2) *Journal of Human Development* 151.

²⁹ See McElroy T *et al*, “War, displacement and productive occupations in Northern Uganda” (2011) *Journal of Occupational Science* 1.

³⁰ Whiteford G “Occupational deprivation: Global challenge in the new millennium” (2000) 63 (5) *British Journal for Occupational Therapists* 200.

³¹ See McElroy (fn 29 above) at 11.

³² See Barutciski M “Tension between the refugee concept and the IDP debate (1998) 3 *Forced Migration Review* 14.

³³ See Giustiniani F “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 (2010-2011) 39(2) *Denv. J. Int’l. L. & Pol’y* 347.

internal displacement, given their already crowded mandate.³⁴ Thus, the preferred approach had to be incremental and less burdensome on states and institutions that had already committed to the protection of refugee rights. Beleaguered by this political concern, the international community had to muster the will to recognise the particularity of the plight of the internally displaced and establish a clear path for norm creation. Buoyed by incontrovertible findings of greater vulnerability of displaced persons, their inability to access humanitarian assistances, and persistent lack of concern by national governments, it became possible to take tangible steps towards establishing a normative framework for the protection of IDPs. Therefore, a request by the Commission on Human Rights to the United Nations for a report on the internally displaced persons and the persistent pressure by NGOs yielded to the appointment a United Nations Special Representative on Internally Displaced Persons in the person of Francis Deng in 1992.³⁵ And this marked the beginning of United Nations serious engagement with issues of internal displacement as a distinct aspect of its humanitarian mandate.

From the beginning the Special Representative understood his task to be that of discerning appropriate normative framework for protection and assistance of IDPs. Thus, he began by identifying the gaps in the existing normative framework, and later, sought the implication of those existing norms on protection and assistance of IDPs, considering the special conditions that arose in situations of displacement. From this synthesis of ideas and norms, the Special Representative proceeded to formulate the Guiding Principles on Internal Displacement,³⁶ which has since become the template for most regional framework of IDP protection. The Guiding Principles contain a clear statement of the rights of IDPs and the obligations which government, insurgent groups and other actors in the theatre of conflict have to protect and assist them. Thus, they comprise what has been described as the minimum international standard for the treatment of IDPs. By adopting the Guiding Principles the international community sent a strong signal of its intention to get involved in situations of internal displacement by creating a system that would better protect persons uprooted from their homes but remain in their own countries. It also enunciated a process through which states could develop their own national laws in line with the internationally accepted principles for the protection of their displaced citizens. More significantly, it opened the doors for debating the rationality of developing a legally binding instrument similar to that of refugees as a means to better protect IDPs.³⁷

³⁴ The agencies that seemed appropriate to deal with displacement were UN High Commissioner for Refugees (UNHCR), the Office of the High Commissioner for Human Rights (OHCHR), the Office for the Coordination of Humanitarian Affairs (OCHA, the World Health Organisation (WHO).

³⁵ ECOSOC Note by the Secretary General pursuant to Economic Social Council Resolution 1990/78; Addendum; Report on Refugees, Displaced Persons and Returnees, prepared by Jacques Cuénod, Consultant, E/1991/109/ Add. 1, 27 June 1991.

³⁶ UN Doc E/CN.4/1998/53/ Add. 2 of 17 April 1998.

³⁷ Cohen R "Strengthening protection of IDPs: The UN's Role", (2006) 7 *Geo J. Int'l. Aff.* 101, 102.

3.1 Defining internal displacement

It is not in doubt that critical to the evolution of norms assigning rights to any category or group of persons is the need to establish a clear definition of that group and to demarcate a status relevant to the rights sought. Yet, in the case of IDPs, the question whether they should be considered as having a special status has been very controversial. This is because before the Guiding Principles, a clearly defined regime for legal and institutional protection of IDPs was deemed inappropriate by some due to the limitations it would put on the exercise of sovereignty, and by others, an unnecessary duplication of standards.³⁸ Certainly the fact that IDPs have not left their country diminishes their claim to a distinct status as compared to refugees.³⁹ However, the fact that they often find themselves in situations that expose them to multiple vulnerabilities demand that they be categorised in a manner that invites certain appeal to protection measures that law can provide. It may therefore be useful to begin the discussion by parsing out the international conception of the phenomenon of internal displacement—basically asking the questions, what does internal displacement mean and how do we define an internally displaced person? This is how the Guiding Principles define internally displaced persons:

Persons or group 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.⁴⁰

There are several items in this definition that should be unpacked. Firstly, the phenomenon of internal displacement can only be triggered by an element of force, which means that there is an act or occurrence that threatens the security of persons or is inimical to their general peace and stability. And because it is the act or occurrence that results in displacement, the displacement is “involuntary”.⁴¹ Thus, it also signifies “helplessness”—that a person is inhibited from determining their place of residence—which is an indicator of a higher sense of vulnerability and deprivation. Secondly, the word “internal” indicates that the phenomenon occurs within a territory and is therefore subject to that territory’s sovereignty. What this means is that any response to internal displacement must factor in the domestic agenda, or the role of its institutions and law. And this immediately calls attention to the problems of the dysfunctional governments, rampant corruption, moribund legislative arrangements and poor

³⁸ See Gessler N “The internally displaced persons” (1999) 11(3) *Int'l. J. of Refugee L.* 451.

³⁹ For a discussion of the controversies that the term engenders see Phuong C, *The International Protection of Internally Displaced Persons* (2004), 13-16. Traditionally, special legal status have been conferred to groups of persons such as minors, refugees, prisoners of war, or even citizens, who have common characteristics. Because these groups have special status, there are unique sets of standards and law that apply to them.

⁴⁰ See the preamble to the UN Guiding Principles, *supra* note 5. According to Kälin, this definition does not confer special status on IDPs but merely “a descriptive identification of the category of persons whose needs are the concern of the Guiding Principles”. See Kälin W “Guiding Principles on Internal Displacement: Annotations” 1, ASIL, Studies in Transnational legal Policy No 32, (2000).

⁴¹ See Mooney E “The concept of internal displacement and the case for internally displaced person as a category of concern” (2005) 24 (3) *Refugees Survey Quarterly* 9, 10.

infrastructure, all of which are almost synonymous with areas of greater incidence of displacement in Africa. Thirdly, although displacement is limited by territory, it still imports a more generalised understanding of the problems that a person who for some reason has been forced to abandon their home, encounters. Thus, the fact of displacement calls for particularity and biased targeting of IDPs, not just for protection, but for assistance as well. But one should also be aware of the argument that territorial limitation of the displacement may impact on the level of protection that is accorded to the internally displaced as compared to refugees and other categories of displaced persons.⁴² Lastly and perhaps much more relevant to the discussion in this article is that what gives internal displacement its definitive character is the plight of those adversely affected. The definition talks of “generalised violence, violations of human rights or natural or human made disasters” which point to the fundamentals of a protection regime. It becomes evident therefore that the definition of IDPs and the acknowledgement of their status as worthy candidates of protection is shaped by the narrative of deprivation and vulnerability.

3.2 Beyond the Guiding Principles

One distinct feature of the Guiding Principles is that it is considered a benchmark for any new norm on IDPs. Several of its key features have been applauded. Apart from providing the first definition of the internally displaced, it takes what Catherine Phuong refers to as a comprehensive approach to internal displacement by addressing the numerous situations in which displacement may arise and covering the broad range of rights that IDPs may be entitled to.⁴³ In addition, the Principles reformulate existing law to bring IDP protection and assistance within the ambit of recognisable regimes of law. Further, it seeks to marginally develop the law, but by improving on the existing regimes. As regards to human rights law, it tries to develop some of its principles “where the existing treaties and conventions may contain some gap”.⁴⁴ Given these attributes, the Guiding Principles is indeed an innovation that seems to be inspiring normative development in Africa. Evidently, Africa seems to be better at designing strategies for dealing with conflict and displacement at the regional level, but the same efforts are rarely cascaded down to the national level.⁴⁵ Indeed there are currently a number of IDP protective norms at the regional level but incidences of lack of protection and abuse of IDPs are still rampant.

⁴² See e.g. Lee L “Internally displaced persons and refugees: Towards legal synthesis?” (1996) 9 *J. Refugees Studies* 27.

⁴³ *Ibid* at 56.

⁴⁴ See Kalin (fn 40), 561.

⁴⁵ Such willingness can be traced back to the 1969 Convention Governing Specific Aspects of Refugee Problems in Africa, which has been honoured more by neglect than tangible enforcement. See Crisp J “Africa refugee patterns, problems and policy challenges” (2000) 18(2) *J. Contemporary Afr. Studies* 157; Oloka-Onyango J “Human rights, The OAU Convention and Refugee crisis in Africa: Forty years after Geneva” (1991) 3 *Int'l. J. Refugee L.* 453; Arboleda E “Refugee definitions in Africa and Latin America: Lessons of pragmatism” (1991) 3 (2) *Int'l. J. Refugee L.* 185; Adepofu A “The dimension of the refugee problem in Africa” (1982) 81 *Afr. Affairs* 21; Rwelimira M “Two decades of the OAU Convention Governing Specific Aspects of refugee problem in Africa” (1989) 1 *Int'l. J. Refugee L.* 557.

There has been tremendous effort by the UN and its affiliated organisations, to encourage states to adopt the principles into their domestic law.⁴⁶ Africa's reaction to this call has been very much positive than in most regions, but not entirely unexpected considering that the continent hosts the majority of IDPs. The first regimes for protection of internally displaced that came after the Guiding principles are contained in the Great Lakes Pact.⁴⁷ The Pact was signed in 2006 and entered into force in 2008, after ratification by 10 out of the 11 member states of International Conference on the Great Lakes Region (Angola, Burundi, Central African Republic, Democratic Republic of Congo, Kenya, Rwanda, Sudan, Tanzania, Uganda and Zambia). The Pact has 10 protocols dealing with 33 project areas. But the two protocols which deal specifically with internal displacement are the Protocol on the Protection and Assistance to IDPs⁴⁸ and the Protocol on Property Rights of Returning Populations.⁴⁹ The inclusion of these two protocols in the Pact was significant because it affirmed their acknowledgement that displacement was a threat to peace and stability of the region. It is noteworthy therefore that the Protocol on the Protection and Assistance to IDPs states that its objectives are to establish a framework for the adoption of UN Guiding Principles as a legal basis for implementing of national law; to ensure legal protection and assistance to IDPs; and to reinforce the commitment of member states to prevent and eliminate the root causes of displacement. Thus, in this Protocol, member states committed to respecting rights guaranteed by international law such as safety and dignity, freedom of movement, family reunification and rights to seek and enjoy asylum.⁵⁰ There are also requirements of consent from IDPs and provision of full information and compensation as necessary. What is remarkable is that member states undertook to adopt these measures in their domestic legislations so to provide a framework for dealing with IDP issues at that level.⁵¹

For the purposes of the discussion here, it is useful to note that the Pact gave impetus to the development of a continent-wide protection and assistance regime for IDPs by first, affirming the Guiding Principles template for future normative development and secondly, enunciating a path for the acceptance of a more intrusive and binding regime. That it was negotiated by states rather than elaborated by experts, is an indication of the deep commitment governments in the region were to dealing

⁴⁶ See e.g. UN GA 2005 World Summit Outcome, Resolution A/RES/60/1, 15 Sept, 2005, para 132.

⁴⁷ Pact on Security, Stability and Development of the Great Lakes Region, 2006, available at <http://www.lse.ac.uk/collections/law/projects/greatlakes/ihl-greatlakes-summary-new-docmt.htm> (accessed 15 May 2011).

⁴⁸ See *Protocol on the Protection and Assistance to Internally Displaced Persons*, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/29D2872A54561F66C12572FB002BC89A/\\$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/29D2872A54561F66C12572FB002BC89A/$file/Final%20protocol%20Protection%20IDPs%20-%20En.pdf). (accessed 15 May 2011)

⁴⁹ See the *Protocol on the Property Rights of Returning Persons*, 30 November 2006 (hereinafter "Protocol on Property"), available at <http://www.lse.ac.uk/collections/law/projects/greatlakes/4.%20Humanitarian%20and%20Social%20Issues/4c.%20Protocols/Final%20protocol.PropertyRights%20-En%20r.pdf> (accessed 15 May 2011).

⁵⁰ Art 4.

⁵¹ Art 6(1)

with IDP issues. And by dealing with IDP issue as a collective the states signalled that displacement was an international issue as opposed to being a concern of single states. Also noteworthy is the fact that Guiding Principles and the Great Lakes Pact were a clear demonstration of how the narrative of vulnerability and deprivation found normative expression.⁵² The Kampala Convention followed on this path. But although drafted on the template of the Guiding Principles and the Pact, it has also expanded the regimes for protection, thus making the potential for flexibility in the articulation of norms based on the narrative become a reality. In the following discussion, I shall isolate some of the key aspects of the Convention with a view to highlight the extent to which the narrative has conditioned the regime of protection and assistance to IDPs that it beholds.

4 THE KAMPALA CONVENTION

The establishment of a regional framework for the protection of IDPs arose out of the realisation that the problem of displacement has become more complex and cannot be handled by the traditional forms of accommodation, care and hospitality existing within African societies. These concerns have been complimented by broader trends at the international level, and within the African region. In July 2004, the Executive Council of the African Union called on the AU Commission on International Law (AUCIL), which had been moribund since then, to develop a legal framework for the protection and assistance of IDPs.⁵³ Significant in the approach was the general acknowledgement that IDPs had special status and presented unique concerns that could not be addressed by simply amending the OAU Refugee Convention. The Commission engaged a select group of experts which prepared a concept paper outlining the main aspects of a protection regime. The concept paper was adopted by the Executive Council in 2006, thereby paving way for the drafting of a convention. In this regard, the commission was mandated to draft a convention in collaboration with AU partners such as the UN agencies and international organisations. The drafting process took two years. The final convention was adopted at the Special Summit of Heads of State and Government of AU Members States on Refugees, Returnees and Internally Displaced persons in Africa held in October 2009 in Kampala, Uganda. The Convention was opened for signature and ratification. Uganda became the first country to ratify it in January 2010. Although the Convention needs 15 ratifications to come into effect, by April 2012, it had only received 11 ratifications.⁵⁴

The Convention is the first binding regional instrument that imposes obligations on states to protect IDPs. Thus, it is groundbreaking and significant.⁵⁵ However, it takes

⁵² See fn 20 above.

⁵³ Executive Council, *Decision on the Situation of Refugees, Returnees and Displaced Persons*, 30 June-3 July 2004, Ex.CL/Dec. 127(V).

⁵⁴ Apart from Uganda, the other countries that have ratified the Convention are: Benin (February 2012), Central African Republic (December 2010), Chad (July 2011), Gabon (January 2011), Gambia (April 2011), Guinea Bissau (December 2011) Lesotho (January 2012), Sierra Leone (July 2010), Togo (July 2011), and Zambia (January 2011).

⁵⁵ See Abebe A "The African Union Convention on Internally Displaced persons: Its codification background, scope and enforcement challenges" (2010) 29 (3) *Refugee Survey Quarterly* 28, 42.

its cue from the UN Guiding Principles and recites some of its key provisions. For example, the definition of IDPs in article 1(k) of the Convention is similar to that in the Guiding Principles. Also, the Convention, like the Guiding Principles, affirms the primary role of states in protecting and assisting IDPs. But this is somewhat of a misnomer because there are many instances where the Convention places responsibility on non-state actors as well. Thus the idea of state responsibility in this regard is not clearly delineated—one has to read the Convention closely to identify the aspects for which the state will take responsibility. Closely linked to this fact is the idea that is often pervasive in most regional instruments that states will strive to enact domestic legislation that puts into effect the standards of protection that the Convention enacts. In article 2 the Convention indicates that its main purpose is to promote and strengthen national measures to prevent, mitigate, prohibit and eliminate root causes of internal displacement.⁵⁶ This presupposes that enforcement measures will be spearheaded through national legislative and institutional arrangements. Although there are many aspects in which the Convention is much more elaborate than the Guiding Principles, the impression that the Convention was a mere attempt to clothe international standards with some regional flavour, cannot be entirely discounted. Nonetheless, the Convention responds to the narrative of deprivation and vulnerability by creating three sets of obligations that, more or less, indicate the character of the protection and assistance regime that it establishes. These are rules that deal with the prevention against “arbitrary” displacement; respect for rights of displaced persons; and provision of assistance to displaced persons.⁵⁷

4.1 Prevention of “arbitrary” displacement

The obligation to prevent arbitrary displacement is embodied in article 4 of the Convention which enjoins states to “prevent and avoid conditions that might lead to arbitrary displacement of persons”. The Convention does not define arbitrary displacement but lists certain kinds of activities, by state or non-state actors, that are prohibited. The idea is that such activities are considered inimical to the primary right not to be displaced. They include displacement based on racial discrimination; those that are used as a method of warfare; and those arising from violations of human rights, harmful practises, and collective punishment.⁵⁸ The list is not exhaustive as it prohibits other forms of displacement “caused by any act, event, factor or phenomenon of comparable gravity” to the ones listed, and which cannot be justified under international law. Regrettably, this provision, similar to the one in the Guiding Principles, is not particularly helpful in identifying acts that may be considered arbitrary.⁵⁹ Much depends on interpretation. Nonetheless, some commentators believe that it will have the effect of addressing the root causes of displacement.⁶⁰ In some

⁵⁶ Art 2(a).

⁵⁷ Art 3(1).

⁵⁸ Art 4(4).

⁵⁹ The list in Guiding Principles (art 2) is much shorter. However, it contains the reference to “ethnic cleansing” and “apartheid” which the Convention conveniently omits.

⁶⁰ See e.g. Birganie A “An African initiative for the protection of the rights of the internally displaced people” (2010) 10(1) *Hum. Rts. L. Rev.* 179, 190.

states in the great lakes region, political leaders have been keen to instigate displacement as a form of gerrymandering. In Kenya for example, the government of the former president Daniel Moi was known to clandestinely instigate the infamous 1990 tribal clashes in the Rift Valley province so as to drive out the non-Kalenjin communities suspected to be the supporters of opposition parties.⁶¹ The tribal clashes displaced thousands of families and created such a huge humanitarian crisis.⁶² Under the Convention such actions would amount to “arbitrary displacement” within the meaning of article 4. Moreover, they could also attract AU intervention as mandated by article 8, as read together with article 4 (h) of the Constitutive Act.

Apart from prevention of arbitrary displacement, states are also required to refrain from and prevent acts that may lead to displacement such as discrimination, genocide, crimes against humanity, arbitrary killing, torture, starvation sexual and gender based violence.⁶³ Also, states are required, “as much as possible” to prevent displacement caused by projects carried out by public or private actors.⁶⁴ So they must ensure that feasible alternatives are explored and socio-economic and environmental impact assessments are carried out.⁶⁵ This requirement adds no value because states are already doing this anyway. Most states in the Great Lakes region do have comprehensive environmental pieces of legislation that establish the requirement of an environmental assessment report before any project is undertaken.⁶⁶ But the administrative procedures are wrought with corruption and inefficiency. It is notable that the Convention does not establish standards upon which the act of state or non-state entities engaged in projects with the potential of causing displacement should be measured to determine whether they are arbitrary within the meaning of article 4. States are merely asked to try “as much as possible” to prevent displacement, which is a very low threshold. This obviously may lead to contradictory approaches, especially where rights are implicated. Most national constitutions establish a “public interest” requirement, which the government must prove to justify its infringement of rights.⁶⁷ It

⁶¹ See Kahl C “Population growth, environmental degradation, state sponsored violence: The case of Kenya 1991-3” (1998) 23 (2) *International Security* 80; Klopp J “Ethnic clashes winning elections: The case of Kenya’s electoral despotism” (2001) 35(3) *Canadian J of Afr. Studies* 473; Brown S “Authoritarian leaders and multiparty elections in Africa: How foreign donors help keep Kenya’s Daniel arap Moi in power” (2001) 22(5) *Third World Quarterly* 725.

⁶² See Abdullahi A “Ethnic clashes, displaced persons and the potential for refugee creation in Kenya: A forbidding forecast” (1997) 9 (2) *Int’l. J. Refugee L.* 196.

⁶³ Art 9(1).

⁶⁴ Art 10.

⁶⁵ Art 10(2).

⁶⁶ For example, in Kenya, the Environmental Management and Coordination Act (No. 9 of 1999) establishes the National Environment Authority (s 4) which oversees the Environmental Impact Assessment system (s 58). See Juma L “Environmental Protection in Kenya: Will the Environmental Management and Coordination Act make a difference” (2002) 9 (2) *South Carolina Environmental Law Journal* 181. Uganda’s Constitution as well as the National Environmental Act (1995), Chapter 153 of the Laws of Uganda, have similarly created normative regimes and institutions for safeguarding the environment. See Akello C “Environmental regulation in Uganda: successes and challenges” (2007) 3 (1) *Law Environment & Development Journal* 23, (Available at <http://www.lead-journal.org/content/07020.pdf>) (accessed 1 January 2013).

⁶⁷ See e.g. Constitution of Kenya (2010), art 40(3). See also Ocheje P “In the public interest: Forced Evictions Land rights and human development in Africa”, (2007) 51 (2) *Journal of African Law* 173.

is curious that AU states did not find it feasible to insert similar requirement in the Convention. The only mention of “public interest” is in article 4 (5) where displacement affects communities with special attachment to land. And here, the public interest must be “overriding and compelling”. It is not entirely clear whether the drafters of the Convention intended to set two different standards in this regard: one for ordinary project related displacements (where public interest considerations are not necessary) and another for communities with special attachments to land (where the public interest must be “overriding and compelling”). The indications then would be that vulnerabilities of IDPs from communities with special interest to land differ from the rest. This interpretation might instigate constitutional contestation in some states with expansive Bill of Rights such as South Africa. Nonetheless, the inclusion of project-induced displacement in the Convention is commendable because the phenomenon is on the increase.⁶⁸

4.2 Respect for rights

As discussed elsewhere,⁶⁹ most protection regimes approach the human rights issues in two ways: by making a blanket declaration of the obligations to protect human rights and through a derivative approach that imports obligations already existing under other human rights instruments. The Kampala Convention is no exception. It may not have been useful to enumerate every single right that IDPs are entitled, other than to derivatively infer the application of other instruments. However there are certain guarantees that are worth mentioning here. To begin with is the right not to be arbitrarily displaced.⁷⁰ This is a basic right which informs the entire protection and assistance regime established by the Convention. Correlative to this right is the requirement that states refrain from and prevent discrimination of IDPs “in the enjoyment of any rights or freedoms on the grounds that they are internally displaced persons”.⁷¹ Also worth mentioning are the rights of socio-economic nature that go to the heart of the protection and assistance agenda. In article 3(1), states are enjoined to “prevent political social, cultural and economic exclusion and marginalisation”. Also, states are required to ensure security of IDPs living in camps. They must “respect and maintain the civilian and humanitarian character” of these camps and safeguard them “against the infiltration by armed groups or elements and disarm and separate such groups or elements from internally displaced persons”.⁷²

In its derivative approach, the Convention recognises the UN Guiding Principles in its preamble and affirms its authoritative statement of the “inherent rights” of IDPs. Also in the preamble several other international instruments are mentioned: The Universal Declaration of Human Rights (1948); The Genocide Convention (1948); the Four Geneva

⁶⁸ See Norwegian Refugee Council, *Internal Displacement: Global Overview of Trends and Development in 2004* (2005), 35; Cernea M “Development induced and conflict-induced IDPs: bridging the research divide” (2006) *Forced Migration Review* 25, 26.

⁶⁹ See Juma (fn 22 above).

⁷⁰ Art 4.

⁷¹ Art 9 para 1(a).

⁷² 9(2).

Conventions (1949) and the 1977 Additional Protocols; UN Refugee Convention (1951) and the 1967 Protocol; and the Convention on the Elimination of all Forms of Discrimination Against Women (1979). Similarly, several African instruments are acknowledged: the African Charter on Human and Peoples' Rights, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the African Charter on the Rights and Welfare of the Child. The spread of instruments in which the rights of IDPs reside widens the scope for application of international standards generally and, provide states with a wide range of options while seeking to improve their mechanisms for protecting and assisting displaced persons. For example, the prohibition of use of displacement as a method of warfare, and the protection to be accorded to civilians in the context of an armed conflict, which are contained in article 4 of the Kampala Convention, are required to conform to the standards of international humanitarian law.⁷³ Likewise, the reference to genocide, war crimes and crimes against humanity, indicate the possibility of states adopting international standards while dealing with crimes arising in situations of internal displacement.⁷⁴

The obligation to respect of rights is not only placed on states. Article 6 places similar obligation on international organisations and humanitarian agencies that assist IDPs. These organisations must act in accordance with "principles of humanity, neutrality, impartiality and independence". Of particular relevance is the role of AU. The Convention affirms the right to intervene in a member state "...in respect of grave circumstances" such as war, crimes against humanity and genocide.⁷⁵ This echoes a similar right contained in article 4(h) of the AU's Constitutive Act.⁷⁶ But the AU's role must be understood in the context of other responsibilities that the Convention places on it. For example, in article 8, the organisation is required to support the efforts of member states in protecting the IDPs.⁷⁷ In fact the Convention gives the states a reciprocal right to seek the intervention of the AU to "restore peace and security...and thus contribute to the creation of favourable conditions for finding durable solutions to the problem of internal displacement".⁷⁸ Particular obligations that the AU is required to perform include helping to coordinate mobilisation of resources; facilitating the collaboration of member states with external agencies and organisations; promoting cooperation between member states themselves in this regard and with external bodies; information sharing and particular cooperation with the office of the Special Rapporteur of the African Commission in addressing issues of IDPs.⁷⁹

⁷³ The presumption here is that all treaty law as well rules of customary international law would be applicable, and not just the Geneva Conventions.

⁷⁴ Art 4(6).

⁷⁵ Art 8(1).

⁷⁶ Kuwali D "The end of humanitarian intervention: Evaluation of the African union's right of interference" (2009) 9(1) *Afr. J. Conflict Resolution* 41; Williams P "From non-intervention to non-indifference: The origins and development of African Union's Security Culture" (2007) 106 *Afr. Affairs* 253; Kioko B "The right of intervention under the African union's Constitutive act: From non-interference to non-intervention" (2003) 85 *IRRC* 807.

⁷⁷ Art 8(3).

⁷⁸ Art 8(2).

⁷⁹ *Ibid* para (a) to (f).

Secondly, the Convention imposes a criminal burden on armed groups whose activities violate the rights of IDPs. Indeed, this is in recognition of the fact that most internal armed conflicts in Africa which result in greater displacement are perpetrated by these groups.⁸⁰ The inclusion of armed groups was controversial at first because some states were concerned of the possibility of giving legitimacy to these organisations. Although there was a political merit to this concern, the more pertinent question should be whether such outfits are legally bound by the act of states. Obviously, as far as international humanitarian law is concerned, armed groups as parties to an armed conflict have obligations under Common Article 3 to the Geneva Conventions and the Additional Protocol II (1977).⁸¹ But the extent to which such groups could be held accountable for human rights violations remains debatable.⁸² That is why the Convention preferred the imposition of criminal liability, which implies that responsibility is individual rather than collective, and also that all other instruments of international criminal justice might be brought to bear on their activities. As for the Convention, the list of prohibited acts that may attract such sanction is in article 7(4). These include obstructing the delivery of humanitarian assistance to IDPs, forcibly recruiting them, especially women and children, into their ranks, violating any shelters provided to IDPs and restricting their freedom of movement. These groups are also required to ensure that IDPs within their areas of control are protected and assisted.

4.3 Assistance to IDPs

The philosophy behind assistance is that displacement should eventually come to an end. Thus, all interventions, be they state or externally sponsored, must aim at facilitating a movement from displacement to relocation or resettlement and eventual reinsertion of IDPs. And although this is not mentioned in the Convention, the idea seems to be quite evident in protection and assistance measures it proposes. In some ways this may be coterminous with the requirement for registration of IDPs, so that a record is maintained of the change in one's condition.⁸³ What is explicit in the Convention is the responsibility with regard to "returnees". Indeed, it requires states to ensure "the return, reintegration or relocation and insertion in safety and dignity". What might be of interest is that the Convention uses the word "returnees" with the purpose of avoiding the difficult task of demarcating specific responsibilities that states should assume to ensure that IDPs are reinserted into society, as opposed to the general duty that states owe to its citizens in circumstances that call for programmes of resettlement, reintegration and re-insertion. While it may be probable that in many situations, the task of reintegrating IDPs into society could be undertaken within the broad framework of post-conflict peace building and reconstruction, it is clear from the Convention that IDPs should be treated differently from other categories of persons who may have been uprooted from their homes during conflict. Further, it is apparent is that the Convention

⁸⁰ Giustiniani (fn 33 above) at 358.

⁸¹ See La Rosa A and Wuerzner C "Armed groups, sanctions and the implementation of international law" (2008) 90 *IRRC* 327.

⁸² Giustiniani (fn 33 above) at 359.

⁸³ Art 3(1).

presumes that states will be at liberty to design their own programmes provided that the relocation and reinsertion is implemented in “safety and dignity”. The problem, however, is that of determining when the displacement ends. At what point should a person cease to be an IDP and therefore not entitled to the benefits of protection and assistance under the Convention?

There are three aspects of the assistance regime created by the Convention. The first is providing humanitarian assistance. Presumably, this should be the first response immediately after displacement occurs. The kinds of assistance that states are required to provide are listed in article 9 (2). They include the usual humanitarian needs of food, shelter, medical care and other health services, sanitation, education and other necessary social services; special protection for those with special needs such as unaccompanied children, pregnant mothers, the elderly and persons with disabilities; guarantee of safety; and freedom of movement. The assistance is extended to host communities since not all IDPs are in camps.⁸⁴ These obligations are required to be achieved through cooperation with other entities such as the United Nations, the African Union, and the many humanitarian organisations.⁸⁵ Analogous to cooperation, states are required to facilitate humanitarian action and respect humanitarian principles as well as the independence of humanitarian actors.⁸⁶ The obligation to accept humanitarian assistance is innovative because it elevates the concerns for IDP assistance above the political considerations of the state. Also, it fills an important lacuna in international humanitarian law where the consent of the receiving states has always been considered paramount. But there is rider inserted in article 5 which provides that “nothing in this article shall prejudice the principles of sovereignty and territorial integrity of states”. The implication would be that external intervention to assist IDPs may still be denied if a state considers it a threat to its sovereignty.

The second is the creation of an enabling environment for return and resettlement and establishment of durable solutions. But ensuring return alone is not enough. According to Kälin, successful return requires that three elements be satisfied: “ensuring the safety of returnees; returning property to the displaced and reconstruction of their homes, and creating an economic, social and political environment that sustains return”.⁸⁷ The Convention talks of sustainable return and local integration or relocation, which are key aspects of durable solutions.⁸⁸ This means that the state must ensure that returnees are provided with necessary material and administrative support in the form of being helped regain their property, being assisted to build shelter and critical infrastructure such as schools for their children. This is not

⁸⁴ Art 5 (5).

⁸⁵ Art 5.

⁸⁶ Art 5 (2), (7) and (8).

⁸⁷ Kälin W “The Great Lakes Protocol on Internally Displaced Persons: responses and challenges”, *Symposium on International Law in Post Conflict Situations: The Great Lakes Proces*, 27 September, 2007, http://www.lse.ac.uk/collections/law/projects/greatlakes/Internat%20Law%20in%20Post%20Conflict%20Situations_%20W_Kaelin.pdf (accessed 5 August 2011).

⁸⁸ Art 11. States are required to promote and create “satisfactory conditions for voluntary, local integration or relocation on a sustainable basis and in circumstances of safety and dignity”.

always easy. In Kenya for example, resettlement is complicated by many factors including corruption, loss of identity documents including title deeds, apathy of provincial administration, and insecurity.⁸⁹ In planning and implementing assistance programmes, states must involve IDPs themselves. This approach ensures that government intervention programmes are accepted and owned by the beneficiaries and also minimises disputes. States must also establish simple mechanisms for resolving disputes. It is possible to envisage a role for traditional institutions for dispute resolution in such situations, because they are local and familiar to their clients. Moreover, local personalities are best suited to adjudicate property claims given that they had actual knowledge of the situation before displacement occurred.

The third aspect of assistance is reparation or compensation. Article 12 enjoins states to provide IDPs with effective remedy and also to create a legal framework through which “fair compensation and other forms of reparations” for damages suffered as a result of displacement can be provided.⁹⁰ The Convention places additional burden on states in cases of natural disasters.⁹¹ In such cases, states “shall be liable to make reparation”, meaning that the obligation is mandatory. Other than in natural disasters, the obligation is merely to create legal avenues through which compensation and reparation may be sought. It seems to me that the underlying objective of article 12 is to provide IDPs with some remedy, whether in the form of material compensation or in the form of retributive justice, but that such remedy must conform to “international standards”. In human rights law, the right to an “effective remedy” is contained in the Universal Declaration of Human Rights,⁹² the International Covenant on Civil and Political Rights,⁹³ and American Convention on Human Rights.⁹⁴ It is also articulated in the *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*⁹⁵ as follows:

In accordance with domestic law and international law, and taking account of individual circumstances, victims of gross violations of international human rights law and serious violations of international humanitarian law should as appropriate and proportional to the gravity of the violation and the circumstances of each case, be provided with full and effective reparation, ...which include the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁹⁶

From an IDP perspective, remedial justice must be balanced with the objectives of facilitating return, securing property, providing means of livelihood and forging peace and reconciliation. The United Nations Principles on Housing and Property Restitution

⁸⁹ Juma (fn 22) at 273.

⁹⁰ Art 12 (1) and (2).

⁹¹ Art 12(3).

⁹² Art 18

⁹³ Art 2(3)

⁹⁴ Art 25

⁹⁵ UN Doc E/CN.4/2005/L.10/Add.11, GAOR 60th sess., Suppl. no. 49 A/RES/ 60/147 (19 April 2005), available at <http://www.unhcr.org/refworld/docid/4721cb942.html> (accessed 14 May 2011).

⁹⁶ *Ibid* principle 18.

for Refugees and Displaced Persons (Pinheiro Principles)⁹⁷ attempts to canvass this imperative by providing that IDPs have the right “to have restored to them any housing, land and/or property of which they arbitrarily or unlawfully deprived, or to be compensated for any housing, land and/or property that is factually impossible to restore as determined by an independent, impartial tribunal.”⁹⁸ The effect of this provision is to place restitution at the centre of the IDP protection agenda, and thereby condition states to find appropriate mechanisms of safeguarding property while seeking to restore normalcy in the lives of displaced persons. The Kampala Convention however, has a broader aim of ensuring that whatever loss or damage the IDPs incurred “as a result of displacement” should be remedied, whether in material form or otherwise.

The presumption that IDPs need assistance could be rebutted in instances where the IDPs are found to be engaging in subversive activities. And that is why article 3(1) (f) found its way into the Convention. Obviously, states are paranoid about their own security and are aware that in the age of asymmetrical warfare, people seeking the protection of the state could be the very ones who are fighting against it. There is always fear that polarities arising from factors that caused the displacement in the first place, could be carried to the new area of settlement. And this is why IDPs are sometimes viewed as the “enemy”.⁹⁹ But the context here is important. Whereas concern with state preservation may not be ruled out, there is also the overarching need for security of the majority of IDPs who may not be involved in any kind of subversion. That is why article 2(g) of the Kampala Convention enjoins state parties to remove any elements of armed groups from among the IDP population.

5 STATE RESPONSE

Perhaps it is still too early to say, but in all probability, the response by African states to the Kampala Convention and by extension the UN Guiding Principles is likely to be no different from what we have seen in respect of other conventions and treaties. African states are often eager to establish normative standards at the regional and international level and then ignore or deliberately frustrate those same standards at the domestic level. It is a pattern that is all too familiar. And that is why a sense of foreboding often creeps into the assessment of Africa’s compliance with international standards.¹⁰⁰ The frustration is born out of what I have described elsewhere as the insularity of African systems.¹⁰¹ And yet the value of domestic enforcement cannot be underestimated.

⁹⁷ See UN Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 28 June 2005, E/CN.4/Sub.2/2005/17, (The Pinheiro Principles), available at: <http://www.unhcr.org/refworld/docid/41640c874.html> (accessed 18 May 2011). For full discussion of the principles see Paglione G “Individual property restitution: from Deng to Pinheiro, and challenges ahead” (2008) 20 (3) *Int’l J. Refugee L.* 391.

⁹⁸ *Ibid* Principle 2.1.

⁹⁹ See e.g. Cohen R “Response to Hathaway” (2007) 20(3) *J. Refugee Studies* 370, 371.

¹⁰⁰ See Okere O “The protection of human rights in Africa and the African Charter on Human and Peoples Rights: A comparative analysis with European and American Systems” (1984) 6(2) *Human Rights Q.* 141.

¹⁰¹ See e.g. Juma L “International dimensions of the rules of impartiality and judicial independence: Exploring the structural the structural impartiality paradigm” (2011) 25 (2) *Speculum Juris* 17.

Indeed, key to achieving the purpose of any regional or international normative standard is their adoption by the domestic system.¹⁰² But while mindful of this experience, it may be worthwhile to explore creative ways in which the gap between international system and domestic could be bridged by focusing on specific areas of normative concern. In the case of IDPs, for example, it is possible to identify what Angela Banks refers to as “discursive spaces”,¹⁰³ less diminished by the insularity of the state, in which domestic roles could be energized and encouraged to meet the commitments made at the regional and international level. This is possible mainly because the phenomenon resides within states. So therefore when we talk of vulnerability and deprivation of IDPs, we are referring to citizens who have a claim to the benefits of state protection and assistance. In essence, the argument is that contrary to what we have seen thus far, the narrative of deprivation and vulnerability should impact on domestic norms and perhaps generate, as a consequence, greater compliance with regional and international protection and assistance regimes. In the discussion below, I attempt to discern how two states of Uganda and Kenya respond to IDP concerns with a view to isolate how they respond to the narrative. In my view the two countries represent ranges of approaches to the IDP phenomenon that may shed some light on why African states are yet to embrace standards that they themselves have enacted at the regional level.

5.1 Uganda

Uganda’s internal displacement figures have soared mainly as a result of the civil war between the rebel group, the Lord’s Resistance Army (LRA), and government forces in Northern Uganda.¹⁰⁴ Other factors responsible for the displacement are the rampant cattle rustling in the area and occasional floods. One study has estimated that there were as many as 1.6 million IDPs in Uganda in 2004, which is just about 6% of the total population.¹⁰⁵ The figure came down to 445, 145 in 2010.¹⁰⁶ The displacement has mainly affected the Acholi, Lango and Teso ethnic communities. About 80% of these live in the so called “protected camps” where conditions of life are extremely poor and they are vulnerable to human rights abuse and deprivation. A report that surfaced in 2005 indicated that about 1000 persons died every week in the IDP camps.¹⁰⁷ Violations have

¹⁰² Hathaway O “Between power and principle: An integrated theory of international law” (2005) 72 *U. Chi. L. Rev.* 469, 497; Koh H “Why do nations obey international law” (1997) 106 *Yale L. J.* 2599, 2656-57.

¹⁰³ Banks A “CEDAW, compliance and Custom: Human rights enforcement in Sub Saharan Africa” (2008) 32 *Fordham Int’l. J.* 781.

¹⁰⁴ For the history and background of the conflict see Nannyonjo J “Conflicts poverty and human development in Northern Uganda” (2005) 94 *The Round Table* 473.

¹⁰⁵ See Nullis-Kapp C, “Darfur overshadows “forgotten” crisis in Northern Uganda” (2004) 82(11) *Bulletin of the World Health Organisation* 886.

¹⁰⁶ UNHCR, Kampala Donor Update, January, 2010. See also, Inter-Agency Standing Committee (IASC) Working Group, Update on IDP Movements, September 2009.

¹⁰⁷ See Baines E “The haunting of Alice: Local approaches to justice and reconciliation in Northern Uganda” (2007) 1 *Int’l. J. Transitional Justice* 91, 95.

been widely reported not just by the LRA, who occasionally raid the camps, but by members of the Uganda Armed forces as well.¹⁰⁸

Uganda is among the first countries in the Great Lakes region to adopt an IDP policy in 2004.¹⁰⁹ The policy has three main components: an outline of policy objectives; institutional organs for the management of IDP matters; and the protection measures. It acknowledges that whereas the government had previously strived to assist and protect IDPs, time had now come for the establishment of standardised, coordinated multi-sectoral and multi-disciplinary procedures and guidelines for responding to IDP matters. Thus, the objectives of the policy set out in the preamble are to protect IDPs from arbitrary displacement; promote durable solutions; and facilitate voluntary return resettlement, integration and reintegration of IDPs. These are further amplified in chapter 1 of the policy to include minimisation of displacement and promotion of the development of socio-economic infrastructure in support of return, and resettlement of IDPs. The lead government agencies charged with the responsibility of coordinating various capabilities, both government and other organisations, was the Department of Disaster Preparedness and Refugees in the Office of the Prime Minister. Various committees were created at the national level to manage and coordinate aspects of IDP protection and assistance that fell under their competence: Inter-ministerial policy committee (policy formulation); interagency technical committee (coordinating activities of sectoral ministries); and the Human Rights promotion and protection Committee (monitoring of protection by government and non-state agencies). At the district level, the District Disaster Management Committee and District Human Rights Promotion Committee were also created.

Recognising that security of people and property was an important aspect of IDP protection and assistance programme, the policy set out several important freedoms and rights in chapter three: freedom of movement; protection against arbitrary displacement; rights of voluntary return and settlement; guarantees of status, identification and registration; guarantees of socio-economic rights (property, food, shelter, family, clothing, education health, water and sanitation). It is noteworthy that the protection regime in this chapter borrows heavily from the Guiding Principles. This is hardly surprising, given that the government pledges, in the preambular paragraphs, that it will be guided by international instruments in the implementation of the policy. So apart from designating agencies and government department that would carry out the tasks specified and provide assistance as mandated, the policy is largely a reflection of the international standards applicable to IDPs. In this way, the policy responds to the narrative of deprivation and vulnerability much more positively than could be said of other domestic regimes.

¹⁰⁸ See Nannyonjo (fn 104 above).

¹⁰⁹ Uganda Government, *National Policy for the Internally Displaced*, August 2004, [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/E144C92E313CB097C12570C400504361/\\$file/National+Policy+for+IDPs.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/E144C92E313CB097C12570C400504361/$file/National+Policy+for+IDPs.pdf). See also, Mukwana R and Ridderbos K "Uganda's response to displacement: Contrasting policy and practice", available at <http://www.fmreview.org/FMRpdfs/GP10/21-22.pdf> (accessed on 21 March 2012).

While it is not my intention to discuss constitutional provisions and the web of legislative arrangements in Uganda, it is safe to mention that a discordance exist in the response to the narrative between national law and international regimes that informs the policy, and this has impacted rather unfavourably to the implementation of the policy. Already, several obstacles in the implementation of the policy have been registered by stakeholders.¹¹⁰ At a workshop organised by the government of Uganda, Brookings Institution and the UN in 2006 to assess the progress in the implementation of the policy, the obstacles were identified as poor coordination among responsible agencies; little consultation or communication with IDPs; lack of resources all round, and its impact especially on security; and lack of proper land policy.¹¹¹ However, in the successive years, the government has taken some strategic steps which are worth mentioning. The imprimatur came from international organisations that at the height of the humanitarian crisis pressured the government to be more proactive. Its moves were greatly assisted and complemented by the fact that the government was able to secure an agreement with LRA in August of 2006. But its approach has mainly been geared towards disbandment of the camps and assisting the return and reintegration of the IDPs. The recently conceived Peace, Recovery and Development Programme (PRDP) has strategies aimed at restoring government authority, rebuilding and empowering communities through the improvement of IDP conditions, their resettlement and reintegration, and promoting peace and reconciliation. Its implementation is still on-going.

One of the obstacles that PRDP is likely to face relates to land. Like in most African states, the majority of land in Northern Uganda is held under customary tenure. Under the Government Land Sector Strategic Plan,¹¹² a land reform strategy was established for converting land held under customary tenure into individual ownership through a process of systematic demarcation. This plan is in consonance with the objectives of land reform as set forth in the Land Act.¹¹³ The expectation was that titled ownership would give people security of ownership and promote investment.¹¹⁴ Perhaps Uganda

¹¹⁰ Miller J "Uganda IDP policy, Brookings-Bern Project on Internal Displacement" (FMR 27) (2007), available at

http://www.brookings.edu/~media/research/files/articles/2007/1/31%20human%20rights%20miller/200701_jm_fmruganda.pdf (accessed on 21 March, 2012).

¹¹¹ See Report of the Workshop on the Implementation of Uganda's National Policy for Internally Displaced persons, July 2006, available at

Government/http://www.brookings.edu/events/2006/07/~media/events/2006/7/04%20uganda/20060704_uganda.pdf (accessed on 21 March, 2012).

¹¹² See, Uganda Government, Land Sector Strategic Plan 2001-2011: Utilising Uganda's Land resources for Sustainable Development, (2001). See also LEMU, Return or transformation: Land and resettlement of IDPs in Northern Uganda, Discussion Paper No 6 (2007), available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/D89C58F5150E3905C1257364002BDD7D/\\$file/REPORT+LEMU+MHLUD+PRPD+response+Jun07+doc.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/D89C58F5150E3905C1257364002BDD7D/$file/REPORT+LEMU+MHLUD+PRPD+response+Jun07+doc.pdf) (accessed on 21 March, 2012).

¹¹³ Act No 16 of 1998. One of the purposes of the Act is to provide for tenure, ownership and management of land. And although it recognises customary tenure (s 4 and 5), it establishes mechanism for converting such tenure into freehold (s 10-15).

¹¹⁴ This widely held view has informed land reform programmes across Africa and South America. See Hunt D, "Unintended consequences of land rights reform: The case of the 1998 Uganda land Act" (2004) 22(2) *Development Policy Review* 173.

should learn from other African countries, such as Kenya, that formalising land rights through registration and issuance of titles alone is not a panacea to instability.¹¹⁵ On the contrary, the processes may even generate greater instability, especially in situations where administrative structures are weak and corrupt, and where competing claims cannot be moderated by the proposed systems of reform.¹¹⁶ Moreover, in post-conflict situations, such as in Northern Uganda, where the majority live in fear, implementing such programme amid delicate processes of reconciliation and return of those displaced, might create even more problems. Perhaps what the government needs to consider is relying on already existing tenure systems to publicly ascertain ownership and boundaries. Thereafter, the land holdings can be backed up by systems that allow for the enforcement of land rights. It is not clear how the Land Act can assist in this endeavour, but certainly a legislative framework that is sensitive to the objectives of streamlining ownership and minimising conflicts arising from the return of IDPs is preferred. What is thus suggested is a hybrid system that relies on customary institutions to identify and demarcate boundaries and a legislative framework that enforces the entitlements. The legislation would also establish permanent institutions for land administration and dispute settlement.

5.2 Kenya

Displacement in Kenya has a long history that stretches back to the politically instigated “tribal clashes” of the Moi days.¹¹⁷ However, the recent spike in numbers of displaced persons after the 2008 post-election violence was clearly unprecedented, and has resulted in greater attention for IDPs in Kenya. This notwithstanding, Kenya has not ratified the Kampala Convention and has no IDP policy. According to a 2011 estimate, the number of IDPs in stood at about 250,000 people.¹¹⁸ The only existing IDP protection and assistance frameworks are those that emanated from the National Accord and Reconciliation Agreement (NARA),¹¹⁹ signed between President Kibaki and Raila Odinga, leader of the ODM party, to end the post-election violence in 2008.¹²⁰ NARA mandated the National Accord Implementation Committee to prepare the Grand

¹¹⁵ See e.g. Platteau J “Does Africa need land reform?” in Toulmin C & Quan J eds., *Evolving Land Rights, Policy and Tenure in Africa* (Institute for Environment and Development, 2000); Haugerud A “Land Tenure and agrarian change in Kenya” (1989) 59 (1) *Africa* 61; Migot-Adhola S et al, “Security of Tenure and Low productivity in Kenya” in Bruce J & Migot-Adhola S eds., *Searching for Land Tenure Security in Africa* (1994).

¹¹⁶ See Hunt D (fn 115 above) at 174; Paul, D, ‘Heading home? Protection and return in Northern Uganda’ (2006) 36 *Humanitarian Exchange* 4.

¹¹⁷ See Abdullahi (fn 62 above); Juma (fn 22 above); Klopp J “Kenya’s internally displaced: Managing civil conflict in democratic transitions” in D. Bekoe ed., *East Africa and the Horn: Confronting Challenges to Good Governance* (2006)

¹¹⁸ Internal Displacement Monitoring Centre (IDMC), Kenya: Internal Displacement Profile (2011), available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/B594F51B576A2A37C12573DB0036DA69?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/B594F51B576A2A37C12573DB0036DA69?OpenDocument) (accessed 20 April, 2012).

¹¹⁹ See the National Accord and Reconciliation Act (No 4 of 2008), available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationNo4of2008.pdf> (accessed 20 April, 2011).

¹²⁰ See Abuya E “Consequences of a flawed presidential election” (2009) 29(1) *Legal Studies* 127.

Coalition Government's programme of action.¹²¹ This committee came up with the *National Reconciliation and Emergency Social Economic Recovery Strategy*,¹²² which then identified four priority areas for action: national reconciliation and peace building, resettlement of IDPs, economic revival and positive engagement of the youth. The task of implementing the strategy was put under the Ministry of Special Programmes, which from the start emphasised the need for facilitating speedy return and resettlement of IDPs and the complete disbandment of camps. To achieve these objectives, the government set up another committee, the Mitigation and Settlement Committee, whose terms of reference included the monitoring and evaluation of the resettlement and reintegration process "with a view to deal with emerging problems", mobilisation of "resources both internally and externally to help in the resettlement and reintegration of IDPs" and advocacy on IDPs rights.¹²³ The Committee's mandate was to be carried out in conformity with international standards and with collaboration of international and regional organisations.

Far from the rhetoric of government and senior politicians, responses to IDP matters have remained ad hoc and uncoordinated. The conditions have remained immeasurable worse for IDPs in camps.¹²⁴ The government has responded to their needs by instituting resettlement programmes, which have nonetheless been much of failure: they are poorly coordinated, riddled with corruption; and were in some instances, even illegal. For example, the government's *Operation Rudi Nyumbani* launched in 2008, was heavily criticised by human rights organisations because the approaches used to remove IDPs from camps were in clear violation of the Guiding Principles.¹²⁵ The greatest difficulty with resettlement has been the inability to resolve deep seated land grievances. But this is not something new. Since the 1990s Kenya's political cohesion has been threatened by land squabbles that occasionally erupt into full scale violence. These in turn lead to further displacement. According to Klopp, therefore, "there needs to be a serious public discussion in Kenya about land grievances, the nature of violence and the extent to which they are linked or not linked. We must be careful not to divert from the real sources of the conflict".¹²⁶ Apart from resettlement, the assistance programmes are equally haphazard and uncoordinated, apart from being poorly funded. As at the beginning of 2010, there were still about 18,600 persons living

¹²¹ See Amadi H, "Kenya's Grand Coalition Government; Another Obstacle to Urgent Constitutional Reform?" (2009) 44 (3) *Africa Spectrum* 156.

¹²² See Report of the National Accord Implementation Committee on *National Reconciliation and Emergency Social and Economic Recovery Strategy*, Government of Kenya, April 14, 2008, available at <http://www.humanitarianreform.org/humanitarianreform/Portals/1/cluster%20approach%20page/Kenya/National%20Emergency%20Social%20and%20Economic%20Recovery%20Strategy.pdf> (accessed 12 Jan., 2011).

¹²³ *Ibid* at 13.

¹²⁴ See Abuya E and Ikobe C "Wasted Lives: Internally displaced persons living in camps in Kenya" (2010) 1 *Int'l. Humanitarian Legal Studies* 1.

¹²⁵ See Kenya Human Rights Commission, *A Tale of Force, Threats and Lies: Operation Rudi Nyumbani' in Perspective'* (2008), available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/D108E31363ADD021C12574F700351865/\\$file/A+Tale+of+Force,+Threats+and+Lies'+Operation+Rudi+Nyumbani'+in+Perspective.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/D108E31363ADD021C12574F700351865/$file/A+Tale+of+Force,+Threats+and+Lies'+Operation+Rudi+Nyumbani'+in+Perspective.pdf) (accessed 15 May, 2011).

¹²⁶ See Klopp (fn 117 above).

in camps spread throughout the Rift Valley province. It has become apparent that a normative framework is needed to streamline IDP response. This has made the civil society and humanitarian organisations to agitate for legislative and policy framework on IDPs.

Two developments have somewhat facilitated the move towards developing such institutional and normative framework. The first was the adoption of the new Constitution in August 2010.¹²⁷ The new Constitution has entrenched rights associated with the well-being of IDPs and made them enforceable through the courts. Article 43 guarantees the rights to 'attainable' standard of health, adequate housing, food, water, social security and education. All these have relevance to how IDPs are treated. For example, in the protection of housing rights, the state is under obligation to provide IDPs with 'adequate' housing while in camps, and that their return is facilitated by either assisting them to go back to their houses, or if the houses are destroyed, helping them construct new ones.¹²⁸ The second factor which has facilitated state response to IDP concerns is the lingering potential of the IDP issue becoming a major political issue in the 2013 general elections. This factor is particularly potent because of the connection between displacement and the land question. But credit must go to the civil society that has been relentless in reminding the government of its obligations under the Great Lakes Pact on Peace Security and Stability that it signed in 2006 and which came into force in 2008.¹²⁹ Indeed, with the help of UN agencies and international NGOs, the local civil society groups were able to draft a policy and to submit it to the government for approval.¹³⁰ Framed along the same lines as Uganda's IDP policy, and adopting the principles of protection and assistance decreed by the Guiding Principles and the Kampala Convention, the draft policy has been hailed as a major breakthrough in the management of IDP issues in Kenya.¹³¹ According to the report of the UN Special Rapporteur on the Human Rights of the Internally Displaced, made after he visited Kenya in 2011, significant efforts are being made by government to develop frameworks for IDP protection.¹³² Apart from the draft IDP policy, the government has also prepared a Draft Bill on Internally Displaced Persons which is yet to be debated in parliament. Although these measures are being taken, the Special Rapporteur lamented the slow processes of putting legislation and appropriate policies in place, lack of proper registration processes of IDPs and data collection, lack of consultations before

¹²⁷ For the developments leading to the promulgation of the new Constitution, see Juma L and Okpaluba C "Judicial intervention in Kenya's Constitutional review process" (2012) 11 (2) *Washington University Global Studies Law Review* 287.

¹²⁸ Consistent with art 11(1) of ICESCR; UN Committee on Economic Social and Cultural Rights, General Comment No 4: The Right to Adequate Housing (Art 11(1) of the Covenant) (6th sess., 13 Dec 1991).

¹²⁹ The Pact includes the protocol on property Rights of Returning Populations, available at [http://www.internal-displacement.org/8025708F004CFA06/\(httpKeyDocumentsByCategory\)/EDBDB590CC1BF1FEC1257248002EC747/\\$file/Great Lakes pact_en.pdf](http://www.internal-displacement.org/8025708F004CFA06/(httpKeyDocumentsByCategory)/EDBDB590CC1BF1FEC1257248002EC747/$file/Great+Lakes+pact_en.pdf) (accessed 15 May 2011).

¹³⁰ See Kenya: Draft policy offer new hope for IDPs, *IRIN*, 19 March 2010, available at <http://www.irinnews.org/printreport.aspx?reportid=88485> (accessed 15 May 2011).

¹³¹ *Ibid.* The Draft Policy was unveiled in March 2010 but is yet to be adopted.

¹³² See Report of the Special Rapporteur on Human Rights of Internally Displaced Persons, UNGA A/HRC/19/54/add. 2, 6 February, 2012.

the implementation of resettlement programmes, inadequate humanitarian assistance to IDPs still in camps, the reluctance to adopt broader approaches to durable solutions, and the lack of programmes for addressing the root causes of displacement.¹³³

6 TOWARDS SYNTHESIS OF APPROACHES

If we begin from the premise that IDPs do not acquire any special rights over and above those accorded them as citizens because they remain within borders, then their claim to protection and assistance could be justified on the grounds of vulnerability and deprivation.¹³⁴ The argument is that international and regional norms that distinctively address these grounds create benchmarks that national frameworks for protection and assistance of IDPs should meet. Moreover, the state has the primary responsibility of protecting and assisting such persons and the pressure to do so is usually endogenous. But looking at what the countries do, and especially our two case studies, it is apparent that national efforts are deficient. Obviously, this anomaly is manifested in the lack of normative frameworks that establish standards of protection and assistance that correspond to that of international and regional frameworks. While there is no doubt that comprehensive national legal frameworks may strengthen government ability to deal with displacement, such framework should respond to the narrative of vulnerability and deprivation. In my view therefore, the narrative can be used to generate a theoretical discussion on protection and assistance of IDPs in the national context. In this regard, several strategies for normative intervention could be postulated. The first is to design norms that deal with particular phases of displacement, from pre-displacement to final resettlement or reinsertion. In this way, separate norms could deal with each phase of the transition. The second approach would be to align existing domestic legislation with international and regional instruments. In this case, the reform would not be so cumbersome and states would simply need to peg standards of protection on those of regional and international instruments. Lastly, states may wish to enact a comprehensive legislation dealing with IDPs. Such legislation would not only set out standards of protection and guarantee rights but also establish institutions exclusively dealing with IDP issues. This approach, unless carefully managed, could point to the recognition of status, which as we have indicated before, can be very problematic. But in the case of Kenya, this may be the most preferred because the new constitutional dispensation has created opportunity for the development of new norms. Already, a new land policy and act have been drafted to take advantage of the institutional and prescriptive rights under the Constitution. This trend should extend to IDP concerns that had been earmarked by the *National Reconciliation and Emergency Social Economic Recovery Strategy* of 2008.

No matter the strategy that states choose, ultimately, dealing with IDP issues requires that there be binding and enforceable regime to buttress the national resolve to address IDP concerns. Secondly, there must be a national vision that elaborates on

¹³³ *Ibid* at 20-22.

¹³⁴ See Kälin (fn 87 above) although arguing from a different standpoint.

the approaches the government is taking to deal with IDP concerns. This, obviously, points to the need for a comprehensive policy framework such as the one of Uganda. Ideally, policy frameworks should demarcate the path for the administrative response to courses of action decreed by binding legislative instruments. According to Mooney, a successful policy will do the following: spell out the institutions that deal with IDPs, assign roles to appropriate government department and set specific coordination strategies among them.¹³⁵ What is being suggested here is that states can respond to the needs of IDPs by adopting a holistic approach that comprises a legislative action as well as a policy framework, both of which galvanise governmental aspiration and visions into tangible programmes of action.

7 CONCLUSION

Clearly, the logic which explains the evolution of norms couched in the language of protection and assistance for target groups, such as IDPs, is underwritten by the narrative of vulnerability and deprivation. The irony is that while the narrative speak to the manifold concerns that internal displacement generate in the domestic arena, it has exerted more influence on the generation of regional and international norms than on domestic norms. Consequently, international protection regimes bear characteristics that are not necessarily present in domestic ones. For example, whereas one can see the obvious implications of Guiding Principles to the overall international governance and protection efforts that have evolved since the principles were adopted in 1998, the same is hardly evident in the domestic scene. Other than isolated cases of remote rationalisation of approaches through policy interventions that we see in Uganda, Burundi and Liberia, African states have largely remained insular to the normative revolution spawned by the Guiding Principles and the Kampala Convention. And judging by what Ugandan and Kenyan situations reveal, a more concerted normative and policy intervention are required to address the plight of IDPs. This article has suggested an integrated approach that takes on board a range of normative options as well as policy framework. These interventions must be synthesised to offer protection and assistance to IDPs that answer to their vulnerability and deprivation. And since the standards of such protection and assistance has been established at the regional and international level, national frameworks may be at ease simply emulating what has so far been prescribed.

BIBLIOGRAPHY

Abdullahi A "Ethnic clashes, displaced persons and the potential for refugee creation in Kenya: A forbidding forecast" (1997) 9 (2) *Int'l. J. Refugee L.* 196.

¹³⁵ See Mooney E "Principles of protection for internally displaced persons" (2001) 38 (6) *International Migration* 81; The concept of internal displacement and the case for internally displaced person as a category of concern (2005) 24(3) *Refugees Survey Quarterly* 9.

- Abebe A “The African Union Convention on Internally Displaced persons: Its codification background, scope and enforcement challenges” (2010) 29 (3) *Refugee Survey Quarterly* 28.
- Abuya E “Consequences of a flawed presidential election” (2009) 29(1) *Legal Studies* 127.
- Abuya E and Ikobe C “Wasted Lives: Internally displaced persons living in camps in Kenya” (2010) 1 *Int’l. Humanitarian Legal Studies* 1.
- Adepofu A “The dimension of the refugee problem in Africa” (1982) 81 *Afr. Affairs* 21.
- Ahlbrandt T “The protection gap in the international protection of internally displaced persons: The case of Rwanda” (Université de Genève Institut Universitaire de Haute Etudes Internationales, July 1996).
- Akello C “Environmental regulation in Uganda: successes and challenges” (2007) 3 (1) *Law Environment & Development Journal* 23
- Amadi H, “Kenya’s Grand Coalition Government; Another Obstacle to Urgent Constitutional Reform?” (2009) 44 (3) *Africa Spectrum* 156.
- Arboleda E “Refugee definitions in Africa and Latin America: Lessons of pragmatism” (1991) 3 (2) *Int’l. J. Refugee L.* 185.
- Baines E “The haunting of Alice: Local approaches to justice and reconciliation in Northern Uganda” (2007) 1 *Int’l. J. Transitional Justice* 91.
- Banks A “CEDAW, compliance and Custom: Human rights enforcement in Sub Saharan Africa” (2008) 32 *Fordham Int’l. J.* 781.
- Barutciski M “Tension between the refugee concept and the IDP debate (1998) 3 *Forced Migration Review* 14.
- Beyani C “The elaboration of a legal framework for protection of internally displaced persons in Africa” (2006) 50 (2) *J. Afr. L.* 187.
- Birganie A “An African initiative for the protection of the rights of the internally displaced people” (2010) 10(1) *Hum. Rts. L. Rev.* 179, 190.
- Brown S “Authoritarian leaders and multiparty elections in Africa: How foreign donors help keep Kenya’s Daniel arap Moi in power” (2001) 22(5) *Third World Quarterly* 725.
- Cardona O “The need for rethinking the concepts of vulnerability and risk from a holistic perspective: A necessary review and criticism for effective risk management” in Bankoff G et al eds., *Mapping Vulnerability: Disasters, Development and People* London: Earthscan (2001).
- Cernea M “Development induced and conflict-induced IDPs: bridging the research divide” (2006) *Forced Migration Review* 25.
- Cohen R “Protecting the internally displaced” *World Refugee Survey* 1996 (US Committee for Refugees, Washington DC: Immigration and Refugee Service of America, 1996).

- Cohen R "Response to Hathaway" (2007) 20(3) *J. Refugee Studies* 370.
- Cohen R "Strengthening protection of IDPs: The UN's Role", (2006) 7 *Geo J. Int'l. Aff.* 101.
- Crisp J "Africa refugee patterns, problems and policy challenges" (2000) 18(2) *J. Contemporary Afr. Studies* 157.
- Downing T "Vulnerability to hunger and coping with climatic change in Africa" (1991) 1 *Global Environmental Change* 365.
- Furedi F "From narrative of the blitz to the rhetoric of vulnerability" (2007) 1 (2) *Cultural Sociology* 235.
- Gessler N "The internally displaced persons" (1999) 11(3) *Int'l. J. of Refugee L.* 451.
- Giustiniani F "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 (2010-2011) 39(2) *Denv. J. Int'l. L. & Pol'y* 347.
- Goldman R and Kälin W "Legal framework" in Cohen R & Deng F eds., *Masses in Flight: Global Crisis of Internal Displacement* Washington DC: Brookings (1998), 73.
- Hathaway O "Between power and principle: An integrated theory of international law" (2005) 72 *U. Chi. L. Rev.* 469.
- Haugerud A "Land Tenure and agrarian change in Kenya" (1989) 59 (1) *Africa* 61.
- Human Rights Watch, *Failing the Internally Displaced: The UNDP Displaced Persons Programme in Kenya* (1996).
- Hunt D "Unintended consequences of land rights reform: The case of the 1998 Uganda land Act (2004) 22(2) *Development Policy Review* 173.
- Johnson D *The Root Causes of Sudan's Civil War* Bloomington: Indiana University Press (2004).
- Juma L "Environmental Protection in Kenya: Will the Environmental Management and Coordination Act make a difference" (2002) 9 (2) *South Carolina Environmental Law Journal* 181.
- Juma L "International dimensions of the rules of impartiality and judicial independence: Exploring the structural the structural impartiality paradigm" (2011) 25 (2) *Speculum Juris* 17.
- Juma L "Normative and institutional approaches to the protection of property rights of IDPs in Kenya's Rift Valley province" (2012) 20 (2) *Afr. J. Int'l. & Comp. L.* 251.
- Juma L and Okpaluba C "Judicial intervention in Kenya's Constitutional review process" (2012) 11 (2) *Washington University Global Studies Law Review* 287.
- Kahl C "Population growth, environmental degradation, state sponsored violence: The case of Kenya 1991-3" (1998) 23 (2) *International Security* 80.
- Kälin W "Guiding Principles on Internal Displacement: Annotations" 1, ASIL, Studies in Transnational legal Policy No 32, (2000).

- Kamungi P “The politics of displacement in multiparty Kenya” (2009) 27 (3) *Journal of Contemporary African Studies* 345.
- Kastberg N “Strengthening the response to displaced children” (2002) 15 *Forced Migration Review* 4.
- Kioko B “The right of intervention under the African union’s Constitutive act: From non-interference to non-intervention” (2003) 85 *IRRC* 807.
- Klopp J “Ethnic clashes winning elections: The case of Kenya’s electoral despotism” (2001) 35(3) *Canadian J of Afr. Studies* 473.
- Klopp J “Kenya’s internally displaced: Managing civil conflict in democratic transitions” in D. Bekoe ed., *East Africa and the Horn: Confronting Challenges to Good Governance* Boulder CO; Lynne Rienner (2006).
- Koh H “Why do nations obey international law” (1997) 106 *Yale L. J.* 2599, 2656-57.
- Koser K “Introduction: Integrating displacement and peace building” (2009) 28(1) *Refugee Survey Q.* 5
- Kuwali D “The end of humanitarian intervention: Evaluation of the African union’s right of interference” (2009) 9(1) *Afr. J. Conflict Resolution* 41.
- La Rosa A and Wuerzner C “Armed groups, sanctions and the implementation of international law” (2008) 90 *IRRC* 327.
- Lee L “Internally displaced persons and refugees: Towards legal synthesis?” (1996) 9 *J. Refugees Studies* 27.
- Levitt J “Conflict prevention, management, and resolution: Africa—regional strategies for the prevention of displacement and protection of displaced persons: The cases of OAU, ECOWAS, SADC and IGAD” (2001) 11 *Duke J. Comp. & Int’l. L.* 39.
- McElroy T *et al*, “War, displacement and productive occupations in Northern Uganda” (2011) *Journal of Occupational Science* 1.
- Migot-Adhola S *et al*, “Security of Tenure and Low productivity in Kenya” in Bruce J & Migot-Adhola S eds., *Searching for Land Tenure Security in Africa* Washington DC: World Bank (1994).
- Mooney E “Principles of protection for internally displaced persons” (2001) 38 (6) *International Migration* 81.
- Mooney E “The concept of internal displacement and the case for internally displaced person as a category of concern” (2005) 24 (3) *Refugees Survey Quarterly* 9.
- Nannyonjo J “Conflicts poverty and human development in Northern Uganda” (2005) 94 *The Round Table* 473.
- Nullis-Kapp C, “Darfur overshadows “forgotten” crisis in Northern Uganda” (2004) 82(11) *Bulletin of the World Health Organisation* 886.
- Ocheje P “In the public interest: Forced Evictions Land rights and human development in Africa”, (2007) 51 (2) *Journal of African Law* 173.

Okere O "The protection of human rights in Africa and the African Charter on Human and Peoples Rights: A comparative analysis with European and American Systems" (1984) 6(2) *Human Rights Q.* 141.

Olaa A "Uganda: The Resilience of Tradition and the displaced Acholi in Kitgum" in Vincent M & Sorensen B eds., *Caught between Borders: Responses Strategies of the Internally Displaced* London: Pluto (2001) 99.

Oloka-Onyango J "Human rights, The OAU Convention and Refugee crisis in Africa: Forty years after Geneva" (1991) 3 *Int'l. J. Refugee L.* 453.

Paglione G "Individual property restitution: from Deng to Pinheiro and challenges ahead" (2008) 20 (3) *Int'l J. Refugee L.* 391.

Paul, D, "Heading home? Protection and return in Northern Uganda" (2006) 36 *Humanitarian Exchange* 4.

Phuong C, *The International Protection of Internally Displaced Persons* Cambridge: Cambridge university Press (2004).

Platteau J "Does Africa need land reform?" in Toulmin C & Quan J eds., *Evolving Land Rights, Policy and Tenure in Africa* London: Institute for Environment and Development, (2000).

Rwelimira M "Two decades of the OAU Convention Governing Specific Aspects of refugee problem in Africa" (1989) 1 *Int'l. J. Refugee L.* 557.

Sen A *Commodities and Capabilities* New Delhi: Oxford University Press (1999);

Sen A "Human rights and capabilities" (2005) 6 (2) *Journal of Human Development* 151.

Tigere P and Amukhobu R "The African Union's Institutional Framework for responding to forced displacements in Africa" (2006) *African Union Policy Review* 53.

Weichselgartner J "Disaster mitigation: the concept of vulnerability revisited" (2001) 10(2) *Disaster Prevention & Management* 87.

Weiss T and Korn D *Internal Displacement: Conceptualisation and Its Consequences* New York: Routledge (2006).

Whiteford G "Occupational deprivation: Global challenge in the new millennium" (2000) 63 (5) *British Journal for Occupational Therapists* 200.

Williams P "From non-intervention to non-indifference: The origins and development of African Union's Security Culture" (2007) 106 *Afr. Affairs* 253.

Essoungou A "Africa's displaced people: Out of the shadows" *Africa Renewal*, April 2010, at 6, <http://www.un.org/en/africarenewal/vol24no1/displaced-people.html> (accessed 21 May 2011).

Heijmans A "Vulnerability: A matter of perception", a paper presented at the international work-Conference on Vulnerability in Disaster Theory and Practice, Winnipeg Disaster Studies, 29-30 June, 2001 Available at

<http://www.abuhrc.org/Publications/Working%20Paper%204.pdf> (accessed 21 May 2011).

IDMS, Democratic Republic of Congo: IDPs need further assistance in contexts of continued attack and insecurity' 14 Sept., 2011, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/111D01A00B251BE0C125790B002DFC4C/\\$file/DRC-Overview-Sept2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/111D01A00B251BE0C125790B002DFC4C/$file/DRC-Overview-Sept2011.pdf) (accessed 15 May 2012).

Internal Displacement Monitoring Centre (IDMC) *Internal Displacement: Global Overview of Trends and developments 2011*, Geneva IDMC, April 2012, available at [http://www.internal-displacement.org/8025708F004BE3B1/\(httpInfoFiles\)/081F7B080CF6371AC12579E40046EDA9/\\$file/global-overview-2011.pdf](http://www.internal-displacement.org/8025708F004BE3B1/(httpInfoFiles)/081F7B080CF6371AC12579E40046EDA9/$file/global-overview-2011.pdf) (accessed 15 May 2012).

Internal Displacement Monitoring Centre (IDMC), Kenya: Internal Displacement Profile (2011), [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/B594F51B576A2A37C12573DB0036DA69?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/B594F51B576A2A37C12573DB0036DA69?OpenDocument) [accessed 20 April 2012].

Kälin W "The Great Lakes Protocol on Internally Displaced Persons: responses and challenges", *Symposium on International Law in Post Conflict Situations: The Great Lakes Process*, 27 September, 2007, http://www.lse.ac.uk/collections/law/projects/greatlakes/Internat%20Law%20in%20Post%20Conflict%20Situations_%20W_Kaelin.pdf (accessed 5 August 2011).

Kenya Human Rights Commission, *A Tale of Force, Threats and Lies: Operation Rudi Nyumbani' in Perspective'* (2008), available at [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/D108E31363ADD021C12574F700351865/\\$file/A+Tale+of+Force,+Threats+and+Lies+'Operation+Rudi+Nyumbani'+in+Perspective.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/D108E31363ADD021C12574F700351865/$file/A+Tale+of+Force,+Threats+and+Lies+'Operation+Rudi+Nyumbani'+in+Perspective.pdf) (accessed 15 May, 2011).

Klopp J *et al* "Internal displacement and local peacebuilding in Kenya: Challenges and innovations", USIP Special Report 251 (2010), <http://www.usip.org/files/resources/SR251%20-%20Peace%20building%20in%20Kenya.pdf> (accessed 21 May 2011).

Miller J "Uganda IDP policy, Brookings-Bern Project on Internal Displacement" (FMR 27) (2007), http://www.brookings.edu/~media/research/files/articles/2007/1/31%20human%20rights%20miller/200701_jm_fmuganda.pdf (accessed on 21 March, 2012).

Mukwana R and Ridderbos K "Uganda's response to displacement: Contrasting policy and practice" available at <http://www.fmreview.org/FMRpdfs/GP10/21-22.pdf> (accessed on 21 March, 2012).

National Accord and Reconciliation Act (No 4 of 2008) available at <http://www.kenyalaw.org/klr/fileadmin/pdfdownloads/Acts/NationalAccordandReconciliationNo4of2008.pdf> [accessed 20 April, 2011].

Uganda Government, *National Policy for the Internally Displaced*, August 2004, <http://www.internal->

[displacement.org/8025708F004CE90B/\(httpDocuments\)/E144C92E313CB097C12570C400504361/\\$file/National+Policy+for+IDPs.pdf](http://displacement.org/8025708F004CE90B/(httpDocuments)/E144C92E313CB097C12570C400504361/$file/National+Policy+for+IDPs.pdf) (accessed on 21 March, 2012).

UN Sub-Commission on the Promotion and Protection of Human Rights, *Principles on Housing and Property Restitution for Refugees and Displaced Persons*, 28 June 2005, E/CN.4/Sub.2/2005/17, principle 2.1, available at: <http://www.unhcr.org/refworld/docid/41640c874.html> (accessed 18 May 2011)