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Strengthened Protection for Internally Displaced Persons in Africa: The Kampala Convention Comes Into Force

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Introduction

On December 6, 2012, the world's first regional treaty on internal displacement came into force. Adopted in Kampala, Uganda, during an October 2009 Special Summit of Heads of State and Government on Refugees, Returnees and Internally Displaced Persons in Africa, the African Union Convention on the

Protection and Assistance of Internally Displaced Persons in Africa (the "Kampala Convention") has been signed by thirty-six African states and ratified by fifteen.[1]

The Kampala Convention's entry into force continues Africa's remarkable history of legal leadership on forced migration. The 1969 Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa dramatically expanded the protection afforded to those forced to flee African countries.[2] The Kampala Convention is an equally significant and sorely needed advancement, given that in 2011, more than 9.7 million people were internally displaced across twenty-one sub-Saharan African countries, representing one third of internally displaced persons ("IDPs") around the world.[3]

This *Insight* provides a brief introduction to the Kampala Convention, highlighting the particular contributions the Convention makes to advancing norms on arbitrary displacement and accountability for internal displacement.

Advancing Protection for IDPs

The Kampala Convention builds on a number of soft law frameworks on IDPs, the most influential being the 1998 Guiding Principles on Internal Displacement.[4] Developed by the Representative of the United Nations Secretary-General on Internally Displaced Persons, the Guiding Principles draw on international human rights and humanitarian law, and refugee law by analogy. They address the rights and needs of IDPs at every stage from the prevention to the resolution of displacement, and have been widely endorsed, including by the General Assembly,[5] the Security Council,[6] the Human Rights Council,[7] and by Heads of State and Government at the 2005 World Summit.[8] The Guiding Principles have been integrated into the practice of major humanitarian organizations and laws and policies in at least twenty countries,[9] and are the centerpiece of the international "normative framework" on IDPs. Critically, the Guiding Principles stress that states bear primary

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responsibility for protecting and assisting IDPs within their jurisdiction.[10]

The Kampala Convention similarly underlines states' primary responsibility for IDPs. Indeed, many of the Convention's substantive provisions are incorporated directly, or with minor amendment, from the Guiding Principles. The Kampala Convention's definition of "internally displaced person," for instance, mirrors the Guiding Principles, which identify IDPs as

persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized state border.[11]

After setting out this and other relevant definitions (Article 1), the Convention's objectives (Article 2) and general obligations (Article 3) are outlined. These form the backdrop for more detailed obligations on the prevention of displacement (Articles 4, 10); protection and assistance during displacement (Articles 5-9); displacement caused by development projects (Article 10); the resolution of displacement (Article 11); remedies for those affected by displacement (Article 12); documentation for IDPs (Article 13); and a number of procedural matters (Articles 14-23).

Normative Advances in the Kampala Convention

The *Annotations to the Guiding Principles* emphasize that they merely reflect pre-existing norms of international human rights and humanitarian law.[12] The Kampala Convention is likewise underpinned by these areas of law, and in particular by regional instruments such as the African Charter on Human and Peoples' Rights and the Great Lakes Protocol.[13] However, in a number of key areas, the Kampala Convention moves beyond these standards to significantly advance international norms on internal displacement.

Arbitrary Displacement

One of the Convention's most notable contributions is the detailed elaboration of the right to be protected against arbitrary displacement. Article 4(4) outlines this right in detail, identifying acts deemed a violation of that right. The scope of coverage is extremely broad, including displacement due to discrimination, armed conflict, generalized violence and human rights violations, "harmful practices,"[14] unnecessary evacuations, or collective punishment.

The prohibition of arbitrary displacement is not, in and of itself, new to international law. The Fourth Geneva Convention prohibits "individual or mass forcible transfers" as a grave breach.[15] The Statute of the International Criminal Tribunal for the former Yugoslavia prohibited "unlawful transfers,"[16] and the Rome Statute lists forcible transfers of population as an act that may qualify as a crime against humanity.[17] However, in outlining the right to protection from arbitrary displacement, the Kampala Convention goes beyond these existing delineations and their reflection in the Guiding Principles.[18] For example, the provisions laid out in Article 4(d) and (e) are significant innovations that capture displacement "caused by generalized violence or violations of human rights" and displacement "as a result of harmful practices." These provisions, clearly influenced by human rights law, have no counterpart in other IDP frameworks to date.[19] Indeed, they fill a potential gap in international law generally. In order to trigger the prohibition on arbitrary displacement, violations do not have to be "widespread" (as with crimes against humanity), nor do these acts need to take place in armed conflict (as in the case of international

humanitarian law). These provisions represent a very broad approach to the prevention of forced migration, one intended to capture any arbitrary displacement, in all circumstances. Indeed, Article 4(h) provides the catchall in case any situations are left out. Any arbitrary displacement due to an “act, event, factor, or phenomenon of comparable gravity” not justified under international law is also prohibited.

To be sure, arbitrary displacement is not strictly a “crime” under the Kampala Convention. In general, the Convention frames arbitrary displacement as a harm against which all persons have a right to be protected. However, Article 4(6) does oblige states parties to “declare as offenses punishable by law acts of arbitrary displacement that amount to genocide, war crimes or crimes against humanity.”^[20] Concomitant obligations in other provisions demand that states parties “ensure individual responsibility for acts of arbitrary displacement, in accordance with applicable domestic and international criminal law.”^[21]

Increasing Accountability for Internal Displacement

Beyond demanding increased responsibility for acts of arbitrary displacement, the Kampala Convention strengthens accountability for internal displacement in several important ways. The Convention stresses that primary responsibility for protecting and assisting IDPs rests with the state parties.^[22] However, in countries such as the Democratic Republic of Congo, Sudan, Nigeria, and Mali, non-state actors are directly involved in causing internal displacement. At the same time, a wide range of actors may join national authorities in responding to internal displacement, including host communities, non-governmental organizations, and United Nations agencies. The Convention therefore also addresses not only the obligations and accountability of states parties, but also of a range of other actors including the African Union, humanitarian agencies, and non-state armed groups.

For example, in the case of armed groups, the Kampala Convention applies international humanitarian norms relating to the protection of civilians and humanitarian personnel to the IDP context: armed groups are to be prohibited from hampering, attacking, or impeding humanitarian personnel involved in assisting IDPs.^[23] The Convention also addresses the accountability of multinational corporations and private military or security companies. Article 3(1)(h) demands that states ensure the accountability of these groups “for acts of arbitrary displacement or complicity in such acts,” while Article 3(1)(i) requires that non-state actors be held accountable when “the exploration or exploitation of economic natural resources” leads to displacement. These provisions clearly go beyond traditional, state-focused international human rights law, yet given the central role of such actors in many contemporary internal displacement crises, this bold approach increases the Convention’s relevance.

The Kampala Convention’s expansive approach to remedies for displacement may also strengthen efforts to ensure accountability for internal displacement. Discussions of remedies for IDPs have typically focused on the loss of housing, land, and property (“HLP”) as the central harm associated with displacement, and have promoted property restitution as the preferred form of redress for refugees and IDPs.^[24] In contrast, the Kampala Convention takes a much broader approach. Article 12 requires that states “provide persons affected by displacement with effective remedies,”^[25] including “just and fair compensation and other forms of reparations, where appropriate . . . in accordance with international standards.”^[26] The damages for which IDPs may seek redress may therefore include not only HLP losses, but also physical, mental, and other types of harms. In addition, the Convention deepens the pool of potential claimants; as they are affected by displacement, members of host and return communities could also seek remedies under Article 12(1). The Convention also indicates in Article 12(3) that a “State Party shall be liable to make reparation to internally displaced persons for damage when such a State

Party refrains from protecting and assisting internally displaced persons in the event of natural disasters.” However, whether and to what extent these remedies are accessible in practice remains to be seen.

Looking Forward

Despite the important achievement that the Kampala Convention represents, a number of challenges remain. The effective implementation of the Kampala Convention is undoubtedly the greatest challenge faced by the states parties and their international backers. The increased protection provided to IDPs under the Kampala Convention hinges on national enforcement, which requires well-tailored implementing legislation and strong support for the institutions charged with enacting these commitments. Continued efforts are also required to encourage more African governments, particularly those grappling with internal displacement situations, to sign and ratify the Convention, ensuring that this landmark legal achievement is translated into landmark gains for IDPs in practice.

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Endnotes:

[1] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa [Kampala Convention], Oct. 22, 2009 (entered into force Dec. 6, 2012), *available at* <http://au.int/en/content/african-union-convention-protection-and-assistance-internally-displaced-persons-africa> [hereinafter Kampala Convention]. The Convention has been ratified by Benin, Burkina Faso, Central African Republic, Chad, Gabon, Gambia, Guinea-Bissau, Lesotho, Nigeria, Niger, Sierra Leone, Swaziland, Togo, Uganda, and Zambia.

[2] Convention Governing the Specific Aspects of Refugee Problems in Africa, Sept. 10, 1969, 1001 U.N.T.S. 45.

[3] Internal Displacement Monitoring Centre, Internal Displacement Global Overview 2011 (Apr. 2012), *available at* www.internal-displacement.org/publications/global-overview-2011. These figures pertain only to those displaced by conflict, generalized violence, and human rights violations. In addition, hundreds of thousands of Africans are internally displaced due to natural disasters and development and infrastructure projects.

[4] See E.S.C. Res. 1998/53, U.N. Doc. E/CN.4/1998/53/Add.2, Annex, *available at* <http://www.unhcr.ch/Huridocda/Huridoca.nsf/0/d2e008c61b70263ec125661e0036f36e> [hereinafter Guiding Principles]; see also International Conference on the Great Lakes Region, Protocol to the Pact on Security, Stability and Development in the Great Lakes Region the on the Protection and Assistance to Internally Displaced Persons (Nov. 30, 2006).

[5] For example, at the 2005 World Summit, 192 Heads of State and Government unanimously recognized the Guiding Principles as an “important international framework for the protection of internally displaced persons” (G.A. Res. 60/L.1, ¶ 132, U.N. Doc. A/RES/60/L.1 (Sept. 16, 2005)), and the General Assembly has not only welcomed “the fact that an increasing number of States, United Nations agencies and regional and non-governmental organizations are applying them as a standard” but also encouraged “all relevant actors to make use of the Guiding Principles when dealing with situations of internal displacement” (see G. A. Res. 62/153, ¶ 10, U.N. Doc. A/RES/62/153 (Mar. 6, 2008)).

[6] See S.C. Res. 1286, U.N. Doc. S/RES/1286 (Jan. 19, 2000).

[7] See H.R.C. Res. 6/32, U.N. Doc. A/HRC/RES/6/32 (Dec. 14, 2007); H.R.C. Res. 14/6, U.N. Doc. A/HRC/RES/14/6 (June 23, 2010).

[8] World Summit Outcome, G.A. Res. 60/1, ¶ 132, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[9] See Report of the Special Rapporteur on the Human Rights of Internally Displaced Persons, ¶ 42, U.N. Doc. A/67/289 (Aug. 10, 2012); see also, Brookings-LSE Project on Internal Displacement,

IDP Laws and Policies Index, *available at* www.brookings.edu/about/projects/idp/laws-and-policies/idp-policies-index.

[10] Guiding Principles, *supra* note 4, Principle 3(1).

[11] *Id.* ¶ 2 (“Introduction: Scope and Purpose”); Kampala Convention, *supra* note 1, art. 1(k).

[12] The Guiding Principles “restate in more detail those legal provisions that respond to the specific needs of internally displaced persons and spell them out in order to facilitate their application in situations of internal displacement.” See Walter Kalin, *Annotations to the Guiding Principles*, 38 *Stud. in Transnat’l Legal Pol’y* 6 (2008) [hereinafter *Annotations*]; see also *Compilation and Analysis of Legal Norms, Report of the Representative of the Secretary-General Submitted Pursuant to United Nations Commission on Human Rights Resolution 1995/57*, U.N. Doc. No. E/CN.4/1996/52/Add.2 (Dec. 5, 1995).

[13] Allehone Abebe, *The African Union Convention on Internally Displaced Persons: Its Codification Background, Scope and Enforcement Challenges*, 29 *Refugee Surv. Q.* 28, 42-45 (2010).

[14] Kampala Convention, *supra* note 1, art. 4(4)(e). “Harmful practices” are defined as “all behavior, attitudes and/or practices which negatively affect the fundamental rights of persons, such as but not limited to their right to life, health, dignity, education, mental and physical integrity and education.” See *id.* art. 1(i).

[15] Geneva Convention (IV) Relative to the Protection of Civilians in Time of War art. 49, Aug. 12, 1949, 973 U.N.T.S. 75. This also extends to non-international armed conflicts. *Id.* art. 85(4); see also Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 17, June 8, 1977, 1125 U.N.T.S. 609.

[16] Statute of the International Criminal Tribunal for the Former Yugoslavia art. 2(g), *available at* http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf.

[17] Rome Statute of the International Criminal Court art. 7(1)(d), July 17, 1998, 2187 U.N.T.S. 90, *available at* <http://untreaty.un.org/cod/icc/statute/romefra.htm>.

[18] Guiding Principles, *supra* note 4, Principle 6.

[19] “Harmful practices,” in particular, is an important concept in African human rights law. See, e.g., Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, July 11, 2003, *available at* <http://www.africa-union.org/root/au/Documents/Treaties/Text/Protocol%20on%20the%20Rights%20of%20Women.pdf>.

[20] Kampala Convention, *supra* note 1, art. 4(6).

[21] *Id.* art. 3(1)(g).

[22] *Id.* art. 5(1).

[23] States are likewise prohibited from impeding humanitarian access, but the obligations provided are couched in rather different terms. States must not “attack or otherwise harm” humanitarian personnel, and they must “allow rapid and unimpeded passage” for all relief consignments. See Kampala Convention, *supra* note 1, art. 5(7), (10).

[24] See Guiding Principles, *supra* note 4, Principle 29; and generally United Nations, Principles on Housing and Property Restitution for Refugees and Displaced Persons (2005) (known widely as the “Pinheiro Principles”), *available at* <http://2001-2009.state.gov/documents/organization/99774.pdf>.

[25] Kampala Convention, *supra* note 1, art. 12(1).

[26] *Id.* art. 12(2).