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**The African Internal Displacement Problem and the
Responses of African Union: - An Examination of the
Essential Features of the AU IDPs Convention**

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Essential Features of the AU IDPs Convention**

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Approval Sheet by the Board of Examiners

The African Internal Displacement Problem and the Responses of African Union: - An Examination of the Essential Features of the AU IDPs Convention

I hereby declare that this thesis is my original work and all source materials used in this work have been duly acknowledged.

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Abstract

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Acronyms

- ACHPR: African Commission on Human and Peoples’ Rights (also stands for African Charter on Human and Peoples’ Rights based on the context of its use)
- ACRWC: African Charter on the Rights and Welfare of Children

AU:	African Union
AUC:	African Union Commission
AWP:	African Women's Protocol
CCAR:	Coordinating Committee on Assistance and Protection to Refugees, Returnees and IDPs
CHR:	Commission on Human Rights
CSOs:	Civil Society Organizations
DID:	Development-Induced Displacement
DRC:	Democratic Republic of Congo
ECOSOCC:	Economic, Social and Cultural Council
ERC:	Emergency Relief Coordinator
GA:	General Assembly
GLR:	Great Lakes Region
HARDP:	Humanitarian Affairs, Refugees and Displaced Persons
HC:	Humanitarian Coordinator
IASC:	Inter-Agency Standing Committee
ICC:	International Criminal Court
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ICGLR:	International Conference on Great Lakes Region
ICRC:	International Committee of Red Cross
IDMC:	Internal Displacement Monitoring Centre
IDPs:	Internally Displaced Persons

IFRC:	International Federation of Red Cross and Red Crescent Societies
IHL:	International Humanitarian Law
ILO:	International Labour Organization
IOM:	International Organization for Migration
MNC:	Multinational Corporation
NGOs:	Non-Governmental Organizations
NSA:	Non-State Actor
OAU:	Organization of African Unity
OCHA:	Office for the Coordination of Humanitarian Affairs
OHCHR:	Office of High Commissioner for Human Rights
PAP:	Pan-African Parliament
PCRD:	Policy Framework on Post-Conflict Reconstruction and Development
PRC:	Permanent Representatives' Committee
PSC:	Peace and Security Council
RC:	Resident Coordinator
RSG:	Representative of the Secretary-General
SARRED:	International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa
UDHR:	Universal Declaration of Human Rights
UN:	United Nations
UNCRC:	United Nations Convention on the Rights of the Child
UNDP:	United Nations Development Program

UNHCR: United Nations High Commissioner for Refugees

UNICEF: United Nations Children Fund

VCLT: Vienna Convention on the Law of Treaties

WFP: World Food Program

WHO: World Health Organization

Chapter One: Introduction

1.1 Background and Literature Review of the Study

The term Internally Displaced Persons (IDPs) has been a recent development despite the fact of long existence of the situations giving rise to internal displacement. Some attribute the use of such term during the Cold War when receiving the nationals from opposition blocs fleeing for political or other reasons.¹ It was only in the 1980s especially with the mass movement of Iraqi Kurds and similar events in Africa and Latin America that the formal mention to the term began.²

The first official reference to the word internally displaced persons was made in the UN General Assembly resolution concerning refugees and displaced persons in Sudan in 1972.³ However, no efforts were made to clarify what this concept meant and when it happened. Other major efforts of the time focusing on matters of IDPs and further raised awareness of the problem of internal displacement related to the organizing of the two international conferences on the matters of refugees and displaced persons. The first of these was the International Conference on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED) which took place in Oslo in December 1988. The other was the International Conference on Central American Refugees in May 1989.⁴

The global attention to the concerns of these groups of people within their territorial borders gathered momentum at the end of 1980s and the beginning of 1990s. Thus, formal discussions on the protective imperatives and the other needs of IDPs were carried out mainly under the auspices of the UN mainly starting from the beginning of 1990s.⁵

In March 1991, the UN Commission on Human Rights requested that the Secretary-General prepare a report on IDPs.⁶ This important report prompted a much more active involvement of

¹ Catherine Phuong, The International Protection of Internally Displaced Persons (2004), P.3.

² Id, P.7

³ Ibid This was mentioned in the paragraphs 2&3 of the UN General Assembly resolution 2958 (XXVII), 12 December 1972.

⁴ Id, P.8

⁵ Roberta Cohen and Francis M. Deng, Masses in Plight, The Global Crisis of Internal Displacement (1998), P.3.

⁶ UN Commission on Human Rights Res. 1991/25, 5 March 1991.

the UN in the issue. It also resulted in the appointment of a Special Representative on IDPs, Mr. Francis M. Deng. The first aspect of his mandate was to analyze the normative framework of protection for IDPs. This ultimately led to the formulation and adoption of the 'Guiding Principles on Internal Displacement' which is one of the important documents on matters of IDPS at UN level. The second aspect of the mandate was to review the existing institutional framework and seek means of improving coordination between various UN agencies. The third and the final aspect of his mandate consisted of on-site visits.⁷

Therefore, it was on the basis of the efforts and recommendations of the Special Representative that the UN adopted an important instrument in 1998 known as the 'Guiding Principles on Internal Displacement'⁸. It is the only document at the UN level directly and specifically addressing the issues of IDPs. The Guiding Principles bring together in one concise document the many norms of special importance to the internally displaced that previously were diffused in an array of different instruments and thereby not easily accessible or sufficiently understood.⁹ The 30 Principles set forth the rights and guarantees relevant to the protection of IDPs in all phases of displacement: providing protection against arbitrary displacement; protection and assistance during displacement; and during return or internal resettlement and reintegration. The Principles address a wide range of civil, political, economic, social, cultural and other rights of particular concern to the needs of IDPs. The Guiding Principles have got continued acceptance and application among the intergovernmental and non-government organizations and other non-state entities such as rebel groups.¹⁰

However, one important point to be emphasized is that despite its codification of preexisting norms of human rights and humanitarian law nature, the Principles remain to be non-binding as no formal treaty-making procedures has been applied at the relevant intergovernmental level. Therefore, because of this fact the protection and assistance needs of IDPs have for long remained under serious legal and institutional gaps.

⁷ Phuong, *Supra* Note 1, p.8.

⁸ The Guiding Principles on Internal displacement, UN Doc. E/CN.4/1998/53/Add.2 (herein after Guiding Principles).

⁹ Erin D. Mooney, "Towards a Protection Regime for IDPs," in Edward Newman and Joanne Van-Selm (eds.), Refugees and Forced Displacement: International Security, Human Vulnerability, and the State (2003), P.163

¹⁰ Roberta Cohen, 'The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting' Global Governance 10 (2004), P.469

An option for making of a binding treaty at the UN level was said to be avoided due to the sensitivity of the matter to most member states and the accompanying slow process in traditional treaty-making and ratification which may take decades to come into force.¹¹

Although there are arguments that IDPs can be protected from pre-existing norms as human rights and humanitarian laws, all the issues and their special needs cannot be adequately covered by such instruments. The first category concerns gaps that arise out of lack of explicit norms addressing identifiable needs of IDPs. The second category of insufficient coverage concerns those cases where a general norm exists but a corollary provision specifically addressing concerns of particular importance to IDPs has not been articulated. In addition, applicability gaps exist where a legal norm does not apply in its entirety in all circumstances. Finally, what were termed “ratification gaps” in the legal protection of the internally displaced arise where states have not ratified key human rights treaties and/or humanitarian law instruments.¹²

The other area of challenge in the protection and assistance debates of IDPs is the absence of institutional set up responsible to manage and follow up the affairs of IDPs. That is, unlike the Refugee Agency, no single organ exists which is centrally and primarily responsible for matters of IDPs worldwide. Responsibilities of giving assistance and protection to IDPs have been divided among the various UN agencies previously under the ‘collaborative approach’ and recently under what is known as the ‘cluster approach.’

Once again such absence of responsible and clear institutional mandate could be attributable either to the magnitude and complexity of the problem itself which goes beyond the capacity and expertise of a single agency or lack of political will or even open opposition to the creation of such mechanism seeing it as a first step towards encroachment of state sovereignty.¹³ Consequently, this has resulted in the lack of responsibility, essential leadership, and predictability in the protection and assistance of IDPs.

At the regional especially African level, the protection and assistance concerns of IDPs have not attracted closer attention for long time. This has been highly paradoxical given the continent’s

¹¹ Simon Begashaw, Developing a Normative Framework for the Protection of IDPs (2004), PP.14-15.

¹² Mooney, *Supra* Note 9, PP.161-62. These gaps and insufficiencies were originally identified in the Compilation and Analysis of Legal Norms. Report of the Representative of the Secretary-General on Internally Displaced Persons, UN Doc. E/CN.4/1996/52/Add.2, 5 December 1995.

¹³ Roberta Cohen, “Developing an International System for IDPs,” International Studies Perspective (2006) 7, PP.95-96.

increased exposure to the crisis of internal displacement and grave situation of the victims of such displacement. While an organized response to the continent's political, economic and social affairs was begun as of the formation of OAU in 1963, its human rights perspective was said to be unsatisfactory. It was only the latter instruments which remedied the insufficiencies of the OAU Charter. Among these are the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the 1981 African Charter on Human and Peoples' Rights. The Refugee Convention is known for its expansion of the refugee grounds under the 1951 UN Convention and its 1967 Protocol with a view to address the then existing African realities. Thus, the OAU Refugee Convention considers as refugees, in addition to those persons fleeing persecution or human rights violation, those uprooted from their homes or habitual residences, among others, by events seriously affecting public order who managed to cross an internationally recognized border.¹⁴ Though this Convention does not basically apply to IDPs, its expanded definition of refugees as including those persons affected by events seriously disturbing public order may benefit those IDPs affected by such events and who successfully found themselves in the other side of an international border. This is an important addition recognizing the African specific problem as in most cases both refugees and IDPs might be fleeing for similar causes.

The African Charter, the main human rights instrument of the continent, addresses a lot of rights and guarantees of general application. These rights and guarantees can, of course, be invoked by IDPs as one category of nationals of the state party to the Charter. It also contains such provisions of paramount importance to IDPs as the right to freedom of movement and choice of residence, prohibition of mass expulsion, right to seek and obtain asylum.¹⁵

The special subject matter treaties such as the African Women's Protocol and African Children's Charter have uniquely recognized the impact of internal displacement on such vulnerable groups and, therefore, provide for express protective regimes.¹⁶ Both instruments constitute the first regional recognition and guarantees of the rights of internally displaced children and women in Africa. The role of such policy instruments as declarations and resolutions of the OAU/AU organs

¹⁴ The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa, AHS/G, CAB/LEG/24.3, 10 Sept, 1969 (herein after OAU Refugee Convention), Art.I (II).

¹⁵ African [Banjul] Charter on Human and Peoples' Rights adopted on June 27, 1981 and entered into force in 1986, OAU Doc. CAB/LEG/67/3 (herein after the African Charter), Art.12.

¹⁶ African Charter on the Rights and Welfare of the Child (ACRWC), adopted in July 1990 and entered into force in November 1999, OAU Doc.CAB/LEG/24.9/49 (herein after the African Children's Charter), Arts.22 & 23 and Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (AWP), adopted in July 2003 and came into force in November 2005, Assembly/AU/Dec.14 (II) (herein after the African Women's Protocol), Arts.10 & 11.

on human rights in general and gender equality, refugees, returnees and IDPs in particular are also important in laying down the ground for subsequent efforts¹⁷.

Institutionally, the initial OAU's understanding was in response to the threats posed to African peoples by colonial powers and racist regimes in southern part of the continent. This approach was obviously reflected in the motives and mandates of the OAU Commission of 1964 and the Bureau for Placement and Education of African Refugees of 1968.¹⁸ The Coordinating Committee on Assistance and Protection to Refugees, Returnees and IDPs (CCAR) was also set up in 1968 with a view to coordinating and harmonizing the works of those various entities involved in the matters of IDPs. However, despite its concrete tasks in the area of refugees especially by bringing together those diverse actors on the ground, the CCAR failed to adopt clear strategies to deal with matters of internal displacement. Its working procedures and improved membership have been under review now and it remains to be seen whether this will overcome its inbuilt weaknesses in the area of IDPs protection and assistance.

Apart from the above, certain mechanisms have been introduced with the transition of OAU to AU which brought into operation some organs with significant effect on the matters of IDPs. The AU Constitutive Act established, in addition to the Assembly and the Executive Council which constitute its primary decision-making organs, such entities as the Pan-African Parliament, the AU Commission, the Permanent Representatives' Committee and the Economic and Social Council.¹⁹ Moreover, the subsequent amendment to its Constitutive Act and a separate Protocol have also added to the above list an essential institutional mechanism of contemporary importance known as the Peace and Security Council.²⁰ All of the above entities are entrusted with broader dimension of human rights as part of their objectives, operating principles or specific functions to be carried out. Therefore, matters of IDPs will be addressed by such entities in the process of discharging their mandates and realizing the overall objectives of the Union. The roles of such organs as PSC will be unquestionable given its mandates in the area of peace and security and the recently recognized intervention power of the Union in member states so as to prevent or stop grave circumstances leading to the commission of serious crimes, namely

¹⁷ Among such policy instruments are the 1994 Addis Ababa Document, the Grand Bay Declaration and Plan of Action on Human Rights in Africa (April 1999), Kigali Declaration on Human Rights in Africa (May 2003), Solemn Declaration on Gender Equality in Africa (July 2004) and many others.

¹⁸ Rachel Murray, Human Rights in Africa: From the OAU to the AU (2004), PP.195-200.

¹⁹ Constitutive Act of the African Union, adopted on July 11, 2000 in Lome, Togo and came into force on May 26, 2001, OAU Doc.CAB/LEG/23.15(July 11, 2000) (hereinafter the Constitutive Act), Art.5.

²⁰ Protocol on Amendments to the Constitutive Act of the AU adopted on 11 July 2003, Arts. 5(f) & 9 and Protocol Relating to the Establishment of the AU Peace and Security Council (PSC) of the AU adopted on 9 July 2002 and entered into force on 26 December 2003, AU Doc Ass/AU/Dec.3(I) (hereinafter PSC Protocol, Art. 2.

war crimes, genocide, and crimes against humanity. However, the OAU/AU mechanism lacks a coordinated and centrally accountable institutional mechanism for the protection and assistance needs of IDPs.

Therefore, it was due to such fragmented and ad hoc arrangements on matters of IDPs both at the global and regional level that African Union, one of the world's leading continent both in the causes of internal displacement and number of IDPs, took an initiative in 2004 to draft a regional Convention for the Protection and Assistance of IDPs in Africa. After a series of deliberation processes both at technical and diplomatic levels, a land mark decision has been recently taken by the Special Summit on Refugees, Returnees and IDPs in Africa which adopted the African Union Convention for the Protection and Assistance of Internally Displaced Persons or known as the Kampala Convention on October 23 2009 at Kampala, Uganda.²¹ The AU IDPs Convention becomes the first of its nature in the world which is particularly devoted to the protection and assistance matters of IDPs. However, it is also credible to give some attention to the initiatives in the Great Lakes Region which have made the issues of IDPs as part of the broader dimensions of the sub-region's security, stability and development agendas. Among the outcome of these initiatives was the adoption of the two Protocols specifically governing the protection, assistance and property interests of IDPs in that sub-region.²²

The AU IDPs Convention includes a broader category of rights and safeguards of human rights and humanitarian laws origin. It incorporates diverse guarantees covering protections from being arbitrarily displaced, to measures and cautions to be taken during necessary or unavoidable displacement and the protection and assistance to be given during and after displacement. Furthermore, the Convention has also included provisions on the obligations of certain non-state actors as multinational companies, private military or security companies and members of armed groups as well as on state sovereignty and territorial integrity, development-induced displacement, the right of intervention by the AU in the member states, and the duty to receive and allow or facilitate the passage of humanitarian aids and personnel to IDPs.

Institutionally, the Convention has made an attempt to establish a Conference of States Parties to monitor and review the implementation of the objectives set in the convention. Moreover, the AU is mentioned as an umbrella institution for the protection and assistance issues of IDPs.

²¹ African Union Convention for the Protection and Assistance of IDPs in Africa (Kampala Convention), adopted on October 23, 2009 and not yet entered into force (hereinafter AU IDPs Convention).

²² Great Lakes Region Protocol on the Protection and Assistance to IDPs (hereinafter GLR IDPs Protocol) and the Protocol on the Property Rights of Returning Persons (herein after the GLR Property Protocol), both of which are adopted on November 30, 2006 and entered into force in 2008.

The previously operating African Commission on Human and Peoples' Rights and its special mechanisms are also given recognition in the Convention. Whether such approach is sufficient to remedy the existing institutional uncertainty in the area will be evaluated in due course.

1.2 Statement of the Problem and Research Questions

As mentioned in the background statement, the protection and assistance issues of IDPs have been suffering from lack of legal and institutional frameworks for long time. IDPs, sometimes known as 'internal refugees' have been neglected and excluded from the benefits of international protection, unlike refugees proper, mainly for the mere fact that the former have not crossed international border(s). However, the situation and difficulties facing IDPs are by no means lesser, even in most cases graver, than those facing refugees. But the fact of crossing the border has been principally employed for long to deny international assistance and protection to the people similarly exposed to hardship. Of course, many states have been either unwilling or hesitant to accept the broader regime of international protection to such persons within their national territory for various considerations. This could be on political or other grounds as sovereignty issues. Even some of them mostly fail or refuse to recognize the existence of such status contrary to the factual reality, let alone permit their protection by outside mechanisms.

Legal protection and assistance of IDPs has been inferred from the preexisting human rights and humanitarian laws. However, these too have not been satisfactory in certain instances given the special situation, needs and vulnerabilities of IDPs. The 'Guiding Principles' is put in place to address the special situations of IDPs. However, it does not carry a binding effect and lacks an obligatory force to hold states accountable for violating the rights of IDPs.

The institutions or agencies dealing with matters of IDPs encompass diverse human rights, humanitarian and development entities. These are so fragmented that it is impossible to certainly locate responsibility and predictability in the future course of action of such actors. This dilemma exists both at regional and global levels.

On the other hand, there have been some recent arguments from different angles which advocates, in certain grave cases of violations of the rights of IDPs, for external intervention in

order to prevent or stop the commission of serious crimes against such groups of peoples. This in turn needs the redefinition of existing state-centered international law norms which manifestly stands in the way of carrying out such measures except under the collective security scheme in the interest of maintaining international peace and security and the imperatives of self-defense. But the Constitutive Act of the African Union and its recently adopted IDPs Convention have laid down a legal basis for intervention out of the long-resisted doctrine of state sovereignty and territorial integrity. What remains are the challenges of political will of its members and the provision for clear thresholds which will justify external intervention. These do not seem an easy task given the continent's recent history and other resource constraints.

Therefore, it is with the above problems and gaps in mind that the researcher has developed an interest on the topic. Thus, the research questions to be addressed in the substance of this work will be principally:

- What are the major protection and assistance gaps in the existing international regimes concerning IDPs?
- What alternatives do exist to address such legal and institutional lacunas, if any?
- Is the AU's initiative to provide a separate regime of protection and assistance to IDPs in an international treaty go consistent with the prevailing international and regional political and practical reality?
- Is there any significant added value both in the normative and institutional aspect by adopting such separate instrument specifically dealing with IDPs at the regional level?
- Will the proposed African system be capable of realizing its conventional promises and tackling effectively with the most or some of the above major challenges facing IDPs in the continent?
- Are the mechanisms set up under the AU IDPs Convention adequate enough to respond and address effectively the existing problems of IDPs in Africa? If not, what is the essence of having such additional system instead of pursuing and strengthening the available mechanisms?
-

1.2.1 Objective of the Study

With the understanding of the above mentioned background, the main objective of this thesis is to identify the basis of protection and assistance of IDPs and its major weaknesses at the global and particularly at the African level. This will mainly lead the writer to critically examine the propriety of having a separate regional instrument for the protection and assistance needs of IDPs and, consequently, identify its major added values and innovations brought about to the existing instruments in filling the legal and institutional gaps.

Thus, the following are some of the specific objectives of this research work:-

- To examine and analyze the adequacy or otherwise of existing regimes of protection and assistance of IDPs at global and regional, particularly African level.
- To evaluate the approach taken by the African Union in dealing with the arguments on appropriateness of setting up a separate normative framework in favour of IDPs.
- To assess and examine thoroughly the level and scope of normative guarantees incorporated in the AU IDPs Convention in light of the existing regimes of protection under human rights and humanitarian laws and the major departures there from, if any.
- To critically assess the role, nature and effectiveness of the institutional mechanisms both for the protection and assistance of victims of internal displacement as well as to ensure compliance to the obligations under the AU IDPs Convention in light of its treaty mandates and functions.

1.3 Significance of the Study

Basically the protection and assistance aspects of IDPs have for long been under uncertainty both at the global and regional levels. Such realities at the global level have been the subject of some scholarly works such as by Francis M. Deng, Roberta Cohen, Walter Kalin and so on. However, the focus on and contributions of regional mechanisms have so far attracted lesser attention. That is, no significant efforts have been made as to what normative and institutional bases exist so as to invoke for the protection and assistance of IDPs. Moreover, the continent of Africa has recently introduced a binding legal instrument in the area of protecting and assisting IDPs. This was opted while the international community has declined to follow conventional way of dealing with the problem. This has created an opportunity to inquire into the motivations

behind such regional efforts and the normative contents of certain innovative provisions incorporated in the Convention.

Hence, this piece of research will serve as an inspiration and beginning point for future and more detailed analysis of the regional initiative taken at the AU level. Accordingly, it will bring into light the survey of existing normative and institutional arrangements in favour of IDPs and thereby test the need to have a separate regional scheme of arrangement. It will, therefore, give further guidelines and insight for those important actors in the matters of IDPs as to the existing options and the recently adopted African system of protection and assistance. In addition to the elaboration of certain innovative provisions of the Convention, the research will also address areas still not well articulated in the Convention and identify the ongoing institutional challenges in the protection and assistance of IDPs in Africa and suggest for possible solutions.

1.4 Research Methodology

This research is principally based on assessment of existing literatures, legal and non-legal instruments pertaining to the problem of internal displacement and IDPs. Thus, various sources materials such as books, journals, reports, legal instruments and other non-legal documents as resolutions, declarations, reports, etc both at regional and global levels are utilized. Internet sources are also consulted in order to supply up to date information. Significant attention is given to the evaluation of the major innovations brought about by the AU IDPs Convention. Owing to its recent adoption, this research has not adequately made a case-oriented analysis except for few decisions of the African Commission and other relevant bodies in some limited areas. However, efforts have been made to contact and incorporate the opinions and observations of those persons involved in the drafting and adoption of the Convention. Recent statistical data compiled by recognized international organizations such as Internal Displacement Monitoring Center (IDMC) is also used.

Generally, the methodologies employed in this work are review and assessment of the existing literatures, legal and non-legal documents from historical, descriptive, comparative and evaluative point of view. The comparative aspect is used to make a brief comparison between the AU IDPs Convention and the UN, OAU/AU and other sub regional instruments in the areas. The evaluative aspect mainly focuses on the critical examination of the essential features of the

AU IDPs Convention by resorting to its various provisions and incorporating the works and opinions of important personalities involved in the making process of the instruments.

1.5 Limitations of the Study

Like any other humanly works, this research suffers from certain shortcomings either in its scope, content, source of information, and personal analysis. The first relates to the lack of similar binding instruments in the area both at international and other regions which inhibited proper comparative discussion and drawing adequate lessons from existing regimes. The second limitation goes to the absence of sufficient practice-oriented analysis of the normative rules concerning IDPs. This is mainly because of lack of sufficient and relevant prior cases specifically addressing issues of IDPs and the recent and non-effective nature of the AU IDPs Convention. Owing to such reasons, discussions exclusively based on mere legal provisions may not fully enable the readers to understand the existing mechanisms of protection and assistance. Third, the writer is also unable to reflect sufficiently the drafting intention of the provisions of the Convention. This is because of institutional and personal reasons. Institutionally, it was really very difficult to get access to such documents from the AU concerned organs because of limited rules of access to official documents to external users and difficulty to locate the exact organ or section responsible to provide such documents. In some cases, properly documented reports are not available. While some are available, there is still a serious lack of personal cooperation which goes out of institutional constraints. Thus, the writer has accessed certain crucial documents from some generous external consultants such as Mr. Renny M. Wafula, Consultant to the AU Special Summit on Refugees, Returnees and IDPs in Africa. Finally, in the interest of brevity, precision, less volume and the usual time and resource constraints, the writer has cut down certain sections and avoided in depth analysis in certain aspects of the content which reduced the comprehensive and detail nature of the research.

1.6 Organization of the Study

This work consists of six chapters each of which is further divided into sections and subsections. Chapter one is about the introductory part of the thesis. It includes background to the problem, statement of the problem, research questions, objective of the study, research methodologies, significance of the study and limitations of the study.

Chapter two addresses the general and conceptual overview of IDPs: definition of IDPs, IDPs vis-à-vis refugees, impact of internal displacement, the end of internal displacement and global statistics of IDPs. Chapter three mainly elaborates the legal and institutional framework for the protection and assistance of IDPs at the international level. The discussion includes identification of the applicable law in situations of internal displacement, the essence of the Guiding Principles on Internal Displacement, the institutional arrangements and approaches in the protection and assistance of IDPs at the UN level.

Chapter four is principally devoted to the analysis of regional responses, particularly the OAU/AU, towards the protection and assistance of IDPs. It is under this chapter that the AU IDPs Convention and its normative contents are elaborated in a detail manner. Topics included under this chapter essentially include the preexisting normative bases of protecting and assisting IDPs, the scope of rights guaranteed under the AU IDPs Convention, state obligations, obligations of other non-state actors and the members of armed groups, the concept of development-induced displacement and the right of the African Union to intervene in the member states for reasons specified under the Constitutive Act and the IDPs Convention. Chapter five is devoted to the assessment of the institutional means of protection and assistance of IDPs in Africa. To this end, both previous and currently adopted mechanisms under the AU IDPs Convention are dealt with. Arrangements under the AU institutional structures such as the PRC Subcommittee on Refugees, Returnees and IDPs, Pan-African Parliament, the Economic, Social and Cultural Council, Peace and Security Council, AU Commission and other relevant institutions are highlighted. The role of preexisting African Commission on Human and Peoples' Rights and its special mechanisms to the matters of IDPs have also been assessed. Mechanisms of protection, assistance and monitoring the implementation under the AU IDPs Convention have also been analyzed in more detail and critical manner.

Chapter six forwards the conclusion and recommendations arising from the findings of the research. Here major observations and outcomes of the thesis are summarized. The recommendations are directed to address the gaps and challenges identified in the protection and assistance efforts of IDPs in Africa and under the AU IDPs Convention.

Chapter Two: General Overview of the Concept of Internally Displaced Persons

Introduction

The notion of internal displacement and internally displaced persons were not explicitly articulated in the broad standard setting campaign which set in motion following the atrocities of World War II. The first official use of the word internally displaced persons was made in the UN General Assembly resolution concerning refugees and displaced persons in Sudan in 1972.²³ However, no efforts were made to clarify what these concepts meant and when they happened. The global attention to the concerns of these groups of people within their territorial borders gathered momentum at the end of 1980s and the beginning of 1990s. Various factors can be attributed to these renewed interests. One could be the plight of ever increasing number of peoples fleeing their homes and the associated sufferings. The other was usually linked with the end of the Cold War which brought a reduced interest in accepting the nationals fleeing from countries in the opposite ideological bloc. Finally, international preoccupation with preventing refugee flow has also brought attention to the internally displaced.²⁴

While all these intricacies affect nearly every continent, the major task of reformation was carried out at the UN level. The role of the UN Commission on Human Rights and the Secretary-General in the 1990s were tremendous. Among the achievements of these joint efforts are the Analytical Report of the Secretary-General on the adequacy of existing protection of IDPs, the appointment of the Representative of the Secretary-General on IDPs and the making of the Guiding Principles on Internal Displacement. And it is this latter document which provided a working definition, more pertinently characterized as description, of IDPs in a standard UN document. The appropriate normative and institutional mechanisms of protecting IDPs and inherent gaps and insufficiencies were also identified in the compilation and analysis of the legal norms by the then Representative of the Secretary-General on IDPs, Mr. Francis M. Deng, a distinguished Sudanese scholar and diplomat. Thus, the later normative and institutional

²³ Catherine Phuong, *The International Protection of Internally Displaced Persons*, Cambridge University Press (2004), P.7.

²⁴ Roberta Cohen and Francis M. Deng, *Masses in Plight, The Global Crisis of Internal Displacement* (1998), PP.3-4.

improvements, both at global and regional levels, are based on such in depth studies and recommendations of the Representative made in the mid of 1990s. With this general background in mind and before proceeding to the detail analysis of the main topic, this part of the research will highlight the efforts made so far in elucidating the meaning of IDPs, differences between IDPs and refugees, the impact of internal displacement and the current global trends of IDPs population.

2.1. Definition of Internally Displaced Persons (IDPs)

The phenomenon of internal displacement and the victim(s) there from, that is, internally displaced person(s) has formed part of international discourse before a couple of decades. This was especially happened when the UN officially used the term in 1972 in its resolution addressing refugees and other displaced persons in Sudan.²⁵ However, different ideas exist as to what meant by “internal displacement” and “internally displaced persons”. For some, the term “internally displaced persons” refers only to people uprooted by conflict, violence and persecution, that is, people who would be considered refugees if they crossed a border. Others, however, consider internal displacement to be a much broader concept and to encompass the millions more persons uprooted by natural disaster and development projects.²⁶

Hence, there was such ambivalence among the international efforts in identifying the meaning and clear category of people falling under such category despite the continuity of the events leading to internal displacement. However, definitional issue was said to be important as it would facilitate the gathering of statistical data and the evaluation of the specific needs of IDPs and, thus, serve operational purposes in the field.²⁷

The first official attempt of defining IDPs was made by then UN Secretary-General Boutros B. Ghali in his Analytical Report in 1992, which defined IDPs as:

²⁵ Phuong, *Supra* Note 1, P.7. This was mentioned in the paras.2&3 of the UN General Assembly resolution 2958 (XXVII), 12 December 1972.

²⁶ Erin D. Mooney, “The Concept of Internal Displacement and the Case for IDPs as a Category of Concern,” *Refugee Survey Quarterly* Vol. 24, Issue 3 (2005), P. 9.

²⁷ ‘Internally Displaced Persons’, Report of the Representative of the Secretary-General, F. Deng, UN Doc. E/CN.4(1995), para.126, in Nils Geissler, The International Protection of IDPs, *International Journal of Refugee Law*, Vol. 11, No. 3 (1999, PP), 452-53.

“Persons or groups who have been forced to flee their homes suddenly or unexpectedly in large numbers, as a result of armed conflict, internal strife, systematic violations of human rights or natural or man-made disaster, and who are within the territory of their own country.”²⁸

This definition reflected two basic elements: the major causes of displacement and its fundamental feature, that is, the movement is coerced or involuntary and that the peoples affected remain within their national borders.²⁹ It is also said that the causes of displacement listed were drawn in part from the broader refugee definitions used in the African and Latin American that extend beyond the narrow and persecution-based criterion in the 1951 Refugee Convention by including persons uprooted by natural and human-made disasters.³⁰

However, the 1992 definition was contended to be problematic in certain aspects, in particularly, its temporal (...suddenly or unexpectedly . . .) and numerical (. . . in large numbers . . .) criteria. The temporal criterion or the requirement of ‘...suddenly or unexpectedly...’ excluded those cases of internal displacement in such countries as Burma, Ethiopia, Iraq, etc where the displacement of population was not a spontaneous event but an organized state policy implemented over years or even decades.³¹ Its numerical criterion was also held problematic in that in reality many displaced often flee in small numbers or even on an individual basis in order to make themselves less conspicuous as happened in Colombia.³² The term “forced to flee” was also said too narrow as it excluded such situations where populations did not flee; but were obliged to leave their homes (expelled) as forced evictions of minorities in Bosnian war or more recently home demolitions and forced removal of more than half a million people in Zimbabwe in 2005.³³

As a result of the above criticisms, subsequent efforts were made to revise the definition of IDPs. This was mainly carried out under the guidance of Secretary-General’s Representative on IDPs, Mr. Francis M. Deng. After a series of works in collaboration with various governmental, non-governmental, academic and research institutions, the Representative came up with the working definition of IDPs. This is also the working definition which is latter included in the UN Guiding

²⁸ United Nations Commission on Human Rights: Analytical Report of the Secretary-General on IDPs, UN Doc. E/CN.4/1992/23 (14 Feb.1992), Para. 17.

²⁹ . 16.

³⁰ Mooney, Supra Note 4, P. 10.

³¹ Id., P.11.

³² Cohen & Deng, Supra Note 2, P. 17.

³³ Mooney, Supra Note 4, P. 11.

Principles on Internal Displacement. The Guiding Principles, which was adopted by the UN Commission on Human Rights in 1998,³⁴ define 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.*³⁵

Thus, this modified and the currently operative version both retained certain aspects of the former definition and introduced new regimes addressing the gaps in the former. While retaining the causes of internal displacement identified in the former definition, it also anticipates for any new situations which may cause coerced movement within national borders by using the phrase 'in particular.' Even peoples may move not only directly forced or obliged by one or more of the listed causes, but also in order to avoid the effects of such causes

During the deliberation stage of the Guiding Principles, there were groups who urged to limit the scope of persons to be covered under the definition, that is, persons subject to persecution or conflict. In other words, these are persons who would be refugees if they crossed an international border.³⁶ This point of contention was mainly raised in relation to persons displaced by disasters (both natural and human-made) and development-projects. However, disaster-affected populations were made part of the category of the definition on the ground that there were and will certainly be experiences that in some natural disasters, governments responded by discriminating against or neglecting certain groups on political or ethnic grounds or by violating their human rights in other ways. The case in point was the relocation subsequent to the mid-1980s famine in Ethiopia which was associated with grave violations of human rights.³⁷

Human-caused disasters such as nuclear or chemical accidents are also included because persons in such situation may require protection. But what is not precisely clear is the lack of explicit mention of development project as a cause of displacement. Some argue that it can form

³⁴ UN Commission on Human Rights, Report of the Representative of the Secretary-General on IDPs: Guiding Principles on Internal Displacement, UN Doc.E/CN.4/1998/Add.2, 11 Feb. 1998 (hereinafter the Guiding Principles).

³⁵ Id., Introduction: Scope and Purpose, Para. 2

³⁶ Mooney, Supra Note 4, PP. 11-12.

³⁷ Phuong, Supra Note 1, P. 30.

part of human-made disaster.³⁸ Others also hold that the Guiding Principles are applicable in situations of development-induced displacement as this is recognized in the very content of the document.³⁹

Thus, it is appropriate to interpret the document in its entirety, that is, its definitional part which provides illustrative list of causes of displacement and its Principle 6 (c) dealing with displacement caused by large-scale development project. Addressing displacement caused by development projects is imperative in that around 10 million people have been displaced by the same every year since 1990s.⁴⁰ This figure is even increasing currently, as to be explained more latter on, affecting more 5 millions of people every year. There are also initiatives at sub regional levels such the Great Lakes Region which considered people affected by development projects as IDPs and made them the beneficiaries of any guarantees available under the Protocol and other international instruments.

However, the prevailing trends in the past and partly in the present show that the international community is still biased in favour of displacement caused by conflict or human rights violations. For instance, many leading NGOs engaged on data collection have so far given more attention to the number of persons affected by either armed conflict or that of human rights violations.⁴¹

In relation to definitional issues, one possible group over which debates were made during the preparation of the Guiding Principles were the inclusion or otherwise of economic migrants, that is, people moving to escape consequences of poverty or for better economic and social opportunities. It was contended that the IDPs definition does not extend to economic migrants mainly because the element of coercion or involuntary movement is not so clear in the case of latter groups.⁴² However, this initial exclusion may not always lead to the outright and permanent exclusion of these groups from assuming such status if the cause of their movement is due to economic injustice and marginalization which precisely fall under violation of their economic and social rights.⁴³

³⁸ Cohen & Deng, *Supra* Note 2, p. 17.

³⁹ Mooney, *Supra* Note 4, p. 13.

⁴⁰ Phuong, *Supra* Note 1, P.30.

⁴¹ See for instance the practice of data collection by the Internal Displacement Monitoring Center (IDMC), *Internal Displacement, Global Overview of Trends and Developments in 2008*, World Refugee Survey, 2005, US Committee of Refugees, etc.

⁴² Cohen & Deng, *Supra* Note 2, P. 17.

⁴³ *Ibid.*

The other crucial element in the definition of IDPs is remaining within one's national borders, that is, persons who have not crossed an internationally recognized border. The requirement of border-crossing is one major element demarcating IDPs from refugees even if some groups such as victims of natural disasters may not acquire refugee status even if they managed to cross borders. The criterion of crossing 'internationally recognized border' was made to avoid confusions as experienced from sudden border changes as happened during the disintegration of former Yugoslavia and Soviet Union.⁴⁴

The question of providing a clear definitional scope of IDPs is also a demanding issue in Africa, the continent most ravaged by internal displacement hosting 45% of the world's IDPs.⁴⁵ Thus, Africa has taken a series of regional efforts to deal with problems of refugees and IDPs, a point to be explained in detail later on. But when coming to the definitional issue of IDPs in Africa, the contents of the two recent documents are relevant to mention. These are the Great Lakes Region Protocols on IDPs and that of the AU Convention for the Protection and Assistance of IDPs in Africa both of which are the first legally binding instruments in the area of IDPs. Both instruments attempt to give legally authoritative definition of IDPs in line with what was provided under the Guiding Principles.⁴⁶ Efforts are made under both documents to ensure consistency with the Guiding Principles.

While copying verbatim the definition given under the UN regime, both instruments enable the definition to be legally binding and certainly identify a predictable and legal status of IDPs. The AU IDPs Convention has further defined, under Article 1(I), the notion of internal displacement as "the involuntary or forced movement, evacuation or relocation of persons or groups of persons within internationally recognized state borders." The terms 'movement, evacuation and relocation' have made to reflect the forms of coercion directly or indirectly exerted on the victims of such movement.

⁴⁴ Mooney, *Supra* Note 4, P. 12.

⁴⁵ See The IDMC, *Supra* Note 18, and *Monitoring disaster displacement in the context of climate change*, OCHA & IDMC (September 2009), P. 11.

⁴⁶ The Great Lakes Region Protocol on the Protection and Assistance to IDPS, adopted on 30 November 2006 and entered into force in 2008 (herein after the GLR IDPs Protocol), Article 1(4) & (5) and The AU Convention on the Protection and Assistance of IDPS in Africa, 23 October 2009 and not yet in force (hereinafter the AU IDPs Convention), Article 1(J)&(K).

The Great Lakes Region Protocol on IDPs further introduced more clarity to the global regime by expressly recognizing the status of persons displaced by large-scale development projects. However, the issue of displacement caused by small or medium-scale development projects will continue to be debatable given the non-exhaustive nature of the causes listed and the impacts of such type of projects on the surrounding populations.

2.2. Internally Displaced Persons vis-à-vis Refugees

In the common parlance, people tend to think of 'refugees' rather indiscriminately as those who have been forced to flee their homes, whether or not they have actually left their own country. However, according to international law, a person merits the label [of refugees] only if he or she has crossed internationally recognized border to escape a well-founded fear of persecution.⁴⁷ In the African and the Latin American reality, the grounds for border crossing are more expanded beyond and above fear of persecution. Thus, border crossing or sometimes 'alienage' is one important dividing line between both groups of persons. This has led to common description of 'internal refugees' and 'external refugees or displaced persons', the former referring to what is known as IDPs. It is asserted that the legal definition of refugees is based on the premise that the bond between the citizen and the state has been severed.⁴⁸ But this is not the case for IDPs who always find themselves within the territorial limit of the state concerned.

The rationale behind border-crossing as a core requirement for acquiring refugee-status was derived from the principle of state sovereignty. That is, the protection and assistance of those persons within their own national territory whether displaced or not primarily falls on the government of that state. This is because the problem raised by IDPs is invariably part of the internal affairs of the state.⁴⁹ However, if such domestic entity is unable or unwilling to fulfill its responsibility towards its citizens, it is expected to request and/or accept outside offers of aid.⁵⁰

Therefore, the distinction of border-crossing matters most as it will entitle a certain group of persons to international protection under a binding regime and responsible institutional arrangement. The entitlement will be claimed if such movement is caused by a well-founded fear of persecution under the 1951 UN Refugee Convention and its 1967 amending Protocol.

⁴⁷ Thomas G. Weiss, "Whither International Efforts for IDPs?" Journal of Peace Research Vol. 36, No. 3 (1999), P. 363.

⁴⁸ Phuong, *Supra* Note 1, P. 21.

⁴⁹ *Id.*, P. 24.

⁵⁰ Roberta Cohen, "Developing an International System for IDPs," International Studies Perspectives (2006), p. 91.

However, these grounds are expanded more under the 1969 OAU Refugee Convention in order to cover a wide range of situations such as 'external aggression, occupation, foreign domination or events seriously disturbing public order.'⁵¹ Thus, when it comes to Africa, the distinction between refugees and internally displaced persons is even less obvious except successful crossing of national borders. People from the same group or displaced from their homes for the same cause may assume two different statuses with significant implications in their assistance and protection needs.

Despite the arguments to merge these two groups and extend the same treatment based on their needs such as by persons like Luke Lee who questions further maintenance of the distinction after the culmination of Cold War ideological tensions, there persist more strong counter arguments still to maintain a separate regime. This is because some say that IDPs remain within the jurisdiction of their own state and responsibility to protect and assist them should not be shifted entirely to the international community.⁵² Another scholar in the refugee study, Hathaway, also adds to this that merging both groups would constitute a violation of national sovereignty.⁵³

Therefore, the distinction of the two categories has been still maintained with the effect that refugees enjoy international protection and assistance under a binding legal instrument and managed by a responsible institution. Internally displaced persons, on the other hand, are left with no distinct legal and institutional regime specifically addressing their particular needs. Even if such groups may demand protection under the existing general national and international regimes, they might have still unique needs which go unaddressed. In this regard, AU's effort and contribution to address the specific needs of IDPs under a binding legal instrument will be evaluated from different angles.

Then what comes next to the mind of any reader is the question that do IDPs form a special category of persons which entitle them to preferential treatment above and beyond any populations who are not displaced from their homes, but affected by conflict, human rights violations or any other factors affecting their rights or wellbeing? There are some views asserting that singling out one group as IDPs could lead to discrimination against others, fostering inequity

⁵¹ The 1969 Convention Governing the Specific Aspects Refugee Problems in Africa, adopted on 10 September 1969 and entered into force in 1974, AHSG, CAB/LEG/24.3 (hereinafter OAU Refugee Convention), Article 1(2).

⁵² Phuong, *Supra* Note 1, p. 25.

⁵³ J. Hathaway, *The Law of Refugee Status*, (1991), in Phuong, *Supra* Note 1, P. 24.

and conflict.⁵⁴ Some still argue that creating a separate status for IDPs would also constitute a major challenge to the principle of state sovereignty.⁵⁵

International agencies such as the International Committee of Red Cross (ICRC) and other humanitarian agencies generally prefer the so-called needs-approach, according to which they concentrate on how to address precarious humanitarian situations adequately, rather than concentrating on categories of persons.⁵⁶

However, distinguished scholars in the matters of IDPs such as Francis M. Deng and Roberta Cohen argue that the purpose of identifying the internally displaced is not to confer on them a privileged status, but to ensure that in a given situation their unique needs are addressed along with those of others.⁵⁷ There are still more pragmatic arguments in favour of treating IDPs as a distinct group. To begin with, in many cases IDPs are the victims of a deliberate policy targeting them for displacement and forced relocation. Minority groups have been particularly vulnerable to this practice, which often occurs along ethnic or religious lines and amounts to what has become known as “ethnic cleansing.”⁵⁸ The following quotation from the State of the World’s Refugees elaborates how IDPs differ from their fellow non-displaced communities:

*Displacement breaks up families and severs community ties. It leads to the unemployment and limits access to land, education, food and shelter. The displaced are particularly vulnerable to violence. . . . the internally displaced frequently suffer the highest mortality rates in humanitarian emergencies . . . In Uganda, the HIV/AIDS rate among the internally displaced is six times higher than in the general population.*⁵⁹

Thus, it is obvious that how internal displacement affects multiple aspects of persons making them more vulnerable to man-made and natural disasters. By specifically addressing such categories of vulnerable groups, the international community would find it easier to call upon governments to assume their responsibility for those populations or to press for international action on their behalf.⁶⁰ That is, identification of the group particularly vulnerable will minimize the possibility to evade responsibility towards ones nationals as well as creates certainty to

⁵⁴ State of the World’s Refugees (UNHCR 2006), P.155 available at <http://www.unhcr.org/> accessed on Oct.02, 2009.

⁵⁵ Phuong, Supra Note 1, P. 27.

⁵⁶ Geissler, Supra Note 5, P. 458.

⁵⁷ Cohen & Deng, Supra Note 2, P.27.

⁵⁸ Mooney, Supra Note 4, P. 16.

⁵⁹ State of the World’s Refugees, Supra Note 32.

⁶⁰ Cohen & Deng, Supra Note 2, P. 29.

international community as to when and for whom to lend their hands to alleviate the needs to these groups. Moreover, the practice of addressing particular needs of certain especially vulnerable groups is not also a new invention. This is because human rights standard setting and implementation have so far also exclusively dealt with such distinct categories of peoples as women, children, minorities, indigenous groups, disabled, refugees, etc.

2.3. Impacts of Internal Displacement

Internal displacement is a phenomenon with multiple impacts not only on its direct victims, but also affecting the local and host communities, the state, neighbouring regions and the natural ecology in general. When seen from the perspective of risks facing the direct victims, the Representative of the UN Secretary-General on the human rights of IDPs has identified four groups of rights: rights related to physical security and integrity; rights to basic necessities of life; economic, social and cultural rights and civil and political rights.⁶¹

In 26 countries surveyed by the Norwegian Internal Displacement Monitoring Center (IDMC) in 2008, IDPs have continued to be exposed to insecurity and violence in the places they fled to. Those especially in camps or settlements were targeted such as in Democratic Republic of Congo (DRC), Kenya, and Chad. This happens even in countries hosting international peacekeeping operations.⁶² They are especially vulnerable to acts of violence and human rights violations, including round-ups, forced conscription and sexual assault.⁶³

Displacement also dramatically disrupts livelihoods, and leads to a severe reduction in access to the basic necessities of life including food, clean water, shelter, adequate clothing, health services and sanitation despite the recognition of such rights in various international human rights instruments.⁶⁴ In nine countries or situations in 2008, the majority of IDPs lacked access to all these basic necessities.⁶⁵ It is apparent that lack of these basic necessities of life will lead to various health risks such as high mortality rate, labour and sexual exploitation, human trafficking, psychological trauma and so on.

⁶¹ Report of the Representative of the Secretary-General on the Human Rights of IDPs, W. Kalin, 31 December 2005, in IDMC, *Supra* Note 19, P.21.

⁶² IDMC, *Supra* Note 19, P. 21.

⁶³ Mooney, *Supra* Note 4, P.16.

⁶⁴ *Id.* P.21.

⁶⁵ These are Central African Republic(CAR), Ethiopia, Iraq, Nigeria, Somalia, Sri Lanka, Darfur(Sudan), Yemen and Zimbabwe.

In their other social, economic and cultural rights, IDPs are often deprived of the means to restore self-reliance, as they lack access to livelihoods and work opportunities. This may be further frustrated by effects of armed conflict (as landmines), inability to regain lands and other properties left behind, lack of sufficient infrastructure in the return areas or already destroyed, economic exploitation of IDPs in urban areas and lack of skills.⁶⁶ It is stated that displacement leads to the massive loss of not only of commodities such as the home, income, land or other forms of property, but also of less tangible symbolic goods, such as cultural heritage, friendship and a sense of belonging to a particular place.⁶⁷

The negative impacts of internal displacement on civil and political rights are manifested by instances such as restrictions on their freedom of movement and free choice of residence for alleged security reasons. Difficulty of access to personal documentation hindered their enjoyment of the right to recognition before the law and other related rights such as access to schools, health care services, property claims, voting rights, etc.⁶⁸

The ‘pernicious effects on individuals, families and communities’ are wide ranging and include ‘impoverishment, social isolation, exclusion from health, welfare and education provision, the breakdown of social relationships and support structures, and the undermining of authority structures, and social roles.’⁶⁹ Cohen and Deng added that displacement alters the structure and size of households and changes family patterns and gender roles such as increasing number of female-headed households.⁷⁰

The environmental effect of displacement is also of considerable dimension. When the displaced flee to rural areas, they may do irreparable damage to the ecosystems in their efforts to satisfy housing and fuel supply. This was what was happened in the Rwanda in the mid of 1990s.⁷¹

Displacement has also an impact on urban centers as rural-urban migration increases the population number in the latter. This in turn results in overload in the provision of social services, water supplies, sanitation facilities, and generally deterioration of urban infrastructure.⁷² To this should be added is security concerns as peoples denied of their basic necessities in such difficult situation may also resort to criminal behaviour endangering safety of

⁶⁶ IDMC, Supra Note 18, P.22

⁶⁷ Mooney, Supra Note 4, p.16.

⁶⁸ IDMC, Supra Note 19, P.24.

⁶⁹ Mooney, Supra Note 4, P.15.

⁷⁰ Cohen & Deng, Supra Note 2, P.26.

⁷¹ Id., P.25.

⁷² Ibid

citizens and impede safe movement. Even there may be instances where effects of displacement may also spill over into neighbouring countries and affect regional and sub-regional peace and stability.

The impact of displacement on certain vulnerable groups as children, women, elderly, disabled, minority and indigenous peoples goes without saying as they are among the disproportionately affected groups. The main causes of displacement such as armed conflict, human rights abuses and development projects have usually a tremendous impact on such most vulnerable groups of the society.

2.4. The End of IDP Status /Internal Displacement

Nowadays, there is no clear answer to the question of cessation of IDP status owing to the lack of agreed criteria. When it comes to the refugee status, it will cease if the UNHCR determines that a particular group no longer needs protection as refugees by applying the cessation clause of the 1951 Refugee Convention and its amending protocol as well as the 1969 OAU Refugee Convention. However, there is no such responsible organ and legally agreed criteria determining the end of IDP status. Because of this uncertainty, currently decisions on when internal displacement ends are made, if at all, on an ad hoc and arbitrary basis. Moreover, the methodologies used and consequently, the conclusions reached differ among actors as encountered for instance in Guatemala and Rwanda in the 1990s.⁷³

The Guiding Principles on Internal Displacement do not give a clear cut temporal demarcation under its Principle 6 (3) which stipulates that “displacement shall last no longer than required by the circumstances”. The last part of the Principles also provides for possible solutions of displacement: return, resettlement and reintegration.⁷⁴ It, while imposing a primary responsibility on competent authorities to facilitate these solutions, stipulates a number of conditions to be met. These are: return or resettlement to occur voluntarily and in safety and dignity, non-discrimination, participation in public affairs and equal access to public services; assistance for recovery and/or compensation for property and possessions destroyed or disposed as a result of their displacement.⁷⁵ Thus, based on the inferences from the above Principles, it is emphasized that solution’s for the end of IDPs status entail more than simply the

⁷³ Erin Mooney, “Bringing the end into sight for IDPs,” *Forced Migration Review (FMR)* 17, 2004, P.4.

⁷⁴ The Guiding Principles, Principles 28&29.

⁷⁵ Ibid

physical movement of returning or resettling, but also require putting in place conditions to ensure the effectiveness of these solutions.⁷⁶

According to the final Framework for Durable Solutions developed by the Brookings-Bern Project on Internal Displacement and the Institute for the Study of International Migration in 2007, the extent to which a durable solution has been achieved depends on both the process that leads to the solution and the fulfillment of certain conditions.⁷⁷ The process includes the provision of relevant information so that IDPs can freely choose their preferred solution, and their consultation and involvement in the process of designing programmes and policies. Conditions for durable solutions include a safe environment, access to documentation, restitution of property or compensation for property lost or destroyed and access to basic necessities of life, services and livelihood opportunities.⁷⁸ However, a clear challenge to these double criteria relates to the time interval required to meet such necessary conditions as these will obviously take long duration of time. And it will also be unrealistic also to rule out possible factors hindering the achievement of these conditions, for instance, lack of infrastructure, re-beginning of conflicts, continued insecurity in original areas, etc. That is why the co-authors of an impressive work on internal displacement, *Masses on Plight*, concluded that displacement ends when returnees have both security and the means to re-establish themselves in their areas of origin.⁷⁹ Thus, it is held that a shift in focus away from the internally displaced as a specific category first requires a determination that the distinct risks and vulnerabilities resulting from displacement no longer exist.⁸⁰

Hence, this seems to be a combined approach as it dually addresses both the cessation of the cause of displacement and the specific needs of IDPs as no more demanding the attention of relevant actors. The former seems to be adopted an inspiration from refugee cessation clause which brings to an end the refugee status if a cause of persecution no more exists. While the later considers the real situation in which IDPs found themselves.

When we come to the Great Lakes Region Protocol and the AU IDPs Convention, the issues of cessation of IDP status is not expressly dealt with under both instruments. The AU IDPs Convention simply refers to obligation of states to seek for lasting solutions to the problem of

⁷⁶ Mooney, *Supra* Note 51, P.5.

⁷⁷ IDMC, *Supra* Note 19, P.25.

⁷⁸ *Ibid.*

⁷⁹ Cohen & Deng, *Supra* Note 2, P.37.

⁸⁰ Mooney, *Supra* Note 4, P.24.

displacement. This is intended to be achieved by creating satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity.⁸¹ The position adopted by the AU IDPs Convention seems to be realistic as most situations of IDPs in Africa are commonly of protracted nature. Most problems of internal displacement caused by armed conflicts, human rights abuses and natural disasters such as drought last longer duration in some instances even taking decades to come to an end. Thus, it seems logical to focus on addressing the root causes of and seeking for sustainable or durable solutions for displacement and it will be then much easy to determine the termination of IDP status once the former challenges are overcome.

2.5. Global Statistics of IDPs and Africa's Position

This part of the discussion may not be properly speaking legal discussion as it goes to the analysis of global trends in the number of IDPs. However, it is also important to have some understanding on the approximate number of IDPs populations worldwide and Africa's share in the global trend. The existence of this knowledge will enable concerned organs to appreciate the level of problems posed by internal displacement, address its root causes and seek durable or lasting solutions for it.

One of the reasons for increased attention to the issues of IDPs and creating a mechanism in the beginning of 1990s was the rapid increase in the number of IDPs. When first counted in 1982, the internally displaced were only 1.2 million in 11 countries. By the 1990s, 20-25 million were to be found in more than 40 countries on most continents of the world.⁸² Recently, a total of 52 countries are affected worldwide by the problem of internal displacement.⁸³

Once again the problem associated with the number of IDPs is that data on such populations are fragmented and mostly approximate. This is mainly attributable to the biased collection of data only for IDPs affected by conflict and human rights violations, as formerly made by many international agencies. But now the IDMC, formed by Norwegian Refugee Council, has started to collect data on not only IDPs-induced by violence and human rights violations, but also those caused by natural disasters and climate change.

According to the IDMC's Global IDP Database in 2008, the number of people internally displaced by conflict, generalized violence or human rights violations across the world stood at

⁸¹ The AU IDPs Convention, Article 11(1).

⁸² Cohen & Deng, *Supra* Note 6, P.3.

⁸³ IDMC, *Supra* Note 19, P.7

approximately 26 million. Among these, Africa hosts nearly half of the world's IDPs (45%) and three out of five of the world's largest internal displacement situations are found in the region.⁸⁴

According to writers such as Chaloka Beyani and AU draft concept note for the Special Summit on Refugees, Returnees and IDPs in Africa, the continent is still home to more than 17 million conflict-related forcibly displaced populations.⁸⁵ Thus, this number will be more considerable by adding those persons uprooted by other causes of displacement such as natural disasters including climate change and development projects.

When we see disaster-induced displacement especially in the context of climate impact, at least 36 million people were displaced globally by sudden-on set natural disasters in 2008. The major disasters are earthquake, floods, storms and extreme temperature, all of which are climate-related hazards.⁸⁶ Therefore, sudden-onset climate-related disasters were responsible for displacing a total of 20.5 million people in 2008.⁸⁷ As to the regional distribution, Asia being the most affected with 31 million. Africa is the third affected continent next to Americas.⁸⁸

Therefore, what the above trends or statistics, despite estimates, remind us or more pertinently the continent of Africa? The increasing victimization of Africa by internal displacement especially by violence, human rights abuses and climate-related natural disasters warrants the need for creating a regional response. As was done by the 1969 OAU Refugee Convention which remedied the gaps in the international protection of refugees, it is right time for Africa and its political organization to address the increasing plight of peoples uprooted from their homes and habitual residences. IDPs in numerous African countries such as Sudan (Darfur), DRC, Somali, Uganda, Zimbabwe, Kenya, etc are left in grave situations and protection gaps. The issue of responsibility to protect such people is so critical as this matter falls in the tug-of-war between state sovereignty and non-interference in the internal affairs on the one hand and that of taking intervention measures on behalf of such peoples. The AU will have a good opportunity to deal with this tension taking its Constitutive Act and the newly adopted IDPs Convention.

⁸⁴ Id., P.14. These are the Sudan, DRC and Somalia, the others being Colombia and Iraq.

⁸⁵ Chaloka Beyani, "Recent Developments: The Elaboration of a Legal Framework for the Protection of IDPs in Africa," *Journal of African Law* Vol.50, Issue 02(2006), P.189 and see also Draft Concept Note, The AU Special Summit on Refugees, Returnees, and IDPs in Africa (2008), P.2.

⁸⁶ .Monitoring disaster displacement in the context of climate change, Office of Coordination for Humanitarian Affairs & IDMC, Sept 2009, PP. 9-10.

⁸⁷ Id., P.9.

⁸⁸ . Id., P.11.

Chapter Three: Legal and Institutional Protection of IDPs: Global Overview

Introduction

The elaboration of existing legal and institutional bases of protection of IDPs at the global, more pertinently at the UN level, will give more insight and firm basis for regional and sub-regional efforts. Although no legal instrument addressing the group specifically exists, protection and assistance needs of IDPs have been repeatedly invoked under various existing instruments of general or specific application. In this regard, the role of human rights and humanitarian law norms are of particular importance. Institutionally too, there continued to exist no legally mandated organ to act on behalf of IDPs. However, this does not mean that the international community has no institutional mechanism responding to the crises of internal displacement. However, what has been absent is centralized and accountable mode of institutional response. The concern of this chapter will be analyzing further the existing international normative and institutional frameworks for the protection and assistance of IDPs at the global level. This will again give us a clear basis as to what mode of response can be pursued at regional level taking into account the successes and challenges facing the global arrangements.

3.1. Normative Framework

3.1.1. The Applicable Laws in Situations of Internal Displacement

The undeniable fact surrounding the protection and assistance of IDPs is the absence of an international legal instrument mainly devoted to the needs of such vulnerable groups. The international community might have some reasons for such diminished interest in not seriously pursuing the affairs of IDPs. Among these, the most commonly invoked reason for reduced concern at the global level is the attitude that IDPs are covered under the existing human rights and humanitarian law standards.⁸⁹ This is basically true assertion as IDPs do not forfeit their inherent rights because they are displaced; they can invoke human rights and humanitarian laws to protect their rights.⁹⁰

A. The Application of International Humanitarian and Human Rights Law

⁸⁹ Roberta Cohen, "The Guiding Principles on Internal Displacement: An Innovation in International Standard Setting," *Global Governance* 10 (2004), P.463.

⁹⁰ Roberta Cohen and Francis M. Deng, *Masses in Plight, The Global Crisis of Internal Displacement* (1998), P.74.

The essence of international humanitarian law (IHL) lies in that it provides for basic guarantees of civilian population and objects during armed hostilities. It contains the rules regulating the means and methods of warfare. The main provisions of humanitarian laws can be found in the Four Geneva Conventions of 1949 and their Two Additional Protocols of 1977. Therefore, IDPs benefit from the same protection provided for all civilians in times of armed conflict, whether internal or international.⁹¹

Since internal conflict is nowadays more prevalent and the main cause of internal displacement especially in Africa, IHL regimes applicable to non-international armed conflict (NIAC) is crucial for the protection of IDPs. Among the Geneva Conventions, Common Article 3 to all Geneva Conventions is the most relevant one as it contains some fundamental principles which are customary in nature, and has been said to enshrine 'elementary considerations of humanity.'⁹² This provision provides that civilians shall be treated humanely and without discrimination. To this end, it gives a short list of prohibited acts.⁹³

Another importance of IHL is that it also contains some specific provisions prohibiting transfers of populations. Article 17 of Additional Protocol II which expressly prohibits such transfers is of special importance to the internally displaced.⁹⁴ Article 49 of the Fourth Geneva Convention, which is applicable to international armed conflicts, also prohibits transfer of population from occupied territories.⁹⁵

When coming to the international human rights law, IDPs are entitled to the guarantees available for all individuals within a national territory without discrimination. Comprehensive human rights standards are available in major international and regional human rights instruments such as the Universal Declaration of Human Rights (UDHR), the Two International Covenants (ICCPR & ICESCR), African Charter on Human and Peoples' Rights (ACHPR), and other

⁹¹ Catherine Phuong, *The International Protection of Internally Displaced Persons* (2004), P.45.

⁹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* (Merits, 1986), Para. 218, in Phuong, *Supra* Note 3, P.45.

⁹³ The prohibited acts are violence to person in particular murder of all kinds, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial.

⁹⁴ Article 17. Prohibition of forced movement of civilian

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.

2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

⁹⁵ The first clause of article 49 of 4th GCs provides as:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive. The limited exceptions of permissible grounds are when transfer is necessary for the security of the population or imperative military reasons.

regional and single-issue human rights norms. Therefore, basic guarantees of economic, social, cultural, civil and political nature can be validly invoked by IDPs. It is also emphasized that in situations which do not assume the status of armed conflict such as riots, civil unrest and disturbances, human rights law will remain the only applicable law.⁹⁶ This is because IHL becomes non-operative due to lower thresholds of such situations.

Therefore, consensus has been reached during the making of Compilation and Analysis of legal norms applicable to IDPs that the later receives substantial coverage in the existing human rights and humanitarian law norms. However, the study by the then Representative of the UN Secretary-General, Mr. Francis M. Deng, has also identified some shortcomings in the existing normative frameworks.

According to Erin Mooney, the areas of insufficient legal protection for the internally displaced fall into two main categories. The first category concerns gaps that arise out of lack of explicit norms addressing identifiable needs. A case in point cited as an example is the absence of an express right not to be arbitrarily displaced and of a right to restitution of or compensation for property lost as a consequence of displacement during situations of armed conflict.⁹⁷ Noting that ILO Convention No. 169 on Indigenous or Tribal Peoples is the only human rights instrument containing explicit prohibition of forcible displacement, such right can also be inferred from general provisions of human rights concerning freedom of movement and the right to choose one's residence, protection from interference with one's home, the right to housing and so on.⁹⁸ To this should be added is the humanitarian law norms which addresses the prohibition of displacement or forcible transfer of civilian population out of permissible grounds.

The second category of insufficient coverage concerns those cases where a general norm exists but a corollary provision specifically addressing concerns of particular importance to IDPs has not been articulated. For example, although there is a general human rights guarantee to freedom of movement, there is no express guarantee against forcible return to dangerous areas within their own countries comparable to the principle in refugee law of non-refoulement.⁹⁹ The

⁹⁶ Phuong, *Supra* Note 3, PP.42-43.

⁹⁷ Erin D. Mooney, *Towards a Protection Regime for IDPs*, in Edward Newman and Joanne Van-Selm(eds.), *Refugees and Forced Displacement: International Security, Human Vulnerability, and the State* (2003), P.162.

⁹⁸ *Compilation and Analysis of Legal Norms, Part II: Legal Aspects Relating to the Protection against Arbitrary*

Displacement. Report of the Representative of the Secretary-General on Internally Displaced Persons, UN Doc.

*E/CN.4/1998/53/Add.2, 11 February 1998, Para.84, cited in Phuong *Supra* Note 3, P.51.*

⁹⁹ Mooney, *Supra* Note 9, P.161.

Analysis suggests that this can be deduced from prohibition of inhuman treatment under the human rights law and that of refugee law by analogy.¹⁰⁰

In addition, applicability gaps exist where a legal norm does not apply in its entirety in all circumstances. Serious gaps such as these could arise in situations falling below the threshold of applying humanitarian law, which at the same time are circumstances in which the restriction or even derogation of a number of human rights may be allowed. Finally, what were termed “ratification gaps” in the legal protection of the internally displaced arise where states have not ratified key human rights treaties and/or humanitarian law instruments.¹⁰¹

Therefore, after identification of the above and other areas of insufficient coverage by the legal team under the leadership of Representative of Secretary-General (RSG), Francis M. Deng, possible solutions were recommended in order to fill the gaps identified. Among them was the need for restatement of general principles of protection in more specific detail and to address clear protection gaps in the future international instrument.¹⁰²

An option for making a binding treaty regime at the UN level was avoided due to the sensitivity of the matter, that is, internal displacement, to most governments as interference in their internal affairs and the fear of accompanying slow process in the traditional state-centered treaty-making and ratification which may take decades to come into force. This was found to be unadvisable provided the pressing needs of IDPs and operational difficulties facing the humanitarian agencies on the ground.¹⁰³

Therefore, it is the aforesaid lack of political will on the part of governments which might erode the speed and content of the new treaty to be drafted and the reliability on the preexisting norms that attracted the attention to what is known as the making of the Guiding Principles on Internal Displacement. Even if detail discussion of its making process and contents exceed the scope of this work, it deserves brief discussion owing to its innovative normative content and increasing exemplarity for later efforts especially in the continent of Africa.

3.1.2. The Guiding Principles on Internal Displacement

The UN Guiding Principles on Internal Displacement is the result of post-Cold War renewed efforts of the international community towards the protection and assistance of IDPs. To this

¹⁰⁰ Cohen and Deng, *Supra* Note 2, PP.106-107.

¹⁰¹ Mooney, *Supra* Note 9, PP.162-63.

¹⁰² *Id.*, P.163.

¹⁰³ Simon Begashaw, *Developing a Normative Framework for the Protection of IDPs* (2004), PP.14-15.

end, concrete task was began at the UN level by the appointment of the Representative of Secretary General (RSG) on IDPs in 1992 pursuant to the resolution of the then Commission on Human Rights. This has led to the designation of a distinguished Sudanese scholar and diplomat Francis M. Deng as the first RSG on IDPs.¹⁰⁴ After a series of study and compilation of the existing regimes by the Representative and his legal team, the findings and recommendations have convinced the Commission to request the Representative to develop “an appropriate normative framework” for the internally displaced in 1996.¹⁰⁵ Thus, the Guiding Principles on Internal Displacement were the outcome of the two years’ efforts involving various experts from governmental, nongovernmental and academic institutions. The final document was presented to the UN Commission on Human Rights in February 1998.¹⁰⁶

In the words of the present Representative of the Secretary-General on IDPs, Walter Kalin, the Guiding Principles are the minimum international standards as well as a practical tool for the protection of the rights of IDPs.¹⁰⁷ The Guiding Principles bring together in one concise document the many norms of special importance to the internally displaced that previously were diffused in an array of different instruments and thereby not easily accessible or sufficiently understood.¹⁰⁸ The Principles also constitute, an innovation in so far as they comprise the elements of IHL, human rights and refugee law and demonstrate the high degree of complementarity between these three bodies of law.¹⁰⁹ In many instances, the Principles cite verbatim the text of the provisions of human rights and humanitarian laws on which they are based.¹¹⁰

Coming to its substantive content, the 30 Principles set forth the rights and guarantees relevant to the protection of IDPs in all phases of displacement: providing protection against arbitrary displacement; protection and assistance during displacement; and during return or internal resettlement and reintegration.

¹⁰⁴ United Nations Commission on Human Rights res.1992/173(5 March 1992).

¹⁰⁵ UN Commission on Human Rights res.1996/52, 19 April 1996, UN General Assembly res.52/130, 12 December 1997.

¹⁰⁶ The Guiding Principles on Internal displacement, UN Doc. E/CN.4/1998/53/Add.2, 11 February 1998 (herein after the Guiding Principles).

¹⁰⁷ Walter Kalin, “The Guiding Principles on Internal Displacement as International Minimum Standard and Protection Tool,” *Refugees Survey Quarterly*, Vol.24, issue 3 (2005), P.27.

¹⁰⁸ Mooney, *Supra* Note 9, P.163.

¹⁰⁹ J. P. Lavoyer, “Guiding Principles on Internal Displacement: A Few Comments on the Contribution of International Humanitarian Law” (1998) 324 *International Review of the Red Cross* 467, in *Phuong* *Supra* Note 3, P. 57.

¹¹⁰ This fact is clearly explained in the W. Kalin’s Annotations on the Guiding Principles developed in 2000.

The document covers a broad range of rights which correspond to the needs of the internally displaced. After outlining some general principles such as the protection of the right to asylum, the primary responsibility of states in providing protection to the internally displaced and the principle of non-discrimination¹¹¹, the second part deals with protection against displacement.¹¹² One of the unique features of the Principles is the recognition of a right not to be arbitrarily displaced under principle 6 at the UN level. It particularly prohibits displacement on ethnic, religious or racial grounds which may amount to ethnic cleansing.

Another aspect of the Principles is the emphasis given to the protection of special categories or vulnerable groups of IDPs such as children, women, elderly, disabled and so on under Principle 4. This is particularly essential as these groups especially women and children form the great majority in the current global IDPs population. The document also essentially addresses such imperative issues as gender specific violence, forcible recruitment of children, women's participation in the distribution of supplies, special health and education needs of women.¹¹³

The Principles also reaffirm the primary responsibility of national authorities to provide protection and humanitarian assistance to IDPs within their jurisdiction. It also imposes obligation on such authorities (whether de jure or de facto) to seek external relief when they do not have the capacity or willingness to fulfill their national responsibility.¹¹⁴

The other important duties of national actors are facilitating the means and conditions to enable IDPs to return voluntarily, in safe and dignity to their homes or habitual residence and assist them in the recovery of or compensation for property and possessions lost as a result of displacement.¹¹⁵

Generally, it can be observed that the Principles address a wide range of civil, political, economic, social, cultural and other rights of particular concern to the needs of IDPs. As stated by the developing team and later annotations on each Principle, efforts were made to restate and clarify existing norms to the specific concerns of IDPs. It is a document with the attribute of reminding and clarifying what rights IDPs can claim towards their government and the international actors as a last resort. And this is hoped to assist the works of relevant entities and agencies operating on the affairs of IDPs both at the office and operational level.

¹¹¹ The Guiding Principles, Section I- General Principles.

¹¹² Id., Principles 5 to 8.

¹¹³ Id, Principles 11(2) (a), 13(1), 18(3), 19(2) & 23(4).

¹¹⁴ Id., Principles 3, 25,

¹¹⁵ Id., Principles 28&29.

Despite its non-binding nature and falling even out of state-negotiated common 'soft laws' such as declarations, resolutions or recommendations, W. Kalin defends that, the Guiding Principles might actually turn out to be much harder than many well-known soft law instruments. He continues to justify this assertion by stating that the Principles are very well grounded in international law and, thus, it is possible to cite multitude of existing legal provisions for almost every Principle.¹¹⁶

Furthermore, the Guiding Principles have got continued acceptance and application among the intergovernmental and non-government organizations and agencies such as rebel groups. Among these are initiatives in the regional and sub-regional levels in Africa which expressly make a reference to the normative value of these Principles and even promoting its status to the legally binding instrument. For example, the Great Lakes Region Protocol on IDPs confers a binding legal status on the Guiding Principles and its Annotations.¹¹⁷ The recently adopted AU IDPs Convention also reinforces this position by expressly recognizing its international importance in protecting the rights of IDPs.¹¹⁸ There have been also national efforts to enact laws and policies on the basis of the Guiding Principles in Africa and other regions such as in Angola, Burundi, Liberia, Sierra Leone and recently in Uganda.¹¹⁹ The normative impact on and the prospective relation between the Guiding Principles and the recently adopted AU IDPs Convention will be assessed later on.

3.2. Institutional Framework

3.2.1. Previous Trends

Institutional response is another pillar of the protection and assistance of IDPs. However, the setting up of adequate and responsible institutional mechanism on behalf of IDPs has not been an easy task in the past. This could be attributable either to the magnitude and complexity of the problem itself which went beyond the capacity and expertise of a single agency or lack of political will or even open opposition to the creation of such mechanism seeing it as a first step towards the encroachment of state sovereignty.

¹¹⁶ Walter Kalin, How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework (December 19, 2001), P.6.

¹¹⁷ Great Lakes Region Protocol on the Protection and Assistance to IDPs adopted on 26 November 2006 and entered into force in 2008, Art.6 (1) & (2) (hereinafter the GLR IDPs Protocol).

¹¹⁸ The AU Convention for the Protection and Assistance of IDPs in Africa (Kampala Convention) adopted on 23 October 2009 and not yet entered into force, Preamble Para.10 (hereinafter the AU IDPs Convention).

¹¹⁹ Cohen, *Supra* Note 1, P. 469.

Unlike refugees who may resort to a statutorily mandated organ for their protection and assistance needs, IDPs do not enjoy such guarantees under international law. In the past and even today, protection of IDPs involves vast number of UN and non-UN humanitarian, human rights and development organizations.

UN institutional response to the problem of internal displacement was brought into scene following the 1988 and 1989 Conferences on uprooted populations in Africa and Latin America which raised some level of awareness of the gaps in the matters of internal displacement.¹²⁰ Following this, in 1990 the General Assembly assigned to resident coordinators the function of coordinating assistance to IDPs in the field. A year later, the post of Emergency Relief Coordinator (ERC) was created in order to promote a more rapid and coherent response to emergency solutions.¹²¹

In 1992, the UN Secretary-General, at the request of the Commission on Human Rights, appointed a Representative on IDPs to focus attention on the human rights dimension of the problem and to identify ways and means of improving protection and assistance for the internally displaced. The same year was also relevant for the creation of Inter-Agency Standing Committee (IASC), chaired by the ERC and composed of the heads of the major UN humanitarian and development agencies, to strengthen coordination in emergency situations.¹²²

Institutional problem of IDPs protection and assistance was clearly identified in the Report of the RSG on IDPs, Mr. Francis M. Deng. This was summarized as follows in his co-authored work, *Masses in Plight*, with another distinguished scholar in the area, Roberta Cohen:-

*An array of UN agencies, humanitarian organizations and nongovernmental organizations (NGOs) have come forward to provide protection, assistance and development aid when governments have been unable or unwilling to meet their responsibilities [. . .] None of these organizations, however, has a global mandate to protect and assist the internally displaced. Their action is ad hoc. A various agencies pick and choose the situations in which they wish to become involved, many IDPs may be neglected.*¹²³

¹²⁰ Thomas G. Weiss and David A. Korn, Internal Displacement Conceptualization and its consequences (2006), P.16.

¹²¹ Cohen and Deng, Supra Note 2, P.127.

¹²² Ibid.

¹²³ Id., P.8.

After identification of the above inherent and structural problems, the Representative came up with three proposals to strengthen institutional arrangement for the internally displaced: to create a new agency; assign the responsibility to an existing organization; or to improve collaborative approach among the different agencies.¹²⁴ The first option, that is, the creation of new agency acting on behalf of IDPs was proved to be unrealistic given that there was neither the political will nor the financial resources to create a new agency in the UN. It also appeared inappropriate since the activities of a new agency would inevitably overlap with that of existing agencies.¹²⁵

The second option which suggested assigning the responsibility to the existing agency also faced some ambivalence. The appropriate candidate in this option was found to be the UNHCR owing to its long experience of involvement and expertise in working with IDPs since 1970s.¹²⁶ In the 1990s, the UNHCR did indeed prove prepared to increase its involvement on behalf of IDPs, however, subject to certain conditions. Those conditions set both by the UN General Assembly and the UNHCR itself so as to involve in the affairs of IDPs are: when refugees and IDPs are so intertwined (refugee-link criteria), a request or authorization from the Secretary-General or other competent principal organ of the UN; the consent of the state concerned; safe access to the populations concerned; and adequate resources and capacity.¹²⁷

Thus, what can be inferred from the above position is that UNHCR is not out rightly rejecting involvement in the matters of IDPs protection and assistance. Rather it has appealed to limited and/or shared responsibility with other agencies provided certain conditions pertaining to its formation-mandate and practical aspect are fulfilled. This trend has been nearly carried into the recently adopted humanitarian responses of the UN.

3.2.2. The Collaborative and Cluster Approaches

The opposition from in and outside of the Refugee Agency has consequently left the third option as last resort of institutional response, that is, a collaborative approach among the different relevant agencies both within and outside the UN system. This approach was initially found appropriate as it allows for a comprehensive and holistic response, involving the various

¹²⁴ Report of the RSG on IDPS to the Commission on Human Rights at its 49th Session, UN Doc. E/CN.4/1993/35, 21 January 1993.

¹²⁵ Naoko Hashimoto, *The UN and IDPs: At the Crossroads of Human Rights and Humanitarian Affairs*, in Andrzej Bolesta(ed.), *Forced Migration and the Contemporary World. Challenges to the International System*, (2003), P.84.

¹²⁶ Ibid.

¹²⁷ The first condition is set in the General Assembly Res.48/116 of 16 December 1993 and the rest are set in the Staff Directive of the UNHCR of 28 April 1993.

relevant agencies and spanning all phases of displacement, from prevention, to emergency response, to return or resettlement and reintegration.¹²⁸ This approach was also endorsed by the Secretary-General in his 1997 Programme for Reform, which recommended that this institutional arrangement should be strengthened so that the responsibility of providing protection and assistance to IDPs would not continue to fall into the gaps between the mandates and activities of existing agencies.¹²⁹ Under this effort, the ERC, who leads the Office for the Coordination of Humanitarian Affairs (OCHA), was assigned with the responsibility of ensuring protection and assistance for IDPs within the inter-agency framework. This was to be carried out by the operational activities of humanitarian or resident coordinators (HC/RC) in the field.¹³⁰

Despite continued efforts to implement this approach under the leadership of ERC and HC/RC both at the headquarter and operational levels, the collaborative approach was found to be flawed and deficient. This was reported by the Secretary-General's Representative in 2003 as:

*"Serious problem of coordination persists and many internally displaced persons continue to fall through cracks, leaving their pressing needs unmet, serious questions remain to be answered, including how responsibility are assigned and how to ensure that appropriate accountability mechanisms are in place."*¹³¹

According to Susan Martin, four principal problems result from this complicated regime of collaborative approach: lack of coordination that makes emergency responses slow and inefficient and hampers efforts to solve the underlying causes of forced displacement; lack of consistency in the treatment of forced migrants; gaps in response when no organization has an explicit mandate to assist or protect; and overlapping mandates, which hinders smooth handover of responsibility as the emergency phase of a crisis ends and longer term issues require attention.¹³² Hence, it is this serious lack of predictability, accountability, and rapid delivery of humanitarian response, which was described by the then US Ambassador to the UN Richard Holbrooke as "co-heads are no heads."¹³³

¹²⁸ Mooney, *Supra* Note 9, P.168.

¹²⁹ Hashimoto, *Supra* Note 37, P.85.

¹³⁰ *Ibid* and see also Mooney, *Supra* Note 9, P. 168.

¹³¹ Francis M. Deng, Statement to the 58th Session of the General Assembly, Third Committee, Item 117, UN Statement, 11 November 2003.

¹³² Susan Martin, Making the UN Work: Forced Migration and Institutional Reform, *Journal of Refugee Studies Vol. 17, No. 3* (2004), P.303.

¹³³ Roberta Cohen, "Strengthening Protection of IDPs: The UN's Role," *Geo.J. Int'nal Affairs*101, (2006), P. 105.

Therefore, in response to these widely publicized deficiencies, the Emergency Relief Coordinator's office in mid 2005 came up with a "sectoral" approach or commonly known as "cluster leads" under which the different agencies would be expected to carve out areas of responsibility based on their expertise and carry them out on a regular basis in emergencies. This was approved by the IASC which agreed to designate global "cluster leads"¹³⁴ specifically for humanitarian emergencies in nine sectors or areas of activity.¹³⁵

The currently operating cluster approach is based on two main aims. Globally, it is designed to strengthen system-wide preparedness and technical capacity to respond to humanitarian emergencies by ensuring that there is predictable leadership and accountability in all the main sectors or areas of humanitarian response. At the country level, on the other hand, its aim is to strengthen humanitarian response by demanding high standards of predictability, accountability and partnership in all sectors or areas of activity. It is about achieving more strategic responses and better prioritization of available resources by clarifying the division of labour among organizations, better defining the roles and responsibilities of humanitarian organizations within the sectors, and providing the humanitarian coordinator with both a first point of call and a provider of last resort in all the key sectors or areas of activity.¹³⁶

Accordingly, the Inter-Agency Standing Committee (IASC) agreed in September 2005 to the designation of a lead agency for each of the clusters where critical gaps had been identified. Among these are the designation of the UNHCR as cluster lead for protection, emergency shelter and camp management and coordination in situations of complex emergencies, UNICEF for nutrition, water and sanitation, WHO for health, WFP for logistics and UNDP for early recovery. Other agencies outside the UN structure such as International Organization for Migration (IOM) are made responsible for camp management and coordination and the International Federation of the Red Cross and Red Crescent Societies (IFRC) are involved in the provision of emergency shelter for IDPs from disaster situations. Protection, one of the essential concerns of IDPs, is

¹³⁴ The global 'cluster leads' includes seven UN agencies: United Nations High Commissioner for Refugees (UNHCR),

United Nations Children Fund (UNICEF), World Food Program(WFP), World Health Organization (WHO), United Nations Development Program (UNDP), Office of High Commissioner for Human Rights (OHCHR), and Office for the Coordination of Humanitarian Affairs (OCHA) and the other two non-UN organizations: International Federation of the Red Cross and Red Crescent Societies (IFRC/ICRC) and International Organization for Migration (IOM).

¹³⁵ Inter-Agency Standing Committee (IASC) Guidance Note on using the Cluster Approach to Strengthen Humanitarian Response, 24 November 2006, P.1.

¹³⁶ Id., P.2.

distributed among the UN agencies such as the UNHCR, UNICEF and OHCHR for IDPs both from conflict and non-conflict situations.¹³⁷

Therefore, the overall structure of the humanitarian reform shows an attempt to involve and utilize the services of major UN and outside agencies towards the protection and assistance needs of IDPs. The reform encompasses wide range of UN and non-UN agencies such as International Organization for Migration (IOM), International Federation of the Red Cross and Red Crescent Societies (IFRC/ICRC), and even some NGOs. What the reform trying to introduce is responsible agencies answerable for each sectors or activities identified as a critical gap in the collaborative approach. Thus, the agencies assigned as cluster leads will be responsible as providers of last resort so as to fill any protection and assistance gaps. This is again hoped to solve the accountability gap and create some certainty to the beneficiaries as to which agency to make a claim ultimately.

Although it is now too early to evaluate the effectiveness of the new approach, there have been some concerns expressed towards the programme. The first of these relates to the less likelihood of donor governments to contribute to the increased cost of global humanitarian reform. The other goes to the hesitation of certain non-UN agencies such as the IFRC/ICRC and others to be part of the reform owing to the fear of compromising their neutrality and the resulting danger of politicization of humanitarian activities by the UN. What is more expected is the cultural or attitudinal change of major UN agencies including improved accountability and a greater effort to closely collaborate and cooperate with all partners.¹³⁸

The first phase of evaluation of the approach conducted in 2007 has also identified some promises and challenges of the implementation of the new reform. Among the positive achievements were improved ability and capacity of humanitarian actors to identify and fill gaps within sectors, stronger and more predictable leadership, some improvements in preparedness and rapid response capability at field level. Shortcomings are also identified as uncertainty about the application and different interpretation of provider of last resort, challenges in working with host state and weak cluster information management.¹³⁹ The second phase of evaluation is expected to be finalized in 2010 which will hopefully identify the possible gains and continuing

¹³⁷ Id., P.3.

¹³⁸ Dennis McNamara, "Humanitarian reform and new institutional responses," *Forced Migration Review* (Brookings-Bern Special Issue), P.10.

¹³⁹ Office for the Coordination of Humanitarian Affairs (OCHA), *Evaluation of the Cluster Approach*, 2006/07.

challenges in the implementation of the new approach. It will then be safe to conclude about the overall performance and achievements of the reform.

Chapter Summary

The protection and assistance of IDPs were for long asserted to fall under the existing international rules applicable both in the peace and war times, i.e. international human rights and humanitarian laws. Despite the existence of many such norms relevant to the rights of IDPs, it was identified that there remained still some gaps and inadequacies in such norms. Therefore, it was the recognition of this reality that ultimately led to the restatement and reformulation of norms of general application to the particular needs and situation of IDPs in the form of what is known as the 'Guiding Principles on Internal Displacement'. This instrument has been an important tool for the protection and assistance of IDPs and a practical guide for those working on IDPs in the field. It has significantly influenced the works of international organizations, national authorities and NGOs acting on behalf of IDPs. The recent efforts of making binding legal instruments in the sub regional and regional levels in Africa are the result of such earlier debates and achievements.

Institutionally, there were also serious gaps in the provision of responsible, prompt and effective protection and assistance to IDPs. In response to this, the international community had put in place what was known as the 'collaborative approach'. This approach tried to involve the diverse UN and non-UN agencies in the protection and assistance of IDPs while discharging their respective areas of responsibilities. This was again found to be deficient and later replaced by the presently operating humanitarian reform called the 'cluster approach'. The cluster approach is made to address the critical gaps identified in the collaborative approach. Accordingly, each cluster area is assigned to the ultimately responsible lead agency as a provider of last response. Initial reports of its functioning have revealed some encouraging improvements in the provision of humanitarian assistance and protection. However, owing to its comprehensive nature involving various agencies of diverse mandates and expertise, its full evaluation is still under way and yet to be finalized at the end of 2010.

Chapter Four: Normative Responses at the Regional Level: The Case of OAU/AU

Introduction

Responses to the problem of internal displacement and internally displaced persons (IDPs) are usually dealt with at three levels: at the international, regional or national or local level. The national or local is the most proximate and primarily responsible for those facing adverse effects of internal displacement. The other two, commonly termed as international means of protection, are there only to give common guidelines and approaches for the national actors in dealing with challenges of international or regional concern. The mechanisms developed at the UN level have been shortly outlined in the preceding chapter.

Regional mechanisms of dealing with various aspects of human rights have a long history. Instances of these efforts include the adoption of general and specific subject matter human rights instruments in Europe, Latin America and Africa. These arrangements have also been given recognition and support from the global arrangement, particularly from the UN mechanism.

Africa has been one of the continents most affected by the problem of internal displacement, hosting nearly half of the world's IDPs population. This crisis is attributable to multiple factors ranging from armed conflict, internal strife, human rights violations, development projects, to competition over scarce natural resources and natural disasters. The gravity of the problem requires a comprehensive and coordinated efforts involving wider sector of entities, both at international, regional and national levels. The continent's unifying political entities, formerly OAU and now AU, have responded to the problem of internal displacement from time to time. These efforts cut across the normative and institutional dimensions. Each of these dimensions will be dealt with in detail in the subsequent sections and chapters.

4.1. Normative Mechanisms of Protection

4.1.1. Previous Mechanisms

In Africa, organized responses to the matters of human rights basically began with the formation of OAU in 1963. The founding document of this continental organ was repeatedly criticized for not giving due regard to human rights of persons. Mention to human rights expressly appears only in its ninth preamble.¹⁴⁰ Human right forms neither part of its objective nor the operative principles. OAU, conceived and born in the mid of struggles against colonialism and racial domination, principally focused on issues of territorial integrity, sovereignty and self-determination.¹⁴¹ However, despite its failure to mention expressly the promotion and protection of human rights as part and parcel of its object and principle clause, the OAU Charter can be credited for giving a basis and instrumentality to fight external domination and racial discrimination prevailing at that time. It was also on the basis of this initial effort that the continent subsequently tried to introduce many specific and general instruments in the area of human rights. It undeniably forms part of the continent's evolving efforts to address diverse challenges facing it from time to time. Fighting colonialism and racial discrimination can by no means be separated from promotion and protection of human rights. It was the denial of the peoples' rights to self-rule, unfair discrimination and injustices which forced the African People and its organization to wage bitter and protracted struggle and ultimately overcome it.

Among the later efforts of the OAU in the area of human rights were the adoption of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa and the adoption of more holistic and the region's basic human rights instrument, the African Charter on Human and Peoples' Rights (ACHPR) in 1981.¹⁴² Coming into force in 1974 and 1986 respectively, both regimes have brought significant expansions in the human rights dimension of the continent.

Even if the 1969 OAU Refugee Convention does not mention internally displaced and thus not directly applicable to the claims of IDPs, it is credited for introducing a protective regime for

¹⁴⁰ The Charter of Organization of African Unity, adopted on 25 May 1963, ILM (1964) 1116 (hereinafter the OAU Charter).

¹⁴¹ These are mentioned in the OAU Charter Preamble Para. 6 and Arts. II (1) (c) (d) & III (1)(3).

¹⁴² The 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa adopted in Sept. 1969 and entered into force in 1974, AHS/G, CAB/LEG/24.3 (hereinafter the OAU Refugee Convention), and African [Banjul] Charter on Human and Peoples' Rights, adopted on June 27 1981 and entered into force in 1986, OAU Doc. CAB/LEG/67/3 (hereinafter the African Charter).

particular problems facing Africa and not brought under the 1951 UN Refugee Convention and its 1967 Protocol. One of its essence lies with the expansion of the refugee definition, beyond and above the politically-motivated and western-oriented 1951 Convention¹⁴³ with a view to fit it to the then realities of the continent. Thus, it was made to be applicable to those persons fleeing their country or habitual residence owing to external aggression, occupation, foreign domination or *events seriously disturbing public order*.¹⁴⁴ The reference to the events seriously disturbing public order is so crucial in the present day Africa in which diverse internal strife, generalized violence, armed conflict and other related factors are becoming the main source of internal displacement. According to this expanded definition, IDPs may get enlarged protection if they managed to cross internationally recognized state border. In other words, the change of status from internal to external displacement, that is, refugees proper, will bring them under more effective protection under existing international normative and institutional arrangement.

The other regional document of considerable importance to the IDPs is the African Charter on Human and Peoples' Rights (ACHPR). The ACHPR is Africa's parent human rights instrument which laid down a basis for regional system of human rights protection and promotion. It is also a document which is inspired by the African traditions and values in the process of formulation of the rights and duties of individual persons and the group. It also manifests distinctive feature by incorporating holistically all categories of collective, economic, social, cultural, civil and political rights and duties of individuals and states in a single document. Thus, the wider range of rights guaranteed under this instrument are also equally available to IDPs like any other national of the state. In addition to basic guarantees of life, bodily integrity and security, there are certain provisions of particular relevance to IDPs such as the right to freedom of movement and choice of residence, prohibition of mass expulsion, right to seek and obtain asylum.¹⁴⁵

However, once again this parent instrument lacks express mention of IDPs under a separate title or provision. This could be attributable to the very purpose of the instrument which is designed to apply to the general public of the continent including displaced persons and possibly in anticipation of the subsequent making of specific subject matter instruments. The latter was

¹⁴³ The 1951 UN Refugee Convention defines refugee in a limitative way under article 1(a) as 'persons owing to well-founded fear of being persecuted for reasons of race, religion, nationality...is outside the country of his nationality or habitual residence and is unable or unwilling to avail himself of the protection of that country...'

¹⁴⁴ The OAU Refugee Convention, Art. I (2).

¹⁴⁵ The African Charter, Art. 12.

indeed witnessed by the adoption of various legal and policy instruments specifically dealing with certain categories of persons such as children and women.

Normative developments in the area of refugees and IDPs continued also with the conducting of international forums and resulting recommendations. This too had laid down a basis for latter course of action. Among these is the International Conference organized by the OAU and the UN on the Plight of Refugees, Returnees and Displaced Persons in Southern Africa (SARRED), which took place in August 1988. Its outcome Declaration and Plan of Action stipulated among other things that the refugee situation was a global responsibility and that asylum should be an international obligation.¹⁴⁶

In another symposium organized by the OAU and UNHCR in 1994 on Refugees and Forced Population Displacements in Africa, it came up with valuable Addis Ababa Recommendation. This document addressed the root causes of refugee flows and other forced displacements and outlined the means of dealing with such challenges.¹⁴⁷ The policy importance of this document is highly considerable as repeated references are made by latter instruments even including in the preamble of the recently adopted AU IDPs Convention.

Further efforts were also made in the area of adopting policy instruments expressly linking human rights and the effects of internal displacement. For instance, the first OAU Ministerial Conference on Human Rights held in 1999 in Mauritius adopted the Grand Bay Declaration and Plan of Action.¹⁴⁸ This Declaration recognizes, under paragraph 9, the link between human rights violations and population displacement and calls for redoubled and concerted efforts by states and the OAU to address the problem. This was repeated in the later Conference of the AU on Human Rights held in 2003 in Kigali, Rwanda¹⁴⁹ The outcome document of this conference, Kigali

¹⁴⁶ Rachel Murray, Human Rights in Africa. From OAU to the African Union, Cambridge University Press, 2004, P. 191.

¹⁴⁷ The OAU/UNHCR Symposium on Refugees and Forced Population Displacement in Africa, 8-10 Sept, 1994, Addis Ababa, Ethiopia.

¹⁴⁸ Gran Bay (Mauritius) Declaration and Plan of Action adopted in the First OAU Ministerial Conference on Human Rights in Africa (1999) Grand Bay, Mauritius (hereinafter the Grand Bay Declaration).

¹⁴⁹ Kigali Declaration adopted in the First AU Ministerial Conference on Human Rights in Africa (2003,)Kigali,

Declaration, called upon the member states to recognize forced displacement as a grave violation of fundamental rights to peace, security and dignity.¹⁵⁰ Moreover, it also requested the relevant organs of the AU to ensure the inclusion of human rights, humanitarian principles and other legal protection measures in peace agreements.¹⁵¹ The initiative to incorporate protection clauses in the peace agreements would be highly crucial to the persons uprooted from their homes due to armed conflict as this will facilitate safe, dignified and voluntary return of such victims and ensure durable solutions.

The AU Solemn Declaration on Gender Equality in Africa adopted in July 2004 has also highlighted its concern on the negative impact of internal displacement on women and children and the exclusion of these groups from conflict prevention, peace negotiation, and peace-building processes.¹⁵²

When assessing the protective regime of latter human rights instruments, two normative documents deserve an express recognition. These are the African Charter on the Rights and Welfare of the Child (ACRWC)¹⁵³ and the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (AWP).¹⁵⁴ The ACRWC is put in place as one of the regional human rights instrument of particular subject matter and designed to cover the gaps left by the UN Convention on the Rights of the Child (UNCRC) and dealing with challenges facing the African children. This fact was clearly mentioned in its preamble among which the socio-economic, natural disasters, armed conflicts, exploitation of African children are among the factors putting African children in a critical situation.¹⁵⁵ Most essentially the Charter, under article 22, demands the state to respect and ensure respect of the rules of humanitarian norms applicable to armed conflict and even internal tensions and strife. Article 23(4) of the Charter

Rwanda (hereinafter the Kigali Declaration).

¹⁵⁰ Id., Para. 11.

¹⁵¹ Id., Para. 14.

¹⁵² Solemn Declaration on Gender Equality in Africa (2004), Addis Ababa, Ethiopia (herein after the Solemn Declaration), Preamble Paras. 9 &11 and Para.2.

¹⁵³ African Charter on the Rights and Welfare of the Child(ACRWC), adopted in July 1990 and entered into force in November 1999, OAU Doc.CAB/LEG/24.9/49 (herein after the African Children's Charter).

¹⁵⁴ Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted in July 2003 and came into force in November 2005, Assembly/AU/Dec.14 (II) (hereinafter the African Women's Protocol).

¹⁵⁵ The African Children's Charter, Preamble, Para.3.

further directs the analogous application of all the guarantees of refugee children to internally displaced children whatever the causes of displacement are.

Therefore, the ACRWC becomes the first regional human rights instrument containing an express guarantee for internally displaced children. The analogous application of the guarantees of refugee children to internally displaced children and the extension of application of humanitarian norms to situations falling below the threshold of armed conflict under IHL are among the unique innovations brought about by the Charter.

The African Women's Protocol (AWP), on the other hand, has not missed one of the serious challenges facing African women. This was addressed by first high-lighting the gravity of the problem on vulnerable groups as women and then providing prohibitive and remedial mechanisms. The Protocol obliges states parties to ensure the increased participation of women in the structures and processes for conflict prevention, management and resolution at all levels as well as in the management of camps and settlements for asylum seekers, refugees, returnees and displaced persons, in particular, women.¹⁵⁶ Women victims of armed conflicts are also regulated under a separate provision which clarifies the obligation of states parties to respect humanitarian law rules. These include, according to article 11(3&4), protection of women against all forms of violence, rape and other forms of sexual exploitation; punishing the perpetrators of such acts and ensuring that no child below 18 years is recruited and takes a direct part in hostilities.

Thus, it can be certainly concluded that the AWP also recognizes the increasing vulnerability and victimization of women to internal displacements especially caused by armed conflicts. To this end, certain preventive and remedial mechanisms are provided and states parties are duty bound to respect and ensure respect by other entities violating the rights of women. The AWP is one of the major normative frameworks laid down by the newly transformed political organ of Africa, that is, the Africa Union. However, the other efforts of this entity beginning from its establishing document to the recently adopted IDPs Convention deserve a separate analysis in the subsequent subsection.

¹⁵⁶ The African Women's Protocol, Art. 10(2) (a-d).

4.1.2. Mechanisms under the AU System

The main concern of this subsection will be elaborating the normative contribution of the Constitutive Act and other binding and non-binding instruments especially the Protocol establishing the Peace and Security Council and the recently adopted Kampala Declaration. These instruments have laid down a basic framework for the latter development of principal legal regime for the protection of the rights of IDPs.

Political, economic and social transition from former OAU to the new AU was effected in 2001, one year after the adoption of its Constitutive Act.¹⁵⁷ The new institution's commitment to human rights was expressly recognized under its opening preamble, the object and principle clauses. The preamble reiterates AU's determination to promote and protect human and peoples' rights, consolidate democratic institutions and culture, and ensure good governance and the rule of law. This is further entrenched in the objectives of the Union. Thus, promoting democratic principles and institutions, popular participation and good governance; and more specifically promoting and protecting human and peoples' rights in accordance with relevant regional and other human rights instruments are among the objectives of the Union.¹⁵⁸ The operative principles of the Union also incorporate respect for democratic principles, human rights, the rule of law and good governance.¹⁵⁹ Gender equality, the respect for the sanctity of human life, condemnation and rejection of impunity are also part of the operative principles which carry crucial human rights dimension.¹⁶⁰

Another far-reaching contribution of the AU Constitutive Act, at least legally speaking, is its recognition of the right of the Union to intervene in the member state in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity and in order to restore peace and security.¹⁶¹ To this end, a centrally enforcing organ, that is, the AU Peace and

¹⁵⁷ Constitutive Act of the African Union, adopted on July 11, 2000 in Lome, Togo and came into force on May 26, 2001, OAU Doc.CAB/LEG/23.15 (herein after the Constitutive Act).

¹⁵⁸ Id., Art. 3(g)&(h).

¹⁵⁹ Id., Art. 4(m).

¹⁶⁰ Id., Art. 4(l)&(o).

¹⁶¹ Id., Art. 4(h) & (j). This principle is also restated under Article 4(h) of the Protocol amending the AU Constitutive

Security Council (PSC) is established as one of the principal organ of the AU.¹⁶² The AU Peace and Security Council, which replaced the former OAU Mechanism for Conflict Prevention, Management and Resolution established in June 1993, is a standing decision-making organ for the prevention, management and resolution of conflicts and serves as a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa.¹⁶³ Without ignoring that the entire objectives of the PSC have a significant bearing on human rights, the Council is, among other things, expected to promote and encourage democratic practices, good governance and the rule of law, protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law, as part of efforts for preventing conflicts.¹⁶⁴

Thus, given conflicts as one major cause of internal displacement, the mandates of the Council in the area of conflict prevention, management and resolution as well as its human rights dimension can give a strong legal basis for the Union's future course of action. What's still remaining is the real testing of these innovative norms on the ground. Despite the existence of such far-reaching standards, the Union and the Council are not still responding adequately and effectively to the crisis of internal displacement mainly caused by internal armed conflicts, internal strife and generalized violence. These events have been witnessed recently in the failures of the regional mechanism to stop the sufferings and grave violations of the rights of Africans in DRC, Central African Republic (CAR), Sudan (Darfur), Somali, Zimbabwe and even recently in Guinea after the military group seized power. The underlying reasons for the recent normative paradigm shift in the responses of the African system towards grave violations of human rights and its future prospects will be analyzed more in subsequent section.

However, despite the challenges facing the regional mechanisms created to act on behalf of such vulnerable groups as IDPs, continental efforts have been continued as witnessed in the recent first Special Summit on Refugees, Returnees and IDPs in Africa held from October 22-23, 2009 in Kampala, Uganda. This was the first Summit ever seen exclusively focusing on the protection and

Act, adopted on July 11 2003 and not yet in force(hereinafter the Amending Protocol).

¹⁶² The Amending Protocol, Art. 5(f) and Protocol Relating to the Establishment of the PSC of the AU adopted on 9 July 2002 and entered into force on 26 December 2003, AU Doc ASS/AU/Dec.3(I) (herein after the PSC Protocol), Art. 2.

¹⁶³ The PSC Protocol, Art.2 (1).

¹⁶⁴ Id., Art.3 (f).

other needs of certain categories of persons. One of the outcome documents of this Summit was Kampala Declaration on Refugees, Returnees and IDPs in Africa.¹⁶⁵

This policy document manifesting political commitment of the continent's supreme organ to forced displacement have addressed various issues. It begins by addressing the prevention of forced displacement and covers the need for extending effective protection to the victims of forced displacement in general and particularly vulnerable groups as women and children and essentially on the reconstruction of communities emerging from conflicts and natural disasters.

In their commitment to prevent forced displacement, an increased emphasis is made to examine those factors that cause or contribute to forced displacement of people arising from conflict and natural disasters. To this effect, states present pledged to establish or strengthen high-level national mechanisms to address the root causes, address under-development and unemployment, sign and ratify relevant legal instruments protecting persons both during war and peace times especially the African Charter on Democracy, Election and Governance.¹⁶⁶ Thus, the Declaration recognized that internal displacement is a crisis caused by multiple factors touching upon the political, economic and environmental situation of a country. To this end, concerted measures should be taken to adequately address the root causes of internal displacement arising both internally and externally especially the support for mercenaries and sponsoring of armed groups that have fueled conflict in Africa.

Once after the crisis of internal displacement has occurred, the effective protection of victims of such forced displacement is another concern of the Declaration. Among those are the undertaking to find durable solutions by promoting and creating conducive conditions for voluntary return, local integration or settlement, creating an enabling environment for such victims to become self-reliant through socio-economic integration, and maintaining the civilian and humanitarian character of camps and centers hosting refugees and IDPs.¹⁶⁷

¹⁶⁵ Kampala Declaration on Refugees, Returnees and IDPs in Africa, adopted by the Special Summit on Refugees, Returnees and IDPs in Africa, 22-23 Oct 2009, Kampala, Uganda, Ext/Assembly/AU/PA/ Draft/Decl. (I) Rev.1 (herein after the Kampala Declaration).

¹⁶⁶ Id., Prevention of Forced Displacement in Africa, Paras. 1, 2, 3&4.

¹⁶⁷ Id., Effective Protection of Victims of Forced Displacement, Paras. 7, 10 and 11.

The Declaration has also urged to meet the specific needs of displaced women and children and other vulnerable groups.¹⁶⁸ Moreover, the commitment on reconstruction of communities emerging from conflicts and natural disasters is premised on resolving the crisis of internal displacement in a sustainable manner. In achieving this, a call is made to implement the AU Policy Framework on Post-Conflict Reconstruction and Development (PCRD), integrated support to both the affected and host-communities, increasing support from humanitarian response to development assistance in disaster and conflict-affected countries, and dealing with challenges of climate change and increased pressure on natural resources.¹⁶⁹

What the above declaratory commitment shows is that effective prevention and eradication of internal displacement requires a series of continuing efforts before, during and after its occurrence. Steps and measures taken at each stage will have considerable implication in the effective response and durable solutions to the problems of internal displacement. These efforts will again require forging of partnerships with various international and regional development and humanitarian agencies as well as non-governmental organizations (NGOs).¹⁷⁰

Therefore, it is on the basis of this firm recognition of the crisis of internal displacement and its impact on various aspects of African Peoples that the AU Supreme organ convinced to adopt the first ever seen binding human rights instrument for the protection and assistance of IDPs in Africa.

The AU Convention for the Protection and Assistance of IDPs in Africa also known as the Kampala Convention is possibly the first ever seen instrument of regional and international application in the entire continent of Africa. However, it is also important to refer to the contribution of the Great Lakes Region (GLR) in taking the lead in establishing binding legal and institutional mechanisms for the protection and assistance of IDPs. Here follows a brief

¹⁶⁸ Id., Meeting the Specific Needs of Displaced Women and Children and Other Vulnerable Groups, Paras. 12-14.

¹⁶⁹ Id., On Reconstruction of Communities Emerging from Conflicts and Natural Disasters, Paras. 15, 16, 19 and 22.

¹⁷⁰ Id., On Forging Partnerships in Addressing Forced Displacement, Paras. 26&27.

discussion of the initiatives in the GLR on IDPs which has given the basis for the latter efforts at a continental level, that is, the AU.

4.1.3. Lessons from the Great Lakes Region (GLR) Protocols

The UN, OAU/AU and inter-state sponsored International Conference on Great Lakes Region (ICGLR) began in 1996 after the shocking events of genocide in Rwanda in 1994 and continued ethnic conflicts in the area.¹⁷¹ After a decade of consultation and deliberation, the sub-region has come up with Dar-es Salaam Declaration in 2004 and the Nairobi Pact on Security, Stability and Development in the GLR in 2006.¹⁷² The outcome documents of ICGLR are so comprehensive dealing with the security, development, governance, human rights and other many issues in the sub-region. In addition to the main Pact which creates a link among other instruments, the entire documents are consisted of ten Protocols, four Programmes of Action and a set of implementing mechanisms and institutions.

Out of the ten Protocols constituting the Pact, two of them specifically addressed the protection, assistance and other property issues of IDPs. These are the Protocol on the Protection and Assistance to IDPs and the Protocol on the Property Rights of Returning Persons.

The Protocol on the Protection and Assistance to IDPs establishes a legal framework for the protection of IDPs through incorporation of the Guiding Principles into domestic law, providing measures aimed at protecting the physical safety and material needs of the displaced, and creating obligations to prevent and address the root causes of displacement.¹⁷³ Moreover, Article 6 of the same urges states parties to adopt and implement the Guiding Principles as a regional framework and to use its Annotations as an authoritative source for interpreting the application of the Principles. This is one of the achievements which systematically convert a collection of non-binding Principles based on pre-existing international standards to a mandatory sub-regional tools for the protection and assistance of IDPs.

¹⁷¹ International Justice and the Pact on Security, Stability and Development in the GLR, An Information Note, International Refugee Rights Institute (2008), P.2.

¹⁷² Chaloka Beyani, Introductory Note on the Pact on Security, Stability and Development in the GLR (2007), P.1 available at <http://eprints.lse.ac.uk/2429> accessed on 17/10/09.

¹⁷³ Great Lakes Region Protocol on the Protection and Assistance to IDPs adopted on November 30, 2006 and entered into force in 2008 (herein after the GLR IDPs Protocol), Art. 2.

The Protocol has also reiterated the primary responsibility of member states in protecting the physical and material safety of IDPs, assessing their needs, establishing and designating organs responsible for IDPs, and facilitating humanitarian access to the affected population. It also contains elaborate guarantees and norms applicable to development-induced displacement.¹⁷⁴

Therefore, it is with the above and other safeguards dealing with populations uprooted within their national borders that laid down the basis for later frameworks at the regional level. To this end, it is stated that the involvement of the AU in the ICGLR process, the role of some key drafters in both the ICGLR and AU processes and the similarity between the Protocol and the [Draft] Convention signals a strong link between the ICGLR and the AU initiative to adopt a legal framework for the protection of IDPs.¹⁷⁵ This contention is certainly valid as many provisions of the Protocol are included in a more detail manner in the AU IDPs Convention. On the other hand, the provisions of GLR Protocols on IDPs are more elaborate than the AU IDPs Convention in certain areas such as provisions providing for development-induced displacement and guarantees on property rights of IDPs.

4.1.4. The AU IDPs Convention

4.1.4.1. The Need for Separate Legal Framework

The effort to create a separate international regime for the protection and assistance of IDPs may not be easy given the complexities of the world politics and the resulting lack of consensus. This is because there exist strong voices against the direct regulation of persons within the national territory on the ground of the principles of sovereignty and non-interference in the internal affairs of states. It is true that the responsibility for protecting the security and well being of nationals in general and IDPs in particular rests with their governments. This was reaffirmed in the Deng's co-authored work, *Masses in Plight*:

Since there is no adequate replacement in sight for the system of state sovereignty, primary responsibility for promoting the security, welfare and liberty of populations must remain with the state. At the same time, no state claiming legitimacy can justifiably quarrel with the

¹⁷⁴ Id., Arts. 3(3), 4, 5& 6..

¹⁷⁵ Chaloka Beyani, in Allehone Mulugeta, *Legal and Institutional Dimensions of Protecting and Assisting IDPs in Africa*, *Journal of Refugee Studies* (2009), P.166.

*commitment to protect all its citizens against human rights abuse. Effective sovereignty implies a system of law and order that is responsive to the needs of the national population for justice and general welfare.*¹⁷⁶

Therefore, it has been strongly argued that sovereignty can not be dissociated from responsibility and that a state should not be able to claim the prerogatives of sovereignty unless it carries out its internationally recognized responsibilities to its citizens, which consists of providing them with protection and life-supporting assistance.¹⁷⁷

However, despite the continuing importance of the principles of sovereignty and non-interference in the inter-state relationship, the proliferation of human rights treaty-making has reduced its absolute nature. Following the atrocities of the WWII and massive human rights standard-setting, security and welfare of persons in one state can also be a concern for other members of the international community. Limitations to the very doctrine of sovereignty are also said to emanate from the consent of the state by voluntarily subjecting itself to international treaty obligations. The international community may also in exceptional situation collectively intervene in the matters of internal affairs as recognized under Chapter VII of the UN Charter and the Constitutive Act of the AU.

Therefore, it is the increasing recognition of the concept of responsible sovereignty and the protection of human rights that convinced member states of AU to provide a treaty regime for IDPs in Africa. However, without discrediting this initiative, there are still other challenges in preferring conventional route of protecting IDPs to other mechanisms such as accepting the Guiding Principles. These are the reasons stated during the making of the Guiding Principles: lack of support from governments; time factor and the existence of sufficient international law applicable to IDPs.¹⁷⁸ Concern to the lack of political support from the government for the making of a separate treaty regime has gone half-way by the adoption of a Convention in a

¹⁷⁶ Roberta Cohen and Francis M. Deng, Masses in Plight, The Global Crisis of Internal Displacement (1998), P.275-276.

¹⁷⁷ Roberta Cohen, Developing an International System for IDPs, International Studies Perspective (2006), P. 90.

¹⁷⁸ Roberta Cohen, The Guiding Principles on Internal Displacement: An Innovation in International standard Setting, Global Governance 10 (2004), PP. 463-64.

Special Summit organized for that purpose. This has shown the existence of political will on the part of the African leaders to address the problem of internal displacement by recently adopting what are known as Kampala Declaration and Convention in October 2009.

Time concern has been raised in relation to longer time taken during the negotiation, adoption and ratification. The negotiation and adoption stage of the AU IDPs Convention have not so far been so cumbersome. However, clear challenge remains as to its ratification and entry into force. This concern mainly emanates from past experiences of standard setting in the continent such as the African Children's Charter and African Women's Protocol both of which took a decade and half a decade respectively to come into force. The recent unsatisfactory progress in the ratification of African Charter on Democracy, Election and Good Governance is another source of fear. Such unpleasant lessons and the fact that the Special Summit was attended by very few Heads of State and Government once again reinforce the earlier argument to avoid engaging on hard law-making. Thus, it is up to the signatory and other African states to facilitate the ratification and entry into force of the Convention which will then leave behind a good experience for other regions to follow similar line of response.

As to the contention that the rights of IDPs are sufficiently covered in the pre-existing legal instruments and what remains is its proper implementation rather than making a new instrument, it seems partly a fair argument. Important African scholars and among the drafters of the AU IDPs Convention such as Chaloka Beyani points to the existence of major lacunas which pose an imbalance in the African Union's commitment to resolve the problems of IDPs, considering that at least a legal framework exists for the protection of refugees in Africa.¹⁷⁹ However, there are also others who contend that the problem of protection of IDPs in the region can not be entirely associated with the absence of a regional legal framework. Even existing treaties and standards, including the 1969 Refugee Convention are examples of such an unfortunate outcome.¹⁸⁰

¹⁷⁹ Chaloka Beyani, "Recent Developments: The Elaboration of Legal Framework for the Protection of IDPs in Africa," *Journal of African Law* 50, 2 (2006), P.190.

¹⁸⁰ Allehone Mulugeta, *Supra* Note 36, P. 168.

The above arguments show that failures to protect and assist IDPs in Africa cannot be entirely attributed to the lack of legal instruments. As elaborated in the preceding chapters, the protection of IDPs falls under a wider range of human rights and humanitarian law instruments. There may be instances that certain areas may not be adequately covered or a norm may be designed in a manner to have general application. Still there may exist few areas which go unaddressed by the existing norms. The identification of such gaps and inadequacies have led to the restatement of human rights and humanitarian law norms to the specific needs of IDPs by the Representative of Secretary-General on IDPs and hence came out as Guiding Principles. Therefore, what was done in the making of the AU IDPs Convention is preparation of norms combining both human rights and humanitarian law rules and made them applicable to the particular needs of IDPs.

Once again it has to be taken seriously that the creation of a treaty-regime for IDPs in Africa does not mean that such groups are not covered under existing regimes. There exist considerable norms covering the protection and assistance needs of IDPs. But these were too scattered, general and touching some aspects of their protection. Codification of binding legal instrument is found necessary due to the gravity of the problem and the need to comprehensively address the problem of internal displacement in Africa. Moreover, there is nothing wrong to put in place a separate instrument specifically addressing IDPs. Human rights standard-settings at the global and regional level have so far addressed especially vulnerable groups of the society as children, women, minorities and recently persons with disabilities in a separate instrument.

Therefore, it was with this understanding that the Executive Council of the AU requested the Secretariat to develop a legal instrument that provides for adequate protection for IDPs.¹⁸¹ The drafting process was further approved by the 2006 Ouagadougou Ministerial Conference which recommended its finalization and submission for consideration and adoption by the Special Summit.¹⁸² After consideration by meetings of independent experts in December 2007 and June 2008, the Draft Convention was adopted by the AU Ministerial Meeting in November 2008.¹⁸³

¹⁸¹ Decision of the AU Executive Council, Ex/CL/Dec.127 (V), adopted in July 2004 in Addis Ababa, Ethiopia.

¹⁸² Ouagadougou Declaration of the Ministerial Meeting on Refugees, Returnees and IDPs in Africa, from June 1-2, 2006, AU/MIN/HARDP/Decl.I (herein after the Ouagadougou Declaration).

¹⁸³ Allehone Mulugeta, *Supra* Note 36, PP. 166-67.

Finally, it was adopted as a legal instrument by the First Special Summit of African Heads of States and Governments on Refugees, Returnees and IDPs held in Uganda, Kampala from October 19-23.¹⁸⁴ The last date of the Summit was especially historical in that it marked the putting of signatures on the world's first ever seen Convention on the protection and assistance of IDPs. The AU IDPs Convention will be the first binding regional instrument of wider application.

According to one draftsman, the outline of the Convention is based on the legal premises of state responsibility for the protection and assistance of IDPs. Moreover, its content draws on the existing and applicable branches of human rights and international humanitarian laws, and synthesizes these whilst seeking to incorporate directly, where relevant, aspects of the Guiding Principles on Internal Displacement.¹⁸⁵

Thus, the discussion hereafter will elaborate some of the essential features and possibly innovations brought about by this internationally unique instrument.

4.1.4.2. Objective of the Convention

The underlying legal, political, historical and other motivation behind the adoption of a particular convention usually figures out in its preamble. The AU IDPs Convention shares this feature by laying down those security, vulnerability, legal and institutional vacuums and other political reasons leading to the adoption of the Convention. The one which attracted the attention of its makers in the first place is the relationship between internal displacement and the continuing instability and tension for African states.¹⁸⁶ This is particularly important in that situation of massive displacement especially by armed conflict and generalized violence has been both the cause and effect of protracted instability in many African states. This even may have cross-border effects disturbing other neighboring states as witnessed in GLR and Western African States.

¹⁸⁴ African Union Convention for the Protection and Assistance of IDPs in Africa (Kampala Convention) adopted on October 23, 2009 and not yet entered into force (herein after the AU IDPs Convention).

¹⁸⁵ Beyani, Supra Note 40, P.194.

¹⁸⁶ The AU IDPs Convention, Preamble Para.1.

However, beyond and above state-centered security reasons, it is the ever increasing suffering and direct vulnerability of IDPs themselves which lies at the center of adopting a new instrument.¹⁸⁷ The impact of internal displacement is so tremendous. As elaborated earlier, it affects basic personal, family, economic, social, cultural and other rights of the victim. This is said to be exacerbated by the absence of legal and institutional arrangements responding to the particular needs of IDPs.¹⁸⁸ The recognition of inherent rights of IDPs provided for and protected under international human rights and humanitarian laws and the primary responsibility of states to respect, protect and fulfill these rights are also firmly stated.¹⁸⁹ The principles of non-discrimination, equality and equal protection of the law as provided for in the regional and international human rights instruments are also reaffirmed to be part of the IDPs Convention under paragraph 8 of the preamble.

The main objectives designed to guide the application and interpretation of the Convention are listed under Article 2. The AU IDPs Convention is based on the objective to: promote and strengthen regional and national measures to prevent or mitigate, prohibit and eliminate root causes of internal displacement and to provide for durable solutions; to establish a legal framework for preventing internal displacement and assisting and protecting IDPs; and to provide for the obligations of states parties, armed groups, non-state actors and other relevant actors in the prevention of internal displacement and the protection and assistance of IDPs.¹⁹⁰

It is clearly noticeable that the latter conventional provisions cross-cut nearly the above objectives in more detail. Provisions are made to prevent factors leading to displacement such as respect to the obligations under international law, devising an early warning system to address potential displacement and preventing persons from arbitrary displacement.¹⁹¹

However, one major element missing from the objective provision is the desire to set up regional institutional arrangement responding to the specific needs of IDPs in the continent. This failure is also repeated in the subsequent provisions of the Convention. This is one aspect of the

¹⁸⁷ Id., Para.2.

¹⁸⁸ Id., Para.12.

¹⁸⁹ Id., Paras. 9&10.

¹⁹⁰ Id., Art. 2(a-e).

¹⁹¹ Id., Arts. 4(1)(2) &(4).

drawbacks of the AU IDPs Convention. The Convention excessively relies on national and global arrangements of protecting and assisting IDPs. This may ultimately lead to the loss of possible benefits of the Convention by externalizing its institutional dimension for the protection and assistance of IDPs.

4.1.4.3. Rights of IDPs under the Convention

The recognition of the rights of IDPs is made in highly encompassing manner. This begins with the affirmation of their inherent rights as widely recognized in various human rights and humanitarian laws. Moreover, an extensive reference is made to the longer list of regional and global human rights instruments.¹⁹² This also reaffirms the belief that there exist considerable norms in the pre-existing instruments which can be invoked by IDPs in a variety of situations. Hence, the rights incorporated in the Convention reflect those wider categories of guarantees existing under the international human rights and humanitarian laws which are made applicable to the specific needs of IDPs. Therefore, the AU IDPs Convention seems to have utilized the recent trends of closing complementarity and convergence between the international human rights and humanitarian laws. Of course, this trend is not a new phenomenon and has been applied in the making of the Rome Statute establishing the International Criminal Court (ICC) and the Guiding Principles on Internal Displacement. Thus, the non-ratification of AU IDPs Convention will not relieve the African governments from discharging their obligations under pre-existing international and regional normative rules.

Owing to the wider scope of reference to other relevant instruments and comprehensiveness of the rights recognized in the Convention itself, closer attention will be given here only to some innovative norms. Following the trend set under the Guiding Principles, the AU IDPs Convention is the first human rights treaty in expressly recognizing the right of all persons to be protected against arbitrary displacement.¹⁹³ As discussed earlier, express mention of this right exists only in international humanitarian law (IHL) and the law relating to indigenous peoples. In human rights law, by contrast, this prohibition is only implicit in certain provisions in particular those pertaining to freedom of movement and choice of residence, freedom from arbitrary

¹⁹² Id., Preamble, Paras.8 &10.

¹⁹³ Id., Art.4 (4).

interference with one's home, and the right to housing.¹⁹⁴ Thus, the AU IDPs Convention becomes the first human rights treaty in expressly guaranteeing persons from risks of arbitrary displacement.

The Convention has further enumerated instances of non-exhaustive categories of arbitrary displacement in some cases by clearly going beyond the lists provided under the Guiding Principles. In addition to displacement based on policies of racial discrimination or other similar practices, unjustifiable individual or mass displacement of civilians in situations of conflict or use of displacement as a method of warfare or collective punishment, the AU IDPs Convention considers displacement caused by generalized violence or violations of human rights or those as a result of harmful practices as arbitrary.¹⁹⁵ The inclusion of the latter grounds is clearly the result of expanding normative bases in the regional human rights treaty-making. Thus, the AU IDPs Convention has taken further inspiration from previous instruments such as the OAU Refugee Convention which expanded the refugee definition and African Women's Protocol which again introduced some normative principles as harmful practices as violation of human rights. This has also proved the efforts to follow consistent and integrated treaty-making in the regional human rights system.

However, the AU IDPs Convention fails to contain in the list the arbitrariness of displacement by development projects which are not justified by compelling and overriding public interests. The hesitation to provide a strong legal basis for development-induced displacement has been witnessed in the drafting process of the Convention by eliminating the original definitional article on development-induced displacement and further diminution of the contents of the provisions on the same subject matter. This is one point awaiting further discussion later on.

Moreover, article 4(5) of the Convention provides for the protection of communities with special attachment to and dependency on land due to their particular culture and spiritual values from being displaced from such lands except for compelling and overriding public interests. This guarantee is again highly important in the continent where a substantial number of traditional

¹⁹⁴ Walter Kalin, *The Guiding Principles on Internal Displacement: Annotations*, Studies in International Legal Policy No.32 (2000), P.14.

¹⁹⁵ The AU IDPs Convention, Art.4(4).

communities with strong attachment to and dependency on land exist. However, the AU IDPs Convention seems to adopt a cautious approach, unlike Principle 9 of the Guiding Principles, in failing to expressly mention these groups of communities as indigenous, minorities, or other peoples. What is even worse is that no express alternatives are provided in case such communities are displaced for compelling and overriding public interest. Thus, the implementing organs can utilize the direction given by ILO Convention No. 169 on Indigenous and Tribal Peoples which, under Article 16(4), states that if return is not possible, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future developments.¹⁹⁶ However, scarcity of land and the possible resistance from other communities out of conception of privileged treatment of such groups will be another source of challenge in implementing this norm.

The AU IDPs Convention has also clarified the right of IDPs to seek safety in another part of the state and more essentially introduced a nearly new regime which guarantees IDPs against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk.¹⁹⁷ The internal plight alternative for IDPs is said to be impliedly embodied under human rights protection of freedom of movement. However, the prohibition of forcible return to areas of danger is the innovative provision which is inspired by the *principle of reoulement* in refugee law. To this effect, W. Kalin states in relation to his Annotations on Guiding Principles on Internal displacement:

This is a novel principle with no direct antecedent in existing instruments. Protection against forcible return to situations of danger is well established in the refugee law principle of non-refoulement, and in major human rights protections relating to torture and the deportation or extradition of aliens. As prohibiting the return of IDPs to situations of danger can contribute significantly to their physical protection and sense of security, sub paragraph (d) meets an important need applying,

¹⁹⁶ Convention Concerning Indigenous and Tribal Peoples in Independent Countries adopted in June 1989 and came into force in May 1991 (herein after the ILO Convention No.169).

¹⁹⁷ The AU IDPs Convention, 9 (2)(e).

*by analogy, the authority of existing refugee and alien-related human rights law to the field of internal displacement.*¹⁹⁸

Therefore, the AU IDPs Convention takes the lead in incorporating the far reaching guarantees of the principle of non-refoulement as provided in the refugee instruments and the customarily recognized torture convention into a regional human rights document. It will continue as an important safeguard for those fearing to return to places where they may face risks either from local authorities or communities who caused their displacement.

The AU IDPs Convention, however, unlike the Guiding Principles, fails to reaffirm what is uniquely recognized in its former human rights instruments, that is, the right of IDPs to seek and obtain asylum in other countries. Given the expanded refugee definition under the 1969 Refugee Convention and the express guarantees of this right under Article 12(3) of the African Human and Peoples' Rights Charter, IDPs can still legitimately invoke and utilize their right to seek and obtain asylum in other countries if they managed to cross an internationally recognized state border.

4.1.4.4. Property-Related Rights of IDPs

Persons uprooted from their homes are usually denied of various benefits of their property rights. This include denial of its direct use and enjoyment, destruction and looting by the agents who caused displacement and/or ultimate occupation by the perpetrators or third parties. The right to property has been recognized under Article 17 of the UDHR and Article 14 of the African Charter. Furthermore, no encroachment is permissible except in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.¹⁹⁹ Safeguarding the property interests of IDPs has also a tremendous effect for the search of durable solutions to problems of internal displacement. A good deal of lessons can also be learned from the efforts of Great Lakes Regions which devoted one of its 10 Protocols on the property rights of returning persons.²⁰⁰

¹⁹⁸ Kalin, Supra Note 55, PP. 37-38.

¹⁹⁹ The African Charter, Art.14

²⁰⁰ The GLR Protocol on the Property Rights of Returning Persons adopted on 30 November, 2006 and entered into

The AU IDPs Convention has, consistent with the continent's main human rights instrument and the commitments under IHL, also provided for taking necessary measures to protect individual, collective and cultural property left behind by displaced persons.²⁰¹ Premised on the experiences from the GLR Protocol, Article 11(4) requires states to establish appropriate mechanisms providing for simplified procedures where necessary, for resolving disputes relating to the property of IDPs.

Moreover, the recognition of the right of IDPs to effective remedies especially with regard to issue of compensation and other forms of reparation for damage incurred as a result of displacement form an essential aspect of evolving international law norms.²⁰² Walter Kalin contends that the question of the right to restitution for the property or to compensation for its loss is not a well-settled principle, but constitutes an evolving trend in general human rights instruments, decisions of regional human rights bodies such as in Europe and Inter-American systems, rules of the War Crimes Tribunal for former Yugoslavia (ICTY), Peace agreements and the World Bank Manuals.²⁰³

Therefore, it is in the mid of this normative uncertainties that the AU IDPs Convention obliges states parties to provide for the right of IDPs to effective remedies including the claim for just and fair compensation and other forms of reparations. However, this provision has some problems. One, it leaves broader margin of option to the states parties to provide for effective legal framework instead of imposing clear obligation to observe. Two, the liability of states parties is only expressly stated in relation to its failures during natural disasters.²⁰⁴ This is unjustifiable limitation as displacement and the resulting damage to property rights of IDPs may be caused by different factors which might have direct or indirect relation with the state concerned. In this area, the GLR Protocol on similar subject is stronger in subjecting states to compensate for the loss of the property directly caused by them and facilitating or ensuring

force in 2008 (hereinafter the GLR Property Protocol).

²⁰¹ The AU IDPs Convention, Art. 9(2)(i).

²⁰² Id., Art.12 (1&2).

²⁰³ Kalin, *Supra* Note 55, PP. 72-73.

²⁰⁴ The AU IDPs Convention, Art.12 (3).

compensation for losses by non-state actors.²⁰⁵ This is a better protective regime as it provides for alternative right of recourse of IDPs against either the state itself or others liable via the existing state machinery irrespective of the cause of displacement. Thus, when seen from this sub-regional mechanism, the AU system fails to provide a reliable means of protection for property interests of IDPs left behind. It remains to be seen whether states will after ratification put in place national systems for property claims of IDPs, of course, if such system does not exist before.

4.1.4.5. Registration and Personal Documentation

Internal displacement is a phenomenon depriving many material and non-material rights of persons. People fleeing from their homes or habitual residence may not have the necessary identity documents so as to be entitled to various rights. This may in turn deny or limit their right to recognition as a person before the law, the exercise of their other personal, family, political, and social rights. These are the rights extensively recognized in various regional and international human rights instruments. The Compilation and Analysis of Representative of Secretary-General (RSG) on IDPs, Mr. Francis M. Deng, has correctly underscored that present international law does not adequately protect the needs of IDPs for personal identification, documentation and registration.²⁰⁶

The above stated legal lacuna has been covered in the AU IDPs Convention. It is explicitly stated that IDPs shall be issued with relevant documents necessary for the enjoyment and exercise of their rights such as passports, personal identification documents, civil certificates, birth certificates and marriage certificates.²⁰⁷ The same also applies to the issuance of new documents or replacement of documents lost or destroyed in the course of displacement without imposing unreasonable conditions. The equal entitlement of this right to the women and men as well as separated and unaccompanied children is stipulated consistent with the existing human rights standards guaranteeing equality, equal treatment and non-discrimination.²⁰⁸

²⁰⁵ The GLR Property Protocol, Art.8 (1&2).

²⁰⁶ Kalin, *Supra* Note 55, P.51.

²⁰⁷ The AU IDPs Convention, Art.13 (2).

²⁰⁸ *Id.*, Art.13(3&4).

Therefore, the AU IDPs Convention has brought about innovative norms in addressing various aspects of identity documents. The documents mentioned will obviously assist the IDPs in exercising wider categories of civil, political, economic, social and cultural rights. Its recognition as a right in a binding legal instrument constitutes one major contribution in the efforts of protection of the rights of IDPs.

4.1.4.6. State Obligations under the Convention

Human rights treaties basically impose various levels of obligations on states parties to them. As the main actors in the international law-making process, states bear the main obligation to respect, protect, promote and fulfill the rights recognized and discharge the obligations in the human rights instrument.

The obligation to respect human rights refers to the obligations to refrain from state intervention, provided the latter is not admissible under any relevant legal limitations and reservations clauses. Unjustified interventions are considered violations of the human right in question.²⁰⁹ The obligation to protect, on the other hand, requires positive state action as it aims to avoid human rights violations by private persons.²¹⁰ Finally, the obligation to fulfill human rights refers to the state's obligation to take legislative, administrative, judicial and practical measures necessary to ensure that the rights in question are implemented to the greatest extent possible.²¹¹

What is missing from Manfred Nowak's dichotomy of state obligation is its promotional aspect which of course can cross-cut through all other obligations. This is because the state may promote the positive culture and altitude towards the respect, protection and fulfillment of human rights in wider range of public and private environment.

It is easily observable from the above assertion that states are primarily responsible for the respect, protection and realization of human rights by persons within their national territory.

²⁰⁹ Manfred Nowak, Introduction to the International Human Rights Regime (2003), P.49.

²¹⁰ Id., P.50.

²¹¹ Id., P.49.

With regard to the obligation to respect, states should not engage in depriving the rights or hindering its exercise or enjoyment by the bearers. Protection encompasses the obligation of states to ensure respect of such rights by extra-state entities by preventing, stopping or remedying unjustifiable encroachment over such rights. These include, among others, the duty to establish organs preventing or remedying its unjustifiable interferences in the rights of persons or the duty to punish the offenders and compensate the victims of such violation. Ultimately, the obligation to fulfill relates to the facilitating the enjoyment or realization of the rights by the holder or direct support and provision of the necessary means ensuring the wellbeing and safety of the persons. Although all the human rights currently require some form of state expenditure, the obligation to fulfill demands relatively considerable state expense such as rights related to health, education, housing, food, other economic and social rights.

Hence, when viewing the obligation assumed by states parties under the AU IDPs Convention, it explicitly incorporates all of the above internationally recognized categories of obligation: the obligation to respect and ensure respect (protect) and fulfill (provide) rights of IDPs. This is an important stipulation recognizing the preexisting practices of the continent's human rights supervisory organ. This is because the above levels of state obligations under any human rights treaties have also been clearly addressed by the African Commission on Human and Peoples' Rights in one of the communication brought against Nigeria.²¹² In this particular communication which alleges the violation of many socio-economic (the right to health, food, housing, etc) and environmental rights of Ogoni communities by the government of Nigeria and private entities such as oil companies in the Niger Delta, the Commission identified four levels of duties for a state that undertakes to adhere to a rights regime, namely the duty to respect, protect, promote and fulfill these rights. It is also stated that these obligations universally apply to all rights and entail a combination of positive and negative duties.²¹³

With regard to the scope of each level of obligation, the obligation to respect entails that the state should refrain from interfering in the enjoyment of all the fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action.²¹⁴ Secondly, the state is obliged to protect right-holders against other subjects by legislation and

²¹² Social and Economic Rights Action Centre (SERAC) and Another V. Nigeria (2001) AHRLR 60 (ACHPR 2001).

²¹³ Id., Para.44

²¹⁴ Id., Para.45

provision of effective remedies. This obligation requires the state to take measures to protect beneficiaries of the protected rights against political, economic and social interferences.²¹⁵ The third obligation of the state, that is, the obligation to promote the enjoyment of all human rights requires the state to ensure that individuals are able to exercise their rights and freedoms, for example, by promoting tolerance, raising awareness, and even building infrastructures.²¹⁶ The last obligation requires the state to fulfill the rights and freedoms it freely undertakes under the various human rights regimes. It is more of a positive expectation on the part of the state to move its machinery towards the actual realization of the rights. It could comprise the direct provision of basic needs such as food or resources that can be used for food (direct food aid or social security).²¹⁷

What is also more interesting with the AU IDPs Convention is that it imposes such levels of obligations throughout the entire stage of displacement: pre-displacement, during displacement and post-displacement stages. It also essentially touches every aspect of human rights starting from the broader and commonly recognized principles of equality and non-discrimination to a wider category of civil/political and socio-economic rights guarantees of IDPs. Some dimensions of these obligations are highlighted below.

A. Obligation to Respect and Ensure Respect (Protect) the Rights of IDPs

There are a lot of non-interference aspects of the obligation of states parties under various provisions of the Convention.²¹⁸ First and foremost is the obligation of state party to refrain from committing an arbitrary displacement of its population.²¹⁹ This obligation is further reinforced by listing the prohibited acts the commission of which may amount to arbitrary displacement under Article 4(4) of the Convention. Based on some explicit guarantees under IHL and the inferences drawn from human rights norms, the AU IDPs Convention demands states parties to refrain from engaging in activities which may lead to the arbitrary displacement.

²¹⁵ Id., Para.46

²¹⁶ Ibid.

²¹⁷ Id., Para.47.

²¹⁸ These and other aspects of the obligations of states parties are repeatedly provided under articles 3, 4, 5,7, 9 10, 11, 12 and 13 of the AU IDPS Convention.

²¹⁹ Id., Arts. 3(1)(a) & 4(1&4).

In addition to the express prohibition of committing arbitrary displacement, the general duty of respecting the human rights guarantees of IDPs under existing human rights and humanitarian law is also firmly stated. These include respect and ensure respect for the principles of humanity and human dignity, humane treatment, non-discrimination, equality and equal protection of the law, the humanitarian and civilian character of the protection and assistance of IDPs.²²⁰ This obligation also extends to the displacement stage. Here states parties are required to refrain from discriminating and committing serious violation against the IDPs.²²¹ Moreover, upholding and respecting the humanitarian principles, the right of IDPs to peacefully request or seek protection and assistance, respecting and not attacking humanitarian personnel and resources or other materials form another innovative part of the Convention.²²² There also exist, an interesting obligation to respect the mandates of AU and the UN as well as the roles of international humanitarian organizations in providing protection and assistance to IDPs in accordance with international law.²²³ This obligation is important to secure access to IDPs by the international community during and after displacement in meeting their protection and material needs when the national mechanism is inadequate or willfully withheld. The principle of humanitarian access is further incorporated into the Convention in obliging states parties to allow rapid and unimpeded passage of all relief consignments, equipment and personnel to IDPs.²²⁴ Whether this forms a new human rights treaty regime creating the obligation to accept humanitarian assistance vis-à-vis the notion of state sovereignty and consent requirement will be discussed in the subsequent section.

The obligation of protecting or ensuring respect aspect of the AU IDP Convention begins by the affirmation of the general obligation and responsibility of states for providing protection and humanitarian assistance to IDPs within their territory or jurisdiction without discrimination of any kind.²²⁵ This obligation is manifested in a variety of ways throughout the Convention. First and foremost is the obligation to prohibit and prevent arbitrary displacement and any form of political, social, cultural and economic exclusion and marginalization that are likely to cause displacement.²²⁶ This obligation reminds states to address those situations which may potentially lead to displacement. To this end, a state party is required to ensure respect for the

²²⁰ Id., Art. 3(1)(c, d, &f).

²²¹ Id., Art. 9(1)(a-e).

²²² Id., Art. 5(8,9&10).

²²³ Id., Art.5 (3).

²²⁴ Id., Art.5 (7).

²²⁵ Id., Art.5(9).

²²⁶ Id., Art.3 (1)(a&b).

protection of rights and guarantees of IDPs under international human rights and humanitarian law.²²⁷ One of this could be ensuring individual responsibility for acts of arbitrary displacement and accountability of non-state actors concerned, including multinational companies and private military or security companies.²²⁸ This is an important provision incorporating an evolving duty to punish and hold accountable non-state actors (NSAs) for acts of arbitrary displacement. The inclusion of accountability of non-state actors especially multinational and private military or security companies is a valuable approach in the today's Africa where exploration of natural resources by such entities has been adversely affecting the lives of many Africans. The best example is the ongoing tensions between the Nigerian government and the communities in the Niger Delta in relation to exploitation of oil resources in the area.

The above obligation also covers state duty to ensure respect of the rights of IDPs by armed or rebel groups. This is another serious challenge where many African states under armed conflict fail to spare the lives and properties of their peoples living under the territories controlled by such armed groups. Therefore, it seems that this failure has led the AU to the direct imposition of obligations on the members of the armed groups exercising a de facto control of certain territories of the state. The propriety of such approach and its future efficacy will be explored later on.

During displacement, it still lies with the states parties to prevent discrimination of IDPs in the enjoyment of their rights, the commission of serious crimes and abuses of their human rights especially genocide, crimes against humanity, war crimes, arbitrary killing, summary execution, sexual and gender-based violence, starvation and so on.²²⁹ These are the guarantees established under international human rights, humanitarian and criminal laws. Hence, the AU IDPs Convention has taken advantage of diverse existing protective regimes available under different international instruments so as to address the particular needs of IDPs. It has also clearly revealed that mere existence of international standards may not suffice unless they are made directly relevant to particular needs of certain vulnerable groups as utilized earlier in the special subject matter human rights treaty-making.

²²⁷ Id., Arts. 3(1) (c-f) & 4(1).

²²⁸ Id., Art.3 (g&h).

²²⁹ Id., Art.9(1)(a-e).

States parties are also given the protection mandates of IDPs from displacement caused by projects carried out by public or private actors.²³⁰ Development projects currently accounts for displacement of large number of populations. These projects may be carried out by the government itself or by private entities. As will be elaborated latter on, development-induced displacement is not adequately addressed in the AU IDPs Convention despite the existence of detail rules in the initial draft which do not survived the adoption stage.

Finally, state duty to protect also extends to situations following displacement and more specifically relating to the sustainable return, local reintegration or relocation. As a matter of principle, it is incumbent upon the states parties to promote and create satisfactory conditions for voluntary return, local integration or relocation on a sustainable basis and in circumstances of safety and dignity.²³¹ These might include, in addition to guaranteeing the safety and wellbeing of returning IDPs, establishing appropriate mechanisms for dispute resolution relating to the property of IDPs. Such mechanisms may include the restoration of the lands of special communities or the payment of just and fair compensation and other forms of reparations for the damage incurred as a result of displacement.²³² However, the property protection regime of the AU IDPs Convention is not adequate as it does not expressly impose an obligation on states to pay compensation for losses or damages attributable to the latter. But, this inadequacy may be addressed under the rules recognizing the obligation of the states parties to provide effective remedy for persons affected by displacement. Thus, such internationally recognized guarantee may be interpreted in a broad manner to entitle the IDPs to claim compensation towards the states either for the latter's direct liability or failure to protect their rights from third party violation.

B. The Obligation to Provide/Fulfill and Facilitate

The obligation to provide or fulfill aspect goes to the material or humanitarian and other long-term needs of IDPs. As IDPs are persons denied access to their habitual residence and means of

²³⁰ Id., Art.10(1).

²³¹ Id., Art.11(1).

²³² Id., Arts.11(5)& 12(2).

livelihood, there is always an imperative to ensure their material needs such as food, shelter, water, clothing, health, education, and other rights

The AU IDPs Convention upholds the primary duty and responsibility of national government for providing humanitarian assistance to IDPs.²³³ This obligation requires the state to assist IDPs by meeting their basic needs as well as allowing and facilitating rapid and unimpeded access by humanitarian organizations and personnel.²³⁴ Therefore, the immediate and direct provision of basic humanitarian assistance to IDPs falls on their governments. However, this does not mean that the requirement of providing basic necessities is entirely at the discretion of the state concerned. While reaffirming the rights of IDPs to seek for humanitarian assistance, the AU IDPs Convention seems to create an obligation for the state within which those affected populations are found to accept the assistance of international humanitarian organizations and personnel.²³⁵ The need for international assistance is stated in relation to the existing capacity or resource availability of the state concerned.²³⁶ However, the effect of state refusal to assist and denial of international access to its IDPs are not clearly stated. This might be serious issue as it usually happens that governments sometimes cause displacement and withhold any assistance nor allow international access to such populations. This may possibly initiate the application of the intervention clause both in the Constitutive Act of the AU and in the present Convention. However, this may be still uncertain given the strict preconditions for its application, the lack of political will of the leaders and constraints of financial resources so as to engage in such costly operations. A little more will be added on this issue later on.

It is not only the immediate needs of IDPs that must be addressed by the state concerned. The Convention also obliges the state to promote self-reliance and sustainable livelihoods amongst IDPs.²³⁷ Obviously, this will raise resource concern as most African states affected by internal displacement are among the economically weaker or the magnitude of displacement has exceeded their capacity. To this end, the support of the AU and the international community is a crucial factor. What is again unique feature of the AU IDPs Convention is that, under Article 6, it imposes certain obligations on international organizations and humanitarian agencies. While

²³³ Id., Arts.5(1) & 3(1)(j&k).

²³⁴ Id., Art.3(1)(j).

²³⁵ Id., Arts.3 (1)(j)(2)(d) & 5(6&7).

²³⁶ Id., Art.5 (6).

²³⁷ Id., Art.3 (k).

demanding compliance to the laws of the country in which such agencies and organizations operate may be something to be regulated by each national government, other obligations of such international organizations and humanitarian agencies may be found inappropriate given that they have their own framework of operation. These agencies and organizations may still argue that such treaties like the AU IDPs Convention cannot impose any obligation on their mode of operation out of their own legally established framework.

4.1.4.7. The Obligation of Non-State Actors under the Convention

A. The Position of Non-State Actors in General

One distinctive feature of the AU IDPs Convention is its incorporation of the provisions dealing directly or indirectly with the accountability or responsibility of non-state actors (NSAs) for human rights of IDPs. This is one deviation from long established state-centered human rights treaty-making which directly binds only the signatory or ratifying states to respect and ensure respect (protect) for the rights recognized in the particular treaty.

The phrase non-state actor is a generic term referring to wider categories of entities outside state domain. Philip Alston mentions such groups as armed opposition groups, national liberation movements, and perhaps transnational corporations.²³⁸

In the AU IDPs Convention, NSAs means private actors who are not public officials of the state, including other armed groups not referred to in article 1(e) above and whose acts can not be officially attributed to the state.²³⁹ Armed groups are also defined separately under article 1(e) as ‘dissident armed forces or other organized armed groups that are distinct from the armed forces of the state.’ The above two definitions are a bit ambiguous regarding the purpose and criteria of making such distinction. First, the definition of armed groups under article 1(e) which is partly taken from article 1(1) of the 1977 Additional Protocol to the Geneva Conventions (Protocol II) is not complete enough to distinguish it from other armed groups mentioned under article 1(n) of the IDPs Convention. It appears that article 1(e) is needed separately for the purpose of imposing direct obligation upon the members of such armed groups. Second, the

²³⁸ Philip Alston (ed.), Non-State Actors and Human Rights (2005), P.6.

²³⁹ The AU IDPs Convention, Art.1(n).

definition of NSAs provided under article 1(n) broadly referring to private actors including other armed groups again seems to be ambiguous in two ways: The first is lack of adequate or clear distinction between armed groups mentioned under article 1(e) and that of 1(n). The other is its elimination of attribution of the acts of such entities to the state. However, there may be instances where the acts of NSAs may be implicated to the state if the latter fails to adequately address the improper acts of the former. It is also understandable from the subsequent provisions that state parties to the Convention are required to ensure respect to the rights and obligations under the Convention by NSAs. And it can be concluded that state failure to ensure respect to such obligations may implicate the acts of such entities to the state itself. Therefore, it can be argued that the term NSAs encompass armed groups which are separately defined and imposed with direct obligations and that of non-state private actors including other groups of armed groups not falling under Article 1(e) whatever distinction is made between the two.

The AU IDPs Convention under article 3(1) (h) makes an express reference of examples of NSAs as including multinational companies (MNCs) and private military or security companies. An express mention of these two entities which are becoming increasingly linked to the human rights abuses seems the beginning of international response to make such entities directly responsible for human rights abuses. It is stated that multinational corporations often wield significant power and affect numerous human beings both directly and indirectly in various sectors of public and private life.²⁴⁰ With enormous wealth and power transcending state boundaries, such entities are often capable of causing more extensive injuries to persons or harm to property, other resources and the environment even more than the decisions and activities of some nation-states.²⁴¹

Of course, the multidimensional effects of the activities of MNCs have also been a challenge in some African countries. For instance, in the previously mentioned communication submitted to the African Commission against Nigeria, it was alleged that the oil consortium consisting of a Nigerian state-owned oil company and Shell had 'exploited oil reserves in Ogoni land with no regard for the health or environment of the local communities, disposing toxic wastes into the environment and local water ways in violation of applicable international environmental

²⁴⁰ Jordan J. Paust, Human Rights and the Responsibilities of Private Corporations, 35 Vand.J. Transnational L. (2001), P.802.

²⁴¹ Ibid.

standards.²⁴²The controversies concerning oil extraction and its adverse effects on the local population in the Niger Delta (Nigeria) is still a continuing problem with many allegations of violation of human rights including displacement. The impact of oil extraction and erecting pipelines traversing different countries by huge multinational corporations such as the Chad/Cameroon Oil Pipeline Project has been contested for its human rights violations, the negative impact on ethnic minorities and disregard for the development needs of the poorest and most marginalized members of the society.²⁴³

The other expressly mentioned category, private military or security companies, seems to refer to the recent development of privatization of military or security industries by outsourcing certain areas previously carried out by government entities. According to Singer, this industry has largely manifested itself following the invasion of Iraq in 2003 and the roles played range from handling military logistics and training local army to protecting key installations and escorting convoys.²⁴⁴ Some of these private contractors were deeply implicated in the torture and humiliation of inmates in the Abu Ghraib prison.²⁴⁵

Such lessons have brought to the attention of the drafters of the Convention the violation of human rights by such entities including arbitrary displacement and the other basic rights of IDPs and the need to address it in the contemporary treaty-making. The domain of private security or military companies in the context of AU IDPs Convention will also include those private forces permitted and assigned to protect and escort those huge national or transnational companies engaged in various economic activities.

Thus, what obligation is assumed by the states parties to the AU IDPs Convention with regard to the acts of the above mentioned NSAs in the context of internal displacement and IDPs? In this area, the AU IDPs Convention seems to reaffirm the age-old state-centered human rights treaty-making. This is because despite the fact of increasing risk of human rights abuses by such and other NSAs, it does not dare to impose a direct responsibility on such entities as multinational

²⁴² SERAC Case(AHRLR) Supra Note 73, Summary of facts Para.2

²⁴³ Dana I. Clark, "The World Bank and Human Rights: The Need for Greater Accountability," Harvard Human Rights Journal 205 (2002), P.209.

²⁴⁴ Peter Singer, *Outsourcing the War* (2004) in P. Alston Supra Note 99, P.9.

²⁴⁵ Alston, Supra Note 99, P.9.

corporations and private security companies for violating human rights. Article 3 *sub articles h and i* only obliges state parties to ensure the accountability of NSAs for acts of arbitrary displacement or complicity in such acts and the accountability of those especially involved in the exploration and exploitation of economic and natural resources leading to displacement. The basis of state obligation to ensure accountability of NSAs arises from the duty of states not only to respect the rights recognized, but also to protect or secure them.²⁴⁶ Thus, the vicarious or indirect liability of states for violations of human rights by non-state activities may be established if the former fails to effectively protect against human rights infringements by the latter.²⁴⁷

Moreover, state obligation to take measures to prevent violations of human rights by non-state actors has been clearly stated by the human rights bodies including judicial entities. The UN Human Rights Committee has, in its General Comment on the prohibition of torture under the ICCPR, stated that ‘it is the duty of the state party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.’²⁴⁸

Jurisprudences at the regional levels are also consistent with the above comment. For instance, in the famous judgment of *Velasquez Rodriguez*, the Inter-American Court of Human Rights held the government of Honduras responsible for the disappearance of the victim because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.²⁴⁹ Similar approach was also followed in the OAU/AU human rights system. For example in one communication against the government of Chad, the African Commission has held that ‘if a state neglects to ensure the rights in the Charter, this can constitute a violation, even if the state or its agents are not the immediate cause of the violation’.²⁵⁰

²⁴⁶ This is a commonly recognized duty under many human rights treaties such as article 2(1) of the ICCPR and article 1 of the African Charter.

²⁴⁷ August Reinisch, *The Changing International Legal Framework for Dealing with NSAs* in P. Alston, *Supra Note 99*, P.79.

²⁴⁸ General Comment No. 20(44) 1992 Art.7, CCPR/c/2/Rev.1/Add.3, 1992 Para. 2

²⁴⁹ *Velasquez Rodriguez V. Honduras*, Inter-American Court of Human Rights, 29 July 1988, Series C, No.4, Para.172.

²⁵⁰ *Commission Nationale des Droits de l’Homme et des Libertes V. Chad*, Communication 74/92, AHRLR 66 (ACHPR 1995).

From the above trends, it can be safely concluded that there is a good basis of holding states responsible for failing to take appropriate measures either to prevent or remedy the violations of human rights by non-state entities. But what is newly added by the AU IDPs Convention is an express mention of the conduct of private or non-state entities which are largely becoming the cause for human rights violations. There has been so far no mention of MNCs or private security companies in any human rights instruments as the violator of human rights and thereby expressly obliging the states to hold them accountable. The AU IDPs Convention did this and it falls on the state parties to ensure the accountability of such actors by taking appropriate national measures.

These measures may include both criminal and civil liabilities for causing arbitrary displacement or complicity in such acts and any other related consequences such as loss of property rights. What is now remaining for the state parties is the ratification of such instrument and the political will to take concrete measures with a view to implementing the Convention obligation. This could also be a good beginning to secure the consensus of international community to impose a direct international obligation on NSAs especially MNCs for their acts causing violation of human rights such as forced displacement of populations in the course of pursuing their economic interests. Moreover, the writer has found interesting to give some attention to the obligations of members of the armed groups which are specifically dealt with in the Convention.

B. Obligation of Members of Armed Groups

The other and more unique nature of the AU IDPs Convention is its direct imposition of certain obligations on the member of armed groups. This makes it the first human rights treaty to regulate directly the act of non-state actors and thereby impose human rights treaty obligation. This is made in the context of protection of IDPs in situations of armed conflict.²⁵¹ Moreover, it is remarkable to see that this part of the Convention is made closely linked to the rules of IHL and international criminal law. International Criminal law is envisaged by the express recognition of the individual criminal responsibility of the members of armed groups for their acts which violate the rights of IDPs.²⁵² Thus, there is a need to refer to the practices of past criminal tribunals and the Statute of ICC for the list of crimes under its jurisdiction and the manner of

²⁵¹ The AU IDPs Convention, Art.7.

²⁵² Id., 7(1&4)

commission giving rise to individual criminal responsibility. In this regard Articles 5 and 25 of the Rome Statute are relevant.²⁵³ Article 5 lists those most serious crimes of concern to the international community as a whole: the crime of genocide, crimes against humanity, war crimes and the crime of aggression even if the latter's definition is still to be carved out in the future agreement. Article 25, on the other hand, provides for the manner of commission of one or more of the above crimes which may result in individual criminal responsibility. Hence, for crimes falling out of the ICC definition, it will be for the national system to create mechanisms of accountability for the acts of members of armed groups. This is commonly recognized in the criminal legislations at national levels.

The AU IDPs Convention has made an explicit reference to the IHL in protecting and assisting IDPs in situations of armed conflict.²⁵⁴ Moreover, it provides a provision which prohibits the members of armed groups from, among others, carrying out arbitrary displacement, hampering the protection and assistance to IDPs, denying IDPs the right to live in satisfactory conditions of dignity, security, and other socio-economic rights, restricting the freedom of movement and recruiting children to take part in hostilities.²⁵⁵

These prohibitions and guarantees of the IDPs in armed conflict appear to be derived from both human rights and humanitarian law norms. They are also so essential in safeguarding the right of protection from arbitrary displacement and other guarantees of IDPs throughout the duration of the conflict. However, the central issue surrounding this commitment of the members of armed groups as one category of non-state actors is the basis of creating such direct obligation. That is, treaties are normally an agreement between sovereign states creating rights and obligations among such states. Even the original version of the Convention until the moment of its presentation to the Special Summit makes reference to the obligations of 'armed groups.'²⁵⁶ This point has been the subject of serious debates among the participants of the Summit not mainly on the legal and conceptual basis of imposing such obligations, but on the danger of legitimizing

²⁵³ Rome Statute of the International Criminal Court, adopted on 17 July 1998 and entered into force on 1 July 2002, A/CONF.183/9, Arts.5&25.

²⁵⁴ The AU IDPs Convention, Art.7 (3).

²⁵⁵ Id., Art.7 (5) (a-e). See also other prohibitions provided under the following sub articles (f-e).

²⁵⁶ African Union Convention for the Protection and Assistance of IDPs in Africa, a Draft presented to the Kampala Special Summit 19-23 October 2009, Art.6.

the status of such groups.²⁵⁷ Finally, the participants of the Summit agreed to add the ‘members’ before the phrase ‘armed groups’ so that the Convention should not directly address to the group which may imply the recognition of their status.²⁵⁸

However, similar controversies were raised during the making of Geneva Conventions Common Article 3 and Additional Protocol II which are made to govern the conduct of armed groups or insurgencies in armed conflicts not of an international character.²⁵⁹ The debate relates to the question how such rules bind the insurgents not a party to either of the Convention or Protocol.

According to the provisions of Vienna Convention on the Law of Treaties (VCLT), treaties can impose rights and obligations upon third parties (such as other non-state parties, insurgents) provided that (a) it was the intention of the parties to the treaty to do so; and (b) the third party assents to these rights or obligations.²⁶⁰ When applying these criteria to the AU IDPs Convention, there will be no problem with regard to the first criteria as it can be observed from the text of the treaty expressly imposing obligation on the members of armed groups. But what is more perplexing is the second requirement of assenting by the members of armed groups. In relation to similar problem on Common Article 3, Lindsay Moir states that insurgents will not necessarily feel obliged to assent to this imposition and comply with the obligations contained in the Article even if doing so may have benefits to them as better treatment of their prisoners and greater credibility in the eyes of the international community. The other point is that it is the government against which they are fighting that laid down obligations for them.²⁶¹

In order to settle the above controversies, there are some scholarly justifications so as to create the binding force of such norms on armed groups. The first of these and initially advanced by a

²⁵⁷ Interview with Mr. Renny Mike Wafula, Consultant [AU Special Summit on Refugees, Returnees and IDPs in Africa](#) on 18/12/2009.

²⁵⁸ Ibid

²⁵⁹ The Four Geneva Conventions of August 1949 and Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

²⁶⁰ Vienna Convention on the Law of Treaties adopted on 23 May 1969 and entered into force on 27 January 1980 (herein after the Vienna Convention), Arts. 34-36.

²⁶¹ Lindsay Moir, [The Law of Internal Armed Conflict](#) (2002), P.53.

certain Greek delegate, Agathocles, is the doctrine of legislative jurisdiction. This provides that insurgents are bound as a result of the parent state's acceptance of the convention. Since upon ratification, the convention became binding on all of the state's nationals, the legally constituted government having the capacity to legislate for all nationals.²⁶² However, the legislative jurisdiction justification has been challenged by such distinguished scholars as Antonio Cassese who stated that insurgents may unlikely accept the commitment under domestic law and even they may declare it null and void in the territory under their control.²⁶³

The other alternative justification asserts that treaties entered into by states are binding upon insurgents provided the rebel authority exercises effective control over part of the national territory which will take to the assumption that they purport to represent the state or part of it.²⁶⁴ This would appear to follow logically from the fact that treaties are binding for a government which assumes power through revolution (as insurgents would in case of victory) since the legal personality of the state remains unchanged.²⁶⁵ But the difficulty with this justification is that the insurgents may not have an intention to represent the state and even it might have been struggling to establish a new state or merge with another state with close background.²⁶⁶

The third alternative proposed holds that insurgents are bound by Common Article 3 and Additional Protocol II as individuals under international law (provided the parent state is a party).²⁶⁷ It is further reiterated that insurgents might be bound by customary international law, Common Article 3 and some of the provisions of Additional Protocol II also merely being confirmation of the existing law which bind all states irrespective of their accession or otherwise to the instruments.²⁶⁸

The above controversies centering on the limits of the binding nature of certain rules of IHL on the members of armed groups will be partly relevant for the AU IDPs Convention under

²⁶² Ibid.

²⁶³ Antonio Cassese in L. Moir Supra Note 114, P.54.

²⁶⁴ D. Schindler and D. Elder as stated in the L. Moir Supra Note 122, P.55.

²⁶⁵ Moir, Supra Note 122, P.55.

²⁶⁶ Ibid.

²⁶⁷ Id., P.56.

²⁶⁸ Ibid.

consideration. This is because the Convention also contains norms of IHL origin which directly imposed obligations on members of armed groups.

With regard to the direct applicability of human rights norms to such non-state entities such as the armed groups and their members, there are some mixed practices and trends at the international level. On the side of those rejecting its application to such entities, it is stated that various bodies including the Inter-American Commission, the Special Rapporteurs and Working Groups of the UN Commission on Human Rights, and the UN Secretary-General have answered the question whether human rights can be applied to armed opposition groups negatively. The principal reason is that human rights regulate the relationship between the government and the governed and aim to check the exercise of state power.²⁶⁹ However, there are certain practices supporting the applicability of human rights treaties to armed opposition groups. Among these, the notable examples are the various resolutions of the UN Commission on Human Rights and the Security Council suggesting that armed opposition groups can violate human rights.²⁷⁰ For instance, the Commission's resolutions on 'Human Rights and Terrorism' expressed concern about the gross violations of human rights perpetrated by terrorist groups.²⁷¹ Lastly, not least, several UN Security Council resolutions show the same tendency. For example, in resolution 1193(1998), the Council urged 'the Afghan factions to put an end to the discrimination against girls and women and to other violations of human rights ... and to adhere to the internationally accepted norms and standards in this sphere'.²⁷² Another document of paramount importance is the Guiding Principles on Internal Displacement which incorporated both human rights and humanitarian law principles and made applicable to all authorities, groups and persons in time of peace and war.²⁷³

Therefore, in the face of continued resistance to conceive human rights norms out of state-centric understanding, the AU IDPs Convention seems to advance some distance in the process of change of international behaviour at least partially in human rights treaty-making out of the traditional state-oriented mentality. This was achieved by bringing members of armed groups

²⁶⁹ Liesbeth Zegved, *Accountability of Armed Opposition Groups in International Law* (2002), PP.39-40.

²⁷⁰ *Id.*, P.47.

²⁷¹ Un Commission on Human Rights, Res 1997/42, pr(11 April 1997); Res 1994/46, pr (4 March 1994); Res 1990/77, Para 7 (7 March 1990). All of them are mentioned in the Zegved Supra Note 130, P.48.

²⁷² Para.14 of res.1193 (28 August 1998) in Zegved supra Note 130, P.48.

²⁷³ The Guiding Principles, Introduction to the Principles, Para.2 and Principle 2.

under direct commitment of a human rights treaty which commonly address the relationship between the government and the governed. Thus, the AU IDPs Convention became an innovative instrument, after the Guiding Principles, to incorporate rules of war and peace in a single instrument and hence again prove the increasing complementarities of both norms. While imposing direct obligation on its members, care was also taken not to recognize the status of armed groups as bearers of treaty obligations. As said above, this was made not out of concern for the legal and conceptual difficulties arising from making of such non-state entities as bearers of human rights obligations. It was rather out of the motive not to create any leeway for the international recognition of their status in such a regional instrument. Obviously, the AU IDPs Convention and its regimes governing the obligations of members of armed groups in situations of armed conflict will attract further debates and researches as to what legal basis exists under the law of international treaty-making and the means of ensuring compliance with such human rights obligations. With regard to the latter, that is, ensuring compliance by members of armed groups, there seems to be a clear challenge. This has been evident from the practice of ongoing armed conflicts in many African countries in which the governments have been unable to stop serious abuses of human rights of their citizens under territories controlled by rebel groups.

An important issue, thus, arising from making the members of armed groups as bearers of human rights commitments is whether this approach will absolve states parties of their obligation to ensure respect to the Convention by such entities. That is, it is commonly established that in human rights treaty, the state bears an obligation not only to refrain from violating the rights, but also should prevent and protect the violation of the rights by non-state entities including the members of armed groups. However, the difficulty is that state parties may not in a position to ensure compliance with conventional obligations by the members of armed groups as happened in many African states such as in Sudan (Darfur), Uganda (north), Congo (east), and Somalia. If this is the case, what is the merit of making such groups as the bearer of obligations under the human rights treaty? Ultimately, it seems that recourse will be made to the mechanisms of implementation under IHL. Therefore, ensuring compliance to the rules applicable to situations of armed conflict under the Convention will utilize the means available under IHL. Hence, the recently established ICC will have its own contribution as one means of ensuring respect to the obligations imposed on members of armed groups. The other is prosecution under domestic laws and courts as one mechanism of ensuring respect and protection of the rights under the Convention. These possibilities seem to have been also

anticipated under Article 7(1) of the AU IDPs Convention which strongly reaffirms the individual criminal responsibility of the members of such groups under domestic or international criminal laws.

4.1.4.8. Development-Induced Displacement under the Convention

The recognition of development as a right has a firm basis in the continent of Africa. This was evidenced by its codification as a binding right under the African Charter on Human and Peoples' Rights.²⁷⁴ This was followed later on by the recognition of the international community especially at the UN level by adopting the Declaration on the Right to Development.²⁷⁵ These two documents recognize and similarly highlight two constitutive elements of the rights: the right to participate in the development process; and the right to a substantive improvement in wellbeing.²⁷⁶ The right to development is also part of the doctrine of state sovereignty via which the latter exercises control over the material and human resources in order to achieve progress in the socio-economic conditions of its citizens. Development efforts are beneficial to the nationals of a particular state by improving their living standards and wellbeing. According to the Walter Kalin, large-scale development projects such as the construction or establishment of dams, ports, mines, large industrial plants, rail ways, highways, airports and irrigation canals can contribute significantly to the realization of human rights.²⁷⁷ This is obviously a true assertion given the interdependent and interrelated nature of socio-economic and other civil and political rights.

However, this does not mean that every development efforts have no social and economic costs. One of these is population displacements and involuntary resettlement of persons affected by such development activities. According to Michael Cernea, one of the advisors of World Bank on social impact of development projects financed by the Bank, forced displacements of populations caused by many infrastructural development programmes epitomize one category

²⁷⁴ The African Charter, Art.22.

²⁷⁵ Declaration on the Right to Development adopted by General Assembly resolution 41/128 of 4 December 1986.

²⁷⁶ Clive Baldwin and Cynthia Morel, Group Rights in Malcolm Evans and Rachel Murray (eds.), The African Charter on Human and Peoples' Rights (2nd Ed.), The System in Practice 1986–2006 (2008), p.272.

²⁷⁷ Kalin, Supra Note 55, p.17.

of disruptive changes that may occur as by product of economic growth.²⁷⁸ He further identified eight crucial dimensions of impoverishment areas caused by displacement: 'landlessness, homelessness, joblessness, marginalization, food insecurity, loss of access to common property assets, increased morbidity and mortality and social disarticulation.'²⁷⁹ Others have suggested the addition of other risks such as the loss of access to public services, loss of access to schooling for school age children, and the loss of civil rights or abuse of human rights, such as loss of property without fair compensation, or violence from security forces or risks of communal violence in resettlement areas.²⁸⁰ These obviously form part of the impacts of internal displacement discussed earlier as specifically applicable to those risks posed by development activities.

Quantitatively, development-induced displacement (DID) has been a cause for great deal of persons displaced from their homes and familiar environment and much higher than that displaced by conflicts and human rights violations. According to the estimate of the World Bank, the global scale of DID is up to 200 million during the last two decades of the 20th Century and the pace is now accelerating by 15 millions of displacement each year.²⁸¹

Another area of concern for development-induced displacement (DID) is the segment of population affected which is usually the most disadvantaged and marginalized group. Citing the Review of the World Bank conducted in 1994, Robinson provides the following on the proximate victims of DID:-

The majority of the displaced are rural and poor because new projects are brought to the most underdeveloped, poorest areas, where infrastructure is lacking and land and political costs are lowest... The remote locations of many dam sites are often inhabited by indigenous

²⁷⁸ Michael Cernea, "Public Policy Responses to Development-Induced Population Displacements," Economic and Social weekly, Vol.31, No.24(June 15, 1996), P.1515. Available at <http://www.jstor.org/stable/4404275> accessed on 19/11/2009.

²⁷⁹ Id., P.1518.

²⁸⁰ Development-Induced Displacement, Training on the Protection of IDPs, IDMC, P.2.

²⁸¹ Michael Cernea, "Development-Induced and Conflict-Induced IDPs: bridging the research divide," FMR/Brookings-Bern Special Issue (2000), P.25.

*peoples, ethnic minorities and pastoral peoples, which explains why ... cultural differences are so prominent in resettlement.*²⁸²

Therefore, having said the above about the overall impact of development projects, the specific ongoing realities in Africa also deserve a close attention. As expressed by the Special Rapporteur of the African Commission, there were huge development-related displacements especially in the area of urban renewal, extraction of natural resource and other DIDs.²⁸³ African countries such as Ghana, Egypt, Nigeria, Cote d'Ivoire, Togo, Benin, Zambia, and Kenya are among the states with significant populations affected by DID especially the construction of big dams.²⁸⁴ It is also easy to remember the controversies surrounding the Ethiopia's plan to construct Gilgel Gibe Three dam for generation of hydro electric power on the ground of its environmental impact and possible displacement of ethnic groups surrounding the Gibe and Omo River. Despite the objection from environmental activists and international financial institutions, Ethiopia's top officials have confirmed the continuation of the project alleging that the project does not and will not entail any significant risk as alleged.

What is also more problematic is the wider support of the Ethiopian public given the protracted and serious shortage of power supply which hindered the country's advancements of many socio-economic efforts in 2009/10. However, who is going to speak about the right of those segments of communities around the Omo River, the majority of which are ethnic pastoralists? Obviously it falls on the national government to protect the rights of such peoples under national and international human rights law. Thus, the point here and of course my concern is the position taken by the recently adopted AU IDPs Convention on development-induced displacement. However, before directly going to the analysis of the new Conventional protective regimes, it is well instructive to highlight those existing guarantees of persons from DIDs. During the making of the Guiding Principles, attempt was made to guarantee persons from arbitrary displacement by large-scale development projects.²⁸⁵ This is said to ensure that development cannot be used as an argument to disguise discrimination or any other human rights violation by stressing that development-related displacement is permissible only when compelling and

²⁸² World Bank's 1994 Review in Jenny Robinson, *Development and Displacement* (2002), P.51.

²⁸³ Report of Intersession Activities by Commissioner Behame Tom Nyanduga, Special Rapporteur on Refugees, Asylum-Seekers, Migrants and IDPs in Africa to the 41st Session of the ACHPR, 16 to 30 May 2007, Accra Ghana, P.3

²⁸⁴ Cernea, *Supra* Note 139, P.1517.

²⁸⁵ The Guiding Principles *Supra* Note 134, Principle 6(2)(c).

overriding public interests justify this measure, that is, when the requirements of necessity and proportionality are met.²⁸⁶ This guarantee is said to be reflected from the human rights provisions on freedom of movement and choice of residence and the operational directives and guidelines of some financial or lending institutions as the World Bank and Organization for Economic Cooperation and Development (OECD)²⁸⁷ However, the guarantees under the operational directives and guidelines of major financial institutions such as the above stated and other lending agencies have not been effective and dependable.²⁸⁸

When coming to the regional guarantees from DIDs, the GLR Protocol is the first to provide elaborated rules on the subject matter. In addition to its express recognition of the rules under the Guiding Principles, it provides a lot of valuable guarantees and procedures dealing with DIDs. These include, among others, ensuring displacement by large-scale development projects are justified by compelling and overriding public interest and development; exploring feasible alternatives of development to avoid DIDs; avoiding arbitrary displacement by taking necessary measures to minimize displacement and to mitigate its adverse effects; obtaining as far as possible the prior, free and informed consent of those to be displaced and providing full information on the reasons and procedures concerning DIDs and, where applicable, on compensation and relocation; providing adequate and habitable sites of relocation and proper accommodation and ensuring the effective participation of IDPs in the planning and management of their relocation and in other affairs affecting their rights.²⁸⁹ These are the far reaching norms which encompass all stages of DIDs-from substantive guarantees against DIDs to procedural requirements regulating the process of necessary and unavoidable displacement.

Substantive protective grounds include prohibition of arbitrary and unjustifiable displacement, minimizing the effects of unavoidable and justifiable displacement, entitlement to compensation and adequate and habitable sites of relocation and provision of proper accommodation. Procedural safeguards are also equally stressed such as the obligation to obtain prior consent of those to be affected by the project, the obligation to provide information concerning the DIDs and matters relating to it, and ensuring participation of IDPs in the decision-making process

²⁸⁶ Kalin. Supra Note 55, P. 17.

²⁸⁷ Id., PP.17-18.

²⁸⁸ This failure is reiterated in various studies including the review of its performance by the World Bank and others as Dana I Clark, Supra Note 104, Jenny Robinson Supra Note 143, M. Cernea Supra Note 139, and others.

²⁸⁹ The GLR IDPs Protocol, Art.5.

leading to displacement. Moreover, the definition of IDPs under the GLR Protocol also includes those persons affected by large-scale development projects. However, this does not mean that other development projects do not cause displacement and remains without any remedies. Victims in such instances may invoke various remedies under the national and international human rights regimes.

The AU IDPs Convention has also something to say on the fate of people affected by development projects. But what should be mentioned first is that the AU IDPs Convention has taken a regressive approach in the finalization of the provisions safeguarding persons from DIDs. This is because provisions directly dealing with DIDs have been reduced both in content and scope of protection. The problem with the stipulation of the provision begins with the use of the wordings of the provision itself. That is, the title which says '*displacement induced by projects*' is not clear enough. The reference to the 'projects' is too general referring to a wide variety of things. Thus, the title should have clearly used 'development projects' as a cause of displacement. The other disinterested approach is manifested by the deletion of the draft sub article separately dealing with persons affected by large-scale development projects as one pertinent category of IDPs. The ultimate exclusion of unjustifiable development-induced displacement from the listed grounds of arbitrary displacement forms another evidence of minimized concern for providing strong safeguards against DIDs. However, there exists a possibility to argue for the inclusion of DIDs under the catch-all clause of article 4(4) (h) which still considers arbitrary displacement caused by any act, event, factor or phenomenon of comparable gravity to all of the listed grounds and which is not justified under international law. It would have been more protective to incorporate the prohibition expressly as reflected under the Guiding Principles and the GLR Protocol.

Substantive wise, the initial draft Article 9 on displacement-induced by development project was more elaborate and contains many clear guarantees for peoples potentially and actually affected by development projects. This draft article contains such provisions expressly prohibiting displacement caused by development projects that are not justified by compelling and overriding public interest; taking all measures necessary to minimize and mitigate the adverse effects of displacement and more detail rules on the full information, consultation and

cooperation of persons to be displaced in the planning and management of the relocation.²⁹⁰ Such minimization of the contents of original draft articles and even the deletion of others were necessitated due to objections from certain African countries which strongly resisted to the existence of any treaty provisions interfering in their development efforts. African countries such as Egypt, Zambia, Sudan and others with huge dams were outstanding ones in such resistance. Others contend that they have domestic rules and procedures governing various aspects of development activities including compensation for expropriation and hence there is no necessity to have such detail treaty rules.²⁹¹ That is why the AU IDPs Convention came out with a minimized version of guarantees for those possible victims of DIDs. It is obvious that balancing the gains and losses from a particular development projects will involve a variety of interests some of which may be even contradictory. Those in charge of making such ultimate decisions may not be the representative of the entire population. There may also be certain pressure groups behind such decisions which again uphold the interests of certain segments of the society of a country. Therefore, it is still expected that there will be some losers in such interest struggles and these mostly become the vulnerable and marginalized groups with lesser voice and power in the national decision-making processes. The AU IDPs Convention is the result of these tensions yielding to the voices of the dominant groups who ultimately succeeded in having a reduced regime of protection from DIDs.

Apart from the above deficiencies, it is, however, possible to infer protection from DIDs from the various provisions of the AU IDPs Convention. Under the general obligation relating to states parties, states are duty bound to ensure individual responsibility for acts of arbitrary displacement and ensure the accountability of NSAs especially involved in the exploration and extraction of economic and natural resources leading to displacement.²⁹² This part of the obligation will be crucial to prevent and give remedies for displacements caused by NSAs in pursuance of their economic interests. This is mainly relevant in current economic set up in which huge multinational corporations are assuming an increasing role in various aspects of economic activities.

²⁹⁰ AU Convention for the Protection and Assistance of IDPs in Africa, Adopted Draft 1, 11 November 2008, Art.9 (1-3).

²⁹¹ Interview with Mr. R.M.Wafula, Supra Note 118.

²⁹² The AU IDPs Convention, Art.3 (1) (g, h&i).

Article 4 of the Convention imposing obligations of pre-displacement phase is also relevant. For instance, under sub article 1, it obliges states to respect and ensure respect for their obligations under international law ... so as to prevent and avoid conditions that might lead to the arbitrary displacement of persons. Thus, development decisions that are not justified under internationally accepted standards may be one condition leading to the arbitrary displacement and, hence, need to be avoided. The non-exhaustive lists of prohibited category of arbitrary displacement under sub article (4) (h) may also give some basis to argue against the prohibition of displacement by unjustified development projects. Furthermore, state's obligation to protect communities with special attachment to, and dependency on land such as indigenous or ethnic minorities from being displaced from such lands except for compelling and overriding public interests is another source of guarantee.²⁹³ However, this too may not be a reliable protection as the justification of compelling and overriding public interests may deny their means of existence by taking their basis of livelihoods such as land, water, pasture and so on. This will continue as real challenge as most large-scale development activities in Africa are carried out on lands and water resources especially occupied by many indigenous and minority groups.

Article 5(4) requires states parties to take measures to protect and assist persons who have been internally displaced due to...or *human made disasters*... Since development projects are the outcome of human activities and hence fall under human-made disasters, states parties will remain obliged to protect and assist the victims of such activities. This will also be relevant for the understanding of the phrase 'human-made disasters' under the definitional provision as including those persons displaced as a result of development projects.

The provision on obligation of states parties to sustainable return, local integration or relocation of IDPs has also certain guarantees which can be invoked by persons affected by development projects. Even if there is less chance for those persons displaced by development projects to return to their original home or locality, it is generally state obligation to seek lasting solutions to the problems of displacement by promoting and creating satisfactory conditions for voluntary return (if possible), local integration or relocation on a sustainable basis and in circumstances of safety and dignity including long-term reconstruction.²⁹⁴ This too is essential guarantee as

²⁹³ Id., Art.4 (5).

²⁹⁴ Id., Art.11 (1&3).

people displaced from their familiar lands remain exposed to various risks to their basic freedoms and socio-economic wellbeing. As identified by M. Cernea before, most development projects left certain segments of the society worse off in various socio-economic and security aspects. Thus, it is the obligation of states parties, and possibly with the cooperation of relevant international actors, to seek for lasting solutions to such victims. These may include relocation to the comparable sites to restore the original livelihood and made them the beneficiaries of the development projects.

The regime regulating the provision of effective remedies for persons affected by displacement is another source of valuable guarantee. Such IDPs may be entitled to compensation and other forms of reparation for damages incurred as a result of displacement.²⁹⁵ It is usual that development projects both in urban and rural areas have the potential to affect various property interests denying actual present and future enjoyment. Hence, IDPs can claim for various forms of reparations for those assets lost and the denial of future use and enjoyment. One essential component of the possible remedies would be the provision of substitute items with comparable value such as land for whose livelihood is closely linked to it. Thus, mere cash payment may not be adequate for such groups of peoples whose continued survival is dependent on traditional life style based on land and other natural resources.

Finally, Article 10 of the AU IDPs Convention is specifically devoted to the displacement induced by projects. As touched upon earlier, this provision is too brief dealing only with certain aspects of DIDs. However, guarantees under its sub articles can be still invoked to extend some protection to IDPs affected by development projects. It is provided that states parties shall, as much as possible, prevent displacement caused by projects carried out by public or private actors.²⁹⁶ An obvious merit behind this sub article is that it adopts the preventive approach to displacement and also it does not make any distinction among the different levels of development projects such as large, medium or small-scale unlike the approach under the Guiding Principles and the GLR Protocol. It also foresees displacement both by public and private actors and regulates them uniformly.

²⁹⁵ Id., Art.12 (1&2).

²⁹⁶ Id., Art.10(1).

However, the above sub article can also be criticized for lack of clear direction as to when development-induced displacement will be tolerated unlike that of the Guiding Principles and the GLR Protocol. In the case of the latter, displacements may be allowed when justified by the compelling and overriding public interests. Therefore, it leaves a broader margin of discretion to the states parties and hence may affect the interest of persons by projects carried out under the guise of development efforts of states not compatible with international standards. In this case, arguments may be based on other provisions of the Convention identified earlier and internationally accepted normative rules.

Sub article 2 of the same provision further states that states parties shall ensure that the stakeholders concerned will explore feasible alternatives, with full information and consultation of persons likely to be displaced by projects. This paragraph highlights the obligation to look for other feasible alternatives so as to prevent displacement or minimize its effects and the involvement of those persons likely to be affected by the carrying out of the proposed project. Seeking for alternatives and recognition of participatory rights being crucial guarantees, this sub article too does not specify who those stakeholders are and what importance will be given to the voices of those likely to be affected. Are the strong and justifiable objections of those exposed groups of persons capable of stopping the execution of the proposed development project? There is no clear answer to such issues and it seems that such will be resolved under national rules and procedures owing to the absence of conventional standards. If this is so, the effect of sub article 3, which requires the carrying out of a socio-economic and environmental impact assessment of a proposed development project prior to undertaking such a project, will also be the same.

The requirement of making various socio-economic and environmental impact assessments prior to implementing the proposed development project is highly essential to take both preventive and remedial measures. But the convention does not dare to say on the choices to be made if the outcome of such assessment is manifestly negative. Thus, what if a particular government or private actor with the former's approval or deliberate silence continues to implement a certain development project despite its unbalanced effect on the socio-economic condition of the surrounding population and the environment? Will it be in breach of this sub article? The obligation to undertake the assessment of possible risks of the proposed project will be

purposeless if no obligation to refrain from pursuing such highly imbalanced project is also attached. The difficulty is that usually such decisions are made by a certain politically or economically dominant groups against other sections of the disadvantaged groups such as the urban poor or those ethnic minorities in remote rural areas. Thus, it would have been better to regulate clearly the outcome of such impact assessment.

By way of conclusion, distinction should be made here between people obliged to leave their homes or habitual residence owing to development projects and those for lack of development. In the first case, it is the positive development activities of various nature carried out either by public or private actors which push peoples out of their homes or habitual residence. This is usually done by taking away or limiting their access to the bases of livelihoods of such persons such as land, pasture, water resources, houses, etc. This involves mostly positive act of the agents of development be it public or private entity.

In the case of people forced to move out of their homes or localities due to lack of development, it is the intolerable or unbearable deprivation of socio-economic situation and other related rights which caused their involuntary movement. This can form part of human rights violation such as discriminatory socio-economic policies, inequitable distribution of national resources leading to the marginalization and ultimate involuntary movement of such segments of the society. Such peoples are the victims of violation of the right to development and other civil, political and socio-economic rights. At the heart of this controversy lies the problem of making distinction between those genuinely moving owing to the violation of their fundamental rights and those merely moving for better socio-economic opportunities within their national territories, that is, economic migrants.

Thus, what remains in the center of such allegation will be a matter of ascertaining the factual socio-economic situation in the areas of origin of such peoples. This will in turn give some evidence as to the level of compulsion exerted over such persons. Those moving out of extreme destitute socio-economic situation will invoke the violation of their rights and come under the definition of IDPs. This again may not seem easy as it appears theoretically for it will create unjustifiable distinction between those still continued living in their homes bearing all the hazards and burdens and those decided to depart their surroundings. Thus, any sound decision

should take into account the condition of local communities if the outcome of such decision is to be reasonable and fair in not privileging certain categories of persons on the mere ground that certain groups managed to move and take refuge in urban centers while others in similar situation not.

4.1.4.9. AU's Right to Intervene and the Principle of State Sovereignty under the Convention

Another important distinguishing aspect of the AU IDPs Convention, which is of course inherited from the founding document of the very organization, is the recognition of the right of the Union to intervene in a member state or the right of its member states to request the same.²⁹⁷ However, it has to be again noted that this affirmation is not a new stipulation in the Convention, but an extension of the recent change of mind of the regional organization which marked since the formation of the new entity. A significant paradigm shift was made with transformation of OAU to AU. In relation to the former organization, it is stated that 'state sovereignty, territorial inviolability and non-interference of member states with the internal affairs of another member state were bedrock principles of the OAU from the time of its inception.'²⁹⁸ This was because African nations were reluctant to cede such hard-won power to a new organization despite the fact that they were members of it.²⁹⁹

However, despite its effort to carry out Charter objectives, strict adherence to such rigid principles also restrained the actions of the OAU, especially in the sphere of conflict management and resolution.³⁰⁰ The principle of sovereign equality that formed the foundation of the Charter has tied the hands of the OAU in many devastating conflicts. It greatly impaired the OAU's ability to manage or resolve the internal conflicts of member states.³⁰¹ Therefore, it is this inflexible and rigid approach of the OAU on the doctrine of state sovereignty and territorial integrity which resulted in its failure to respond effectively to the grave situations prevailing in its member states.

²⁹⁷ Id. Art.8 (1&2).

²⁹⁸ Jonathan D. Rechner, "From the OAU to the AU: A Normative Shift With Implications for Peacekeeping and Conflict Management, or Just a Name Change?" 39 *Vand.J.Transnat'l L.*, 543 (2006), P.547.

²⁹⁹ Id., P.548.

³⁰⁰ Munya in J. D. Rechner Supra Note 159, P.556.

³⁰¹ Ibid.

Such repeated failure of the OAU to intervene in order to stop the gross and massive human rights violations in Africa in the past and the increasing criticisms against such silence that prompted the inclusion of the legal right to intervene under the Constitutive Act of the African Union.³⁰² The other basic reason for the change of approach in the continent of Africa is the repeated failure of the international community to respond appropriately to the tragedies such as the collapse of Somali state, genocide in Rwanda, the protracted war in the Democratic Republic of the Congo (DRC) and the current ongoing crisis in Sudan (Darfur).³⁰³ Accordingly, Article 4 of the Constitutive Act of the Union provides for:

(h) 'the right of the Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity'; and

(j) 'the right of member states to request intervention from the Union in order to restore peace and security.'

These normative rules have exactly found their place in the AU IDPs Convention under Article 8(1&2). Furthermore, institutional measure has been taken with a view to implementing the above mandates. One of this is the creation of the AU Peace and Security Council (PSC).

Therefore, what can be understood from the changes brought about by the AU is that its Constitutive Act becomes the first international treaty in recognizing the legal right to intervene in internal affairs of the member state(s). Its human rights dimension as reaffirmed under the IDPs Convention makes it more unique instrument. When viewed from the perspective of the UN Charter which only allows the use of military intervention in self-defense or under the collective security arrangement in order to maintain or restore international peace and security, the AU mechanism introduces a broader system both in its ground of intervention and those responsible to carry it out. The intervention envisaged may not necessarily involve the use of force. This can be clearly observed from the various objectives and operating principles of the AU PSC which mainly focus on preventive strategies and diplomatic settlement of disputes and

³⁰² Ben Kioko, "The right of intervention under the African Union's constitutive Act: From non-interference to non-intervention," *IRRC*, vol.85, No. 852 (December 2003), P.812.

³⁰³ Dan Kuwali, *The end of humanitarian intervention: Evaluation of the AU's right of intervention* (2009), P.42.

conflicts.³⁰⁴ Finally, it will be on the 15 non-permanent members PSC of the Union, according to article 7(f) of the Protocol, to decide on appropriate modalities of intervention. The manner of intervention takes multilateral. The AU Constitutive Act does not recognize any unilateral action of any member state.³⁰⁵

The grounds or conditions for intervention are limited to those expressly stated: in case of circumstances amounting to war crimes, genocide and crimes against humanity by the Union's own initiatives and in order to restore peace and security upon the request of member states and decision of the Assembly. Thus, it is in relation to serious violations of human rights leading to the above listed grave crimes and to restore the breakdown of law and order that the AU mechanism may come into operation. But the threshold of the above listed violations of human rights and humanitarian law norms requires further clarification. To this end, recourse can be made to the definitions and constituting elements of such crimes or violations as provided for under the Genocide Convention, norms of humanitarian law under the Geneva Conventions and its Additional Protocols and the Statutes and decisions of both Special Criminal Tribunals and that of the ICC.

Hence, AU's recent effort to take the responsibility to protect those populations of the continent facing serious violations of their rights constitute a promising improvement in the history of regional protection of human rights. It also places the regional organization in the lead position to rescue its troubled peoples from mass atrocities and grave violations of their fundamental rights.

The recognition of the right of intervention in a member state on behalf of the rights of IDPs forms one of the key achievements. It can also be seen as the beginning of the use of intervention to prevent human rights violations in such egregious manner. It has shown the firm determination of the leaders of the continent, at least in law, that they will no more keep silent to violators of the rights of Africans in a shocking manner under the guise of state sovereignty and territorial integrity. They have also proved that sovereignty is not merely treated as rights,

³⁰⁴ The PSC Protocol, Arts.3 (b), 4 (a & b) &, 6(b & c) & 7(a).

³⁰⁵ The Constitutive Act, Art.4 (g).

but also as responsibility of each African state to respect and protect the rights of their nationals from such grave violations of their rights. The Report of the International Commission on Intervention and State Sovereignty of 2001 summarizes this as follows:

*Sovereignty implies dual responsibility: externally-to respect sovereignty of other states, and internally-to respect the dignity and basic rights of all the people within the state. In international human rights covenants, in UN practice, and in state practice itself, sovereignty is now understood as embracing this dual responsibility. Sovereignty as responsibility has become the minimum contents of good international citizenship.*³⁰⁶

Thus, AU's efforts will obviously form part of this developing trend towards the acceptance of sovereignty as a responsibility. Moreover, this notion is more reinforced under the AU IDPs Convention by its imposition of the obligation to allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel to IDPs.³⁰⁷ The duty of states parties to allow and facilitate humanitarian access to their IDPs by the international community when the former is unable or unwilling to assist them forms another contribution of the AU IDPs Convention. However, one point not clearly mentioned in the Convention is whether the international community, particularly the AU, can make access to such populations without the consent of the state concerned before making any decision to formally intervene. Automatic access without the consent of state concerned does not seem to exist given the existence of provisions both under the Constitutive Act and the Convention upholding the principles of state sovereignty and territorial integrity.³⁰⁸ This uncertainty will necessarily require the coming into operation of the exceptional provisions to the above principles, that is, either the Assembly or the PSC should pass a formal decision requesting the state concerned to respect its obligations under the Convention. One of this will be allowing or facilitating humanitarian access to its IDPs. It is only when such efforts fails and when the situation justifies for intervention under the Constitutive Act that humanitarian activities can be carried out in the territory of the state concerned without the latter's consent. This indirectly amounts to intervention in the internal affairs of the member state as stipulated in the Constitutive Act of the Union.

³⁰⁶ ICISS Report 2001 in D. Kuwali Supra Note 164, P.48.

³⁰⁷ The AU IDPs Convention, Art.5 (7) and see also similar stipulation under Art.3(1)(j).

³⁰⁸ Id., Art.5(12) and The Constitutive Act, art.3(b) & 4(a&g)

However, there are also some concerns expressed, for instance, in relation to the grounds of intervention extended under the Protocol Amending the Constitutive Act of the Union. The grounds of intervention have been extended to encompass also a 'serious threat to legitimate order.'³⁰⁹ It is said that this amendment invites the fear that the new ground may be invoked as an excuse to violate the human rights of those engaged in legitimate civil strife or struggles for self-determination against repressive governments.³¹⁰ Similar concern also remains with regard to article 4(i) which allows for 'requests' from members for intervention to 'restore peace and security' in their countries.³¹¹ A historical tendency for solidarity among African leaders increases the likelihood of such an interpretation.³¹² Therefore, it is up to the AU supreme political organs to keep their legal promises and reverse the pessimistic views on the future gains of the normative and institutional transformations brought about.

Thus, what remains still in the continent is the putting into practice of such promises. African experiences of responding to humanitarian crises and human rights violations in the continent both in past and currently have not left behind encouraging lessons. One initial challenge for the realization of the norms in the existing instruments is said to be lack of political will of its leaders. Ben Kioko describes the prevailing situation as follows:

*The appreciation of the need for intervention may not be shared at all levels. There may also be instances in which one country is protective of the interests of another and is opposed to intervention for that reason. There may also be instances when it is generally agreed that some form of intervention is necessary, but there is no agreement on its form or objective, its mandate and duration.*³¹³

This concern may be justified in the repeated failures of the leaders of the continent let alone to forcefully intervene in member states, even fails to express their open condemnation of certain dictatorial and long-reigning regimes known for anti-democratic and anti-human rights policies. On the other hand, some genuine efforts of the organization both in the past as in Chad,

³⁰⁹ The Amending Protocol, Art.4(h).

³¹⁰ Frans Viljoen, International Human Rights Law in Africa, Oxford University Press, 2007, P.196.

³¹¹ Ibid.

³¹² Ibid.

³¹³ Kioko, Supra Note 163, P.823.

Burundi, Rwanda and currently in Sudan (Darfur) and Somalia have been suffering from logistical and financial limitations. To cite one past illustration and of course relevant still, the cost of OAU's peacekeeping missions in Chad in the early 1980s was well beyond its annual budgets.³¹⁴ It does not seem that there are now significant changes in the area of financial constraints. The recently active peacekeeping operations of the AU in Somalia and Sudan are highly supported by external sources especially reach western countries.³¹⁵ This strongly implies that AU mechanisms of peacekeeping may collapse if such sources are no more willing to continue their support. Even if not realized in the near future, the AU should still look into its internal means of dealing with such home grown challenges. Otherwise, duplications in the normative standard-settings will not bring any concrete changes to the various problems facing the continent. And one of this will be the crisis of internal displacement and its resulting victims.

Chapter Summary

Africa has been and is still in the forefront of the continents facing serious humanitarian challenges. One of these is the challenge of internal displacement. The continent also hosts the largest victims arising from such crisis. Official normative responses to such challenges can be traced back to the time of establishment of its political organ i.e. the OAU. Although the founding document of this organ was criticized for being less attentive to its human rights dimensions, it has set in motion the ways of dealing with diverse problems of the continent. These were witnessed by the subsequent efforts of adopting many human rights documents such as the OAU Refugee Convention, the African Charter, the African Children's Charter, the African Women's Protocol and many other policy instruments.

Therefore, the adoption of the AU IDPs Convention is the result of such evolving efforts and political decisions for the protection and promotion of human rights in general and that of vulnerable groups in particular. This Convention becomes a unique instrument, of course after the non-binding Guiding Principles and the GLR Protocols, in addressing matters of internal displacement and IDPs in an internationally binding human rights Convention. It is remarkable especially when the international community, particularly at the UN level, has declined to pursue the conventional route of protecting and assisting IDPs.

³¹⁴ Rechner, *Supra* Note 159, P.558.

³¹⁵ *Id.*, P.575.

This Convention has brought into reality for the first time such guarantees as protection from arbitrary displacement, the internal plight alternative of IDPs and the refugee principle of non-refoulement in the context of internal displacement. With regard to the obligations of states parties, it has incorporated all levels of obligations under any human rights treaties: the obligation to respect, protect, fulfil and, of course, to promote. All of these obligations are made equally applicable at all stages of displacement: pre-displacement, during displacement and post-displacement. It has also some key provisions protecting the property rights of IDPs including the broader entitlement to the effective remedies and the personal registration and documentation regimes by taking into account the particular needs of peoples deprived of their familiar environment. There are also such far-reaching provisions directly imposing human rights obligations out of state domain as members of armed groups, express mention of the liability of NSAs as MNCs and the right of the Union to intervene and some basis of guarantees from DIDs.

Chapter Five: Institutional Mechanisms of Protection and Assistance of IDPs

Introduction

The protection and assistance of IDPs becomes complete when there is an institution mainly entrusted with the responsibility for dealing with matters of internal displacement and the consequences arising there from. Institutional dimension is one pillar of the responses addressing the diverse needs of persons under actual or potential threat of displacement. These may include devising mechanisms for early warning systems with a view to preventing the crisis of internal displacement and rendering with prompt, effective and responsible remedies for those actually uprooted from their familiar environment.

Therefore, such efforts may need the involvement of diverse entities in order to comprehensively address the various challenges posed by internal displacement. However, the role of some agencies may be more demanding than others owing to the proximity of their mandates to the problem of internal displacement and their established expertise. This reality will be more obvious when discussing the institutional responses of the African political organizations, that is, the OAU/AU, to the problem of internal displacement. Despite the fact of existence of certain entities with some mandates on the refugees and related matters, it has been difficult to trace the protection and assistance of IDPs to a single institution in Africa.

This has led to the necessity of elaborating the role and respective mandates of different institutions dealing with the continent's political, economic, social, peace, human rights and other affairs. One important areas of focus in this regard will be the mechanisms and organs established under the newly transformed regional organization, that is, the African Union. It has brought into reality a series of important institutions of diverse competencies on the promotion and protection of human rights in the continent.

Hence, it is on the bases of the multifaceted reforms via the newly introduced regional organization that the AU IDPs Convention came into reality. This Convention has also followed

its own institutional arrangement for the protection and assistance of IDPs in Africa. Moreover, it has also put in place a mechanism to supervise and ensure the proper implementation of the obligations assumed under the Convention. This is known as the 'Conference of States Parties' to the Convention. Thus, discussions under this chapter will cover both the previously existing and the newly created mechanisms for the protection and assistance of IDPs in Africa. In addition, critical evaluation will be made on the adequacy of the mechanisms brought under the new arrangement.

5.1. Previous Mechanisms

Historically, OAU institutional response went back to the time of its formation especially in relation to the then refugee flow caused by increasing liberation movements and other anti-racist struggles. The first of these was the OAU Commission of Ten on refugees established in 1964 which was established in response to refugee problems around the great lakes region³¹⁶. The Commission was initially mandated to consider how to deal with the then refugee flow to adjacent countries and ways and means of maintaining refugees in their country of asylum.³¹⁷

The Commission thus became the main policy-making body of the OAU on refugee issues. It has also taken mission to states, given advice to governments and provided emergency financial help to states.³¹⁸ However, the Commission has not escaped criticisms for being too politically influenced and for its lack of action. The extent of its impact was clearly limited by considerations of realpolitik as well as by the very real constraint of the 'non-interference' clause.³¹⁹ Despite such challenges, the structure of the Commission has survived the political transition of OAU to AU and now renamed as Permanent Representatives Subcommittee on Refugees, Returnees and Displaced Persons (PRC Subcommittee on Refugees). The PRC Subcommittee is now an acting policy organ of the AU Commission and other supreme political organs.³²⁰

³¹⁶ Rachel Murray, *Human Rights in Africa: From the OAU to the AU* (2004), P.195.

³¹⁷ Problem of Refugees in Africa, CM/Res.19 (II) in R. Murray Supra Note 1, P.196.

³¹⁸ Id., P.196.

³¹⁹ Ibid.

³²⁰ The Coordinating Committee on Assistance and Protection of Refugees, Returnees and IDPs (CCAR), A new focus to meet the challenges of a changed humanitarian environment, P.1 available at http://www.unhcrro.org/Regional_Partners/ accessed on 12/10/09.

The other institutional response of earlier time was the setting up of the Bureau for Placement and Education of African Refugees in 1968.³²¹ As the name indicates, the tasks of the Bureau were to look for educational opportunities of refugees; give them resources to deal with their situation; mediate with host countries to ensure their rights are not violated and so on.³²² It was renamed in the early 1990s as the Bureau for Refugees, Displaced Persons and Humanitarian Assistance. This was mainly made to reflect the role that it was supposed to play in the ever changing refugee situation on the continent.³²³ The Bureau had been struggling with various internal and external challenges as lack of funding, professionals, and failure to issue public criticisms of member states, and thus it did not survive the institutional transformation to AU.³²⁴

Another institution of early formation in the framework of OAU is the Coordinating Committee on Assistance and Protection to Refugees, Returnees and IDPs (CCAR). The CCAR was established in 1968 by the decision of the OAU Council of Ministers to assume the functions of coordinating and harmonizing the disparate efforts of the many actors in the field.³²⁵ The Committee, composed of inter-governmental bodies and NGOs, was made to give advice to the Commission and assisting the OAU to work externally.³²⁶ Thus, it provided the channel through which the operational programmes and common objectives of the OAU, NGOs and other institutions were coordinated and harmonized.³²⁷ According to one writer, CCAR's significant achievements were related to its coordination activities among the OAU, UNHCR and NGOs to provide educational programmes for refugees in Southern African countries who had fled South Africa due to Apartheid.³²⁸ But its activities focused mainly on refugees and failed to adapt to the dynamic and fast changing dimension of forced displacement in the continent.³²⁹ Thus, it is such and other weaknesses of CCAR which recently led to the reformation of its various aspects including its membership and rules of procedure.³³⁰

³²¹ This was created by the Resolution of OAU Conference on Legal, Economic and Social Aspects of the Refugee Crisis in Africa.

³²² Murray, Supra Note 1, P.197.

³²³ Ibid.

³²⁴ Id., PP.199-200.

³²⁵ CCAR Supra Note 5, P.

³²⁶ Lawyers' Committee for Human Rights 149 in R Murray Supra Note 1, P.200.

³²⁷ CCAR Supra Note 5, P.1.

³²⁸ Allehone Mulugeta, Legal and Institutional Dimensions of Protecting and Assisting IDPs in Africa, *Journal of Refugee Studies* (2009), P.161.

³²⁹ UNHCR (2006) in Allehone M., Supra Note 13.

³³⁰ Revitalizing the AU Coordinating Committee on Assistance to Refugees, Returnees and Internally Displaced

Persons-a timely Agenda, UNHCR, Addis Ababa (November 2006), P.2.

The newly revised and adopted rules of procedure envisage an enhanced structure and a broader and more representative membership. The enhanced structure would entail an expanded role in the CCAR which include: the promotion of more positive policies on refugees, returnees and IDPs; proposing projects and mobilizing resources needed for their implementation; serving as a forum to bring matters requiring the urgent attention of the AU decision-making organs through the PRC Sub-Committee, and commissioning studies in order to better advise the PRC Sub-Committee on Refugees.³³¹ With regard to the membership, the revised rules of procedure advocated for a more inclusive approach including those organizations that are actively engaged in refugee, returnee and IDP activities in Africa. The number of African NGO members and observers will increase and more importantly, commissioners or officials of member states closely working with refugee affairs would be admitted on a rotating membership basis.³³²

Therefore, it is hoped that the improvements to CCAR working procedures and expanded membership will contribute to the enhanced responses to the issues of IDPs through the utilization of technical and professional knowledge and experience of diverse entities involved. However, it is now too early to reach at a conclusion regarding its recorded successes and problems still hindering its effectiveness.

5.2. The Role of African Commission on Human and Peoples Rights and Its Special Mechanism

Before exploring the current AU mechanisms, it is noteworthy to shade some light on the role of the African Commission on Human and Peoples' Rights (ACHPR) in the protection of the rights of IDPs. Created by virtue of Article 30 of the African Charter, the ACHPR has been the continent's principal supervisory organ in the area of human and peoples' rights promotion and protection.

In addition to performing any other tasks which may be entrusted to it by the Assembly, the Commission has three expressly listed functions: the promotion of human and peoples' rights;

³³¹ Ibid

³³² Ibid

the protection of human and peoples' rights; and the interpretation of the African Charter.³³³ The Commission mainly operates under the African Charter on Human and Peoples' Rights (ACHPR). The African Charter contains basic rights and guarantees the breach of which can be invoked in front of the Commission. The Commission has indeed passed some decisions relevant to returnees and IDPs.³³⁴ Despite such efforts, the Commission is said to have noticeably shied away from monitoring the enforcement of either the OAU Refugee Convention or other relevant norms applicable to IDPs.³³⁵

However, the recent efforts of the Commission in the area of protection and promotion of the rights of IDPs deserve some mention. One of this is the appointment of the Special Rapporteur on Refugees, Asylum-Seekers, Migrant Workers and Displaced Persons in 2004. This mandate was renewed in 2007.³³⁶ The Special Rapporteur regularly presents a report on the situation of vulnerable groups including IDPs. He made a modest contribution by investigating IDPs' situations, compiling reports and collecting and disseminating data.³³⁷ His reports have included not only detail on his activities but also an attempt to outline the situation of the groups under his mandate and concerns in particular countries. In some instances, he has gone so far as to condemn the governments for violations of the African Charter towards refugees and others in their jurisdictions.³³⁸ However, it is yet to be seen whether the Special Rapporteur will expand his activities under the AU IDPs Convention.

Therefore, the increased attention of the African Commission in the issues of IDPs such as recent agreement with the UNHCR for better coordinated works and the appointment of the Special Rapporteur will for sure enhance the promotion and protection of the rights of IDPs. The individual access to the procedures of the Commission, at least under the African Charter, will also give another avenue for IDPs to defend their rights and seek possible remedies. In this regard, the Commission has so far entertained complaints submitted on behalf of refugees

³³³ African [Banjul] Charter on Human and Peoples' Rights adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5 (herein after the African Charter), Art.45.

³³⁴ Allehone Mulugeta., Supra Note 13, P.161 and R. Murray Supra Note 1, P.59.

³³⁵ Id., P.161.

³³⁶ Resolution on the Mandate of the Special Rapporteur on Refugees, Asylum Seekers and Internally Displaced Persons in Africa, ACHPR/Res.72 (XXV) 04, June 2004 and this mandate was renewed by ACHPR/Res.116 (XXXXII) 07, November 2007. The latter resolution included migrants as one subject of concern to the Special Rapporteur.

³³⁷ Allehone M., Supra Note 13, P.162.

³³⁸ Rachel Murray, The Special Rapporteurs in the African Systems, in Malcolm Evans and Rachel Murray (eds.), The African Charter on Human and Peoples' Rights (2nd Ed.), The System in Practice 1986–2006, P.367.

under the African Charter and the OAU Refugee Convention.³³⁹ In one case submitted on behalf of the Sierra Leonean refugees against the Guinea, the Commission found that the Republic of Guinea has violated many provisions of African Charter on Human and Peoples' Rights and also article 4 of OAU Refugee Convention.³⁴⁰

It is also the recognition of such efforts of the Commission which found its way into the AU IDPs Convention as one important continental mechanism for the protection and assistance of IDPs. To this end, the Convention requires the AU to share information with the Commission and cooperate with its special mechanism such as the Special Rapporteur in addressing the crisis of internal displacement and the protection and assistance of IDPs.³⁴¹ Thus, the Convention has made the Commission's system as part of the continent's institutional mechanisms to respond to the problems of internal displacement.

5.3. Mechanisms under the AU Structure

The transformation of OAU to AU has brought noticeable changes and new institutions which one way or the other has closer link to the matters of IDPs. However, it is not the purpose of this work to carry out an in-depth survey of the role of each AU organs on the protection and assistance of IDPs. Rather attempts will be made to highlight the mandates of some organs which might significantly contribute to the protection and assistance needs of IDPs in the continent.

The AU founding document, the Constitutive Act, under Article 5 created various organs touching different issues of the Union. These include the Assembly and the Executive Council of the Union which are the supreme decision-making organs of the Union. Other organs with considerable importance to the matters of IDPs are the Pan-African Parliament, the AU Commission, the Permanent Representatives' Committee and the Economic and Social

³³⁹ For instance one of the cases entertained by the Commission concerning the violation of the rights of refugees under the OAU Refugee Convention was the African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) V. Guinea (2004) AHRLR 57 (ACHPR 2004).

³⁴⁰ Id., Para.74.

³⁴¹ African Union Convention for the Protection and Assistance of IDPs in Africa (Kampala Convention), adopted on October 23, 2009 and not yet entered into force (hereinafter the AU IDPs Convention), Art8(e&f).

Council.³⁴² Added to the above list is the AU Peace and Security Council introduced by the Amending Protocol to the Constitutive Act.³⁴³

When examining some of the powers of the above institutions as relating to the matters of IDPs, the mandates of the two supreme organs, that is, the Assembly and the Executive Council are phrased in a general manner crosscutting broader political, economic, social and other issues.³⁴⁴ Among these is the notable right of the Assembly to decide on the intervention in the member states in certain circumstances giving rise to grave violations of human rights and other serious crimes of international concern. In addition to the above, the Assembly may exercise other numerous functions having a direct or indirect bearing on human rights including the rights of IDPs. These may include adoption of legal or non-legal instruments, establishment of appropriate institutions, appointment or election of the necessary staff to relevant institutions, allocation of budgets, carrying out supervisory works and taking any other ultimate measures upon the recommendation of other organs for the protection and promotion of human rights in the continent.³⁴⁵ Therefore, it is needless to mention that the promotion and protection of human rights in general and that of IDPs in particular will be one of the areas of attention of the Assembly of the Union while taking final policy and legal decisions in the various political, economic, social and other aspects of the continent.

The Executive Council of the Union, coming next to the Assembly, has also important role in the area of human rights. Meeting more frequently than the Assembly, the Council can discharge a lot of functions. One, it can carry out some or all of the above mandates of the Assembly through the latter's delegation.³⁴⁶ Thus, it can pass any binding or non-binding decisions. Among these, the noteworthy to mention include the decisions and recommendations arising from Ministerial Conferences on Human Rights as done in Grand Bay, Kigali and Ouagadougou Declarations and Plan of Action. It is also through the recommendation of this organ that the drafting process for the AU IDPs Convention has begun. More importantly, in 2003 the Assembly

³⁴² Constitutive Act of the African Union, adopted on July 11, 2000 in Lome, Togo and came into force on May 26, 2001, OAU Doc.CAB/LEG/23.15(herein after the Constitutive Act), Art. 5(1) (c, e, f &h).

³⁴³ Protocol on Amendments to the Constitutive Act of the AU adopted on 11 July 2003 (herein after the Amending Protocol), Art. 5(f) & 9(1) and the Protocol Relating to the Establishment of the PSC of the AU adopted on 9 July 2002 and entered into force on 26 December 2003, AU Doc Ass/AU/Dec.3(I) (herein after the PSC Protocol), Art.2.

³⁴⁴ The Constitutive Act, Arts.9& 13(1).

³⁴⁵ Id., Art.9

³⁴⁶ Id., Art.9(2).

extended the mandates of the Executive Council to include consideration of the activity reports of the African Commission on Human and Peoples' Rights³⁴⁷ and this work has begun in June 2006 by adopting the 20th Activity Report of the Commission without referring to the Assembly.³⁴⁸

Furthermore, the above general mandates of the AU supreme organs can be reinforced by the competencies and works of other and more specific organs containing explicit reference to human rights and other related areas. Thus, it is noteworthy to highlight the human rights dimension of some of the organs of the AU which may also contribute to the protection of the rights of IDPs.

Among these, the first to come is the Pan-African Parliament (PAP). According to Article 17 of the Constitutive Act, the Pan-African Parliament is desired to be established in order to ensure the full participation of African peoples in the development and economic integration. Among its objectives are promoting the principles of human rights and democracy in Africa and to encouraging good governance, transparency and accountability in Member states.³⁴⁹ Thus, it is stated that the establishment of PAP is informed by a vision to provide a common platform for the peoples of Africa and their grass roots organizations to be more involved in discussion and decision-making on the problems and challenges facing the continent.³⁵⁰ The PAP has so far passed some resolutions, for instance, appealing the ratification of AWP and also deployed fact-finding and peace missions to Darfur (Sudan), Cote d'Ivoire, DRC and Mauritania in 2004 and 2005.³⁵¹

Thus, it is hoped that the PAP will take internal displacement as one of the continent's serious challenges facing the great mass of Africans and seek for durable solutions. As a representative organ of the African Peoples at least indirectly as it exists now, the PAP will bring problems posed by internal displacement and its victims to the attention of other decision-making organs

³⁴⁷ Decision on the 16th Annual Activity Report of the African Commission on Human and Peoples Rights, AU Doc Assembly/AU/Dec.11(II).

³⁴⁸ Frans Viljoen, *International Human Rights Law in Africa* (2007), P.199.

³⁴⁹ Protocol to the Treaty Establishing the African Economic Community Relating to the Pan-African Parliament, CM/2/98(LXXIII), Annex I(herein after the PAP Protocol), Arts. 3(2&3).

³⁵⁰ Id., Preamble Para.3.

³⁵¹ Viljoen Supra Note 33, P.187.

for more political and legal responses. The experiences in other regions, such as the European Union, can also serve as a good inspiration as to how far such institution can play in the consolidation of human rights and democratic norms in the continent. This is particularly important given substantial number of persons are displaced in Africa by human rights abuses and armed conflicts.

The other organ of crosscutting competence is the Economic, Social and Cultural Council (ECOSOCC) of the African Union. The ECOSOCC is an advisory organ composed of different social and professional groups of the member states of the Union.³⁵² To this end, promoting and defending human rights and fundamental freedoms including gender equality form one basic component of its object and functional domain.³⁵³ Thus, once again this organ will offer another forum to deal with the promotion and protection of human rights especially socio-economic and cultural rights in a more inclusive manner (including diverse categories of actors) both in public and private dimension. Certainly the ever-increasing deprivations of basic needs of IDPs will be addressed within such broader schemes of arrangement.

Another organ of AU with real competence in the matters of displaced persons is the Permanent Representatives' Committee (PRC). The PRC, consisting of the ambassadors or permanent representatives of the states to the AU headquarter in Addis Ababa, is said to be the most active institutions of the Union engaging continuously in negotiations on a variety of issues.³⁵⁴ The broad involvement of the PRC also extends to standard setting and it has involved in the drafting process of the Protocol Merging the African Human Rights Court and the AU Court of Justice.³⁵⁵ This has a Sub-Committee on Refugees, Returnees and Displaced Persons (PRC Sub-Committee on Refugees) which replaced the former OAU Commission on Refugees. The PRC Sub-Committee is the relevant organ acting between the Executive Council and other organs of the Union.³⁵⁶ This Sub-Committee is said to support the work of the AU Commission through providing political leadership in response to humanitarian emergencies, conducting in-country needs assessment, followed with token assistance as well as sensitization of governments and the international

³⁵² The Constitutive Act, Arts.22 (1) & 3(1).

³⁵³ Statute of the Economic, Social and Cultural Council of the African Union, adopted in July 2004 (Assembly/AU/Dec.42 (III)) (hereinafter the ECOSOCC Statute), Arts.3 (5) and 7(5).

³⁵⁴ Viljoen Supra Note 33, P.183.

³⁵⁵ Ibid.

³⁵⁶ The Constitutive Act, Art.21 (1).

community to the plight of displaced persons in Africa.³⁵⁷ It has also taken a leading role in the elaboration of a legal framework for the protection and assistance of IDPs in Africa.³⁵⁸

Therefore, it seems that it is through the liaison and instrumentality of PRC Sub-Committee that imperative issues of IDPs and other vulnerable groups will be brought to the attention of the AU policy organs, that is, the Executive Council and finally to the Assembly for any concrete and final decisions. Being a collection of permanent representatives, it can act promptly over issues of serious humanitarian emergencies including the crisis of internal displacement and the possible measures to alleviate such situation.

The other AU organ deserving express mention is its Secretariat, that is, the AU Commission. The activities of AU Commission (AUC) are cross-cutting and holistic and at times involve inter-departmental coordination and collaboration.³⁵⁹ Among the eight Departments of the Commission, the one most closely related to the matters of IDPs is the Political Affairs Department. This Department is concerned with democratization, governance, the rule of law and human rights. It is also further divided into Divisions including the Democracy, Governance, Human Rights, and Elections Division, the Humanitarian Affairs, Refugees and Displaced Persons (HARDP) Division and the African Commission on Human and Peoples' Rights. Although the mandates of all Divisions will have a clear human rights and humanitarian implications on the rights of IDPs, the place of HARDP will be unique by expressly incorporating IDPs as one of its main addressees.

This Division is the line operational unit of the AUC and acts as a secretariat to all the organs on forced displacement matters. Thus, it facilitates the activities of these organs, the decision-making, policy development and general discussion forums on matters related to forced displacements as well as coordinating the interface between the humanitarian actors and the decision-making organs of the Union.³⁶⁰ It is also affirmed that the Division remains central in the coordination, documentation and liaison of the work of the AU Commission, AU organs and

³⁵⁷ Patrick Tigere and Rita Amukhobu, "The African Union's Institutional Framework for Responding to Forced Displacement in Africa" *African Union Policy Review* 53, (2006)P.52.

³⁵⁸ Viljoen Supra Note 33, PP.183-184.

³⁵⁹ Tigere and Amukhobu Supra Note 42, P.50.

³⁶⁰ Id., P.52.

other partners on matters related to forced displacements.³⁶¹ It has to be mentioned that among the division's priority areas is the achievement on the elaboration of a legal framework for the protection and assistance of IDPs which ultimately culminated in the adoption of a binding legal instrument. Hopefully, this organ will continue soliciting the ratification and entry into force of this Convention.

Finally, mention has to be made to the most important institution of the Union recently set up, the Peace and Security Council (PSC) of the African Union. The PSC was not the original institution under the Constitutive Act, but came into reality by amendment of the political document of the Union. Thus, according to the Protocol Amending the Constitutive Act of the AU, the PSC is set up as the standing decision-making organ of the AU for the prevention, management and resolution of conflicts.³⁶² Replacing the OAU Mechanism for Conflict Prevention, Management and Resolution set up in 1993, the PSC is expected to serve as a collective security and early-warning arrangement to facilitate timely and efficient response to conflict and crisis situations in Africa. This will be carried out through the support of other bodies such as the Commission, a Panel of the Wise, a Continental Early Warning System, an African Standby Force and a Special Fund.³⁶³

In addition to its broader objectives and operating principles centering on peace, security and stability in the continent of Africa, it has various specific human rights promotion and protection competencies. Therefore, as part of efforts for preventing conflicts, the Council is expected to protect human rights and fundamental freedoms, respect for the sanctity of human life and international humanitarian law.³⁶⁴ Its guiding principles, based on the Constitutive Act of the Union, in addition to the values mentioned under the object clause, makes a reference to the right of the Union to intervene in a member state in respect of grave circumstances, namely war crimes, genocide and crimes against humanity.³⁶⁵

³⁶¹ Ibid.

³⁶² The Amending Protocol, Art. 5 & 9(1) and The PSC Protocol, Art.2 (1).

³⁶³ The PSC Protocol, Art.2 (1&2).

³⁶⁴ Id., Art.3 (f).

³⁶⁵ Id., Art.4 (j&k).

Therefore, the establishment and the powers entrusted in the PSC is one of the innovative additions to the existing mechanisms of the Union. It is also interesting to see that issues of human rights protection and promotion are linked to the efforts of establishing peace and security in the continent. In a continent seriously ravaged by diverse conflicts of varying degree and hosting large number of victims due to such conflicts, the Council is a proper institution to carry out those protective norms reflected in the Constitutive Act of the Union. It will also be in a position to give rapid and proximate response to the continent's breakdown of peace, security and stability which is becoming a source of increasing suffering of numerous populations.

Its provisions highlighting the responsibility to protect the victims of conflict and ensuring respect to international humanitarian law are also so essential in placing the obligation on continental organ to rescue the victims trapped in armed conflicts and other violent situations. It also attempts to fill the protection gaps existing in the international system of protection. To this end, the powers and functions entrusted to the Council are broad enough to achieve its stated objectives if carried out effectively.

However, despite certain ongoing efforts of the Council to restore peace and security and protect the victims of conflict in some African countries as in Darfur (Sudan) and Somalia, its recorded success and future prospects are still uncertain. There are other African countries in which the Council is unable to respond effectively and hence continued with grave suffering of the civilians. The Democratic Republic of Congo (DRC) can be one example. The reason behind such unsatisfactory achievements of the Council seem numerous and complex. One is lack of political determination and willingness of many African long-reigning leaders. This attitude in turn emanates from the very behaviour of many African leading groups most of which are deeply implicated in serious human rights abuses. This has been clearly noticed when the leaders of the continent and their organization fail to take bold position and open condemnation regarding the recent human rights abuses in many African countries such as in post-election Kenya, Ethiopia, Zimbabwe and in others under armed conflict as in Sudan (Darfur). In most of these countries, it was rather pressures outside the continent which significantly influenced the behavior of regimes engaged in anti-human rights activities. A series of sanctions on Zimbabwe and Sudan and even the indictment of the ICC can be such instances.

In addition to the indifferent political attitude of the Assembly, some genuine efforts of the Council are usually cut back by the Union's serious shortage of resources. That is why it is asserted that mere decisions will not suffice if no means is available to uphold its decisions.³⁶⁶ Even if the PSC is made to be understood under the global context by making reference to the UN framework of maintaining international peace and security, it can independently carry out peacekeeping and peace operations activities in the continent of Africa. This in turn requires massive resources as most military activities are too expensive. The current peacekeeping operations of the Union in few conflict-affected countries are also significantly funded by external sources. This will have in turn an implication on its continuity and ultimate success.

The prevailing situations in many African countries such as lack of good governance, popular democracy, rule of law and respect for human rights will pose another challenge for the efficacy of the Council. These areas are not open for the scrutiny of the Council and even surprisingly the Council is composed of some countries with bad records with regard to the above mentioned values. Hence, will such countries make sudden and historical decisions on themselves and other similar states as a beginning of genuine efforts in the democratization and respect for human rights values in the continent of Africa? There remain still long way to travel and the recent changes of mind in few African countries such as in Ghana, South Africa, Senegal, Zambia, Botswana, etc, being too promising, are not adequate enough to reach at a definite conclusion regarding the future course of action in the continent. Therefore, it remains for the Union to exert more and more efforts in the upcoming years if the lofty objectives in its founding and other basic instruments are to be realized.

5.4. Institutional Mechanisms under the AU IDPs Convention

5.4.1. Protection and Assistance of IDPs

Attempts have been made to elaborate the existing institutional arrangements having a substantial role in the protection and assistance of IDPs both at the international particularly at the UN and regional (OAU/AU) level. Existing avenues at both levels have also shown that how the issue of protecting and assisting IDPs are too complex and still under uncertainty. The UN system, after a series of tests under various arrangements, has now been operating under the 'cluster approach'. The OAU/AU systems preceding the recently adopted IDPs Convention had

³⁶⁶ Jakkie Cilliers & Kathryn Struman, "Challenges Facing the AU's PSC," *African Security Review* 13(1) (2004), P.97.

no particularly institutionalized and accountable systems of protection and assistance for IDPs. The scheme has been too fragmented and falls under the mandates of various organs. It seems that it has continued reliance on the global arrangement. Previous discussions have also shown that matters of IDPs crosscut various institutions of the continental system operating on human rights, political affairs, peace, security, and conflict matters. Thus, the question to be asked here is that what institutional mechanisms of protection and assistance are brought about by the recently adopted AU IDPs Convention?

The desire to create a viable institutional arrangement for the protection and assistance of IDPs begins with the preamble of the Convention. However, the drafters' attention to the setting up of institutional framework is not satisfactory. Out of fifteen preambular paragraphs of the Convention, express mention of institutional mechanism is made only in one place while only highlighting lack of such institution.³⁶⁷ In other cases, mention is made in relation to the recognition of the roles of international organizations and agencies especially within the UN framework, civil society organizations (CSOs) and other relevant partners and stakeholders.³⁶⁸ Moreover, the establishment and mandates of relevant institutions in charge of the matters of IDPs are also non-existent under the objective clause of the Convention.

The institutional mechanisms envisaged under the Convention can be understood in three forms: national, regional and international. Among these, the Convention relies heavily on national and international mechanisms of protection and assistance. Nationally, the Convention has strongly established the primary duty and responsibility of states parties to prevent internal displacement and protect and assist those internally displaced within their jurisdiction.³⁶⁹ To this end, states parties are obliged to designate appropriate authority or body responsible for coordinating activities aimed at protecting and assisting IDPs and also directly responsible for their protection and assistance.³⁷⁰

³⁶⁷ The AU IDPs Convention Preamble Para. 13.

³⁶⁸ Id., Preamble, Para. 12 & 14.

³⁶⁹ Id., Arts. 3 & 5(1).

³⁷⁰ Id., Art. 3(2)(b).

Obviously no one will dare to contest the expansive role assumed by states parties for various reasons. First, it is normal and established rule of treaty-making that states are the bearers of obligations under any treaty regimes. Second, there is also this consideration of sovereign responsibility of states for the protection of persons within their territory. In the past, efforts to create a separate regime on IDPs had been strongly resisted on the ground of sovereignty. However, national mechanisms may in certain instances fail to respond to the protection and assistance needs of IDPs. This may happen due to lack of capacity or willingness on the part of the national government. Then, what system is put in place to cope up with such scenarios at the regional level (AU)?

At the regional level, the initial provision on the establishment of a new AU Office of the High Commissioner for IDPs was rejected.³⁷¹ Even if no recorded justifications are available, this was said to be because of the existing realities of financial shortages of the Union and the ever-increasing role of UNHCR in the continent of Africa which make the creation of a separate entity unnecessary.³⁷² However, the justification relying on the existence of the UNHCR may face certain problems for various reasons. One of these could be the fact that UNHCR is an international refugee agency covering the entire world and, thus, its regional focus may not be reliable. The other is that UNHCR may not be responsible for all categories of IDPs. For instance, it has usually declined to involve in the disaster-induced IDPs. Finally, the UNHCR's involvement in the protection and assistance of IDPs does not have a legal basis except the resolutions and requests of the organs of UN and its own voluntary engagement out of humanitarian consideration.

Therefore, there is no provision in the Convention entrusting such responsibility to a single regional entity. What is generally provided is the obligation relating to the AU. In addition to its intervention powers and the duty to support states to discharge their Conventional obligations, the African Union is specifically expected to: strengthen the institutional framework and capacity of the Union with respect to protection and assistance of IDPs; coordinate the mobilization of resources; collaborate with international organizations and agencies, CSOs and other relevant

³⁷¹ Allehone Mulugeta a, *Supra* Note 13, P.167.

³⁷² Interview with Mr. Renny Mike Wafula, Consultant [AU Special Summit on Refugees, Returnees and IDPs in Africa](#), on 18/12/2009.

actors; share information with the African Commission on Human and Peoples' Rights and cooperate with the Special Rapporteur of the African Commission for Refugees, Returnees, IDPs and Asylum-Seekers.³⁷³ Thus, what can be seen from the above arrangement is that the Union foresees the utilization of both existing internal (regional) and external (international) mechanisms of protection and assistance. There is, of course, an indication that the AU may put in place certain institutional means for the protection and assistance of IDPs. This can be inferred from the obligation to 'strengthen the institutional framework and capacity of the Union'. However, there is no clear indication whether one of the candidates will be the African Commission on Human and Peoples' Rights and its other special mechanisms or any of the AU organs elaborated before. The relations adopted with the human rights mechanisms of the Union such as the African Commission and its Special Rapporteur are limited to the sharing information and cooperating in addressing the situation of internal displacement and in protecting and assisting IDPs.

Given the scattered AU entities involving in the affairs of IDPs, no clear attempt is made to assign responsibility to any one of such organs. The very political organ is mentioned as an umbrella organ over the matters of IDPs. Therefore, it is obvious that the existing AU organs some of which are elaborated before such as the PRS Sub-Committee on Refugees, Division on Humanitarian Affairs, Refugees and Displaced Persons and the Peace and Security Council will continue involving in the protection and assistance issues of IDPs in Africa. There also seems ambivalence to create a regional High Commissioner on IDPs. The fear, as stated above, probably emanates from resource constraints of the continent and unnecessary overlapping of mandates with the UNHCR. That is why repeated references are made to the role of the UNHCR and urged to continue its efforts in protecting and assisting IDPs in Africa.³⁷⁴

Therefore, the AU systems of protection and assistance is strongly arranged in away to operate under the existing global especially the UN arrangement. This is clearly evident from references to and repeated approval of the currently functioning scheme of UN humanitarian response.³⁷⁵ Such endeavors to operate in a harmonized international scheme will obviously enhance coordinated and stronger humanitarian responses by utilizing existing resources and expertise.

³⁷³ The AU IDPs Convention, Art.8.

³⁷⁴ Id., Preamble Para.12.

³⁷⁵ Id., Preamble Para 12&14 and Arts. 3(2)(b), 4(3), 5(6), 6, 8(3)(c & d), and 9(3).

But one unsatisfactory work goes to the aspect that while the AU attempts to create a legal framework for IDPs, it should have also traveled certain way by putting in place a certain responsible institutional means like the one for refugees. Shortage of resources can be understandable and is found in every Union's organs. And this is not unique problem to the matters of IDPs. It is also possible to utilize the existing potentials by clearly allocating the responsibilities among the relevant organs of the Union. Dependence on such international agencies as the UNHCR may face also some problems mentioned above and, hence, it will amount to externalization of home challenges. Moreover, the mere elaboration of legal norms can not constitute adequate response to the grave circumstances facing IDPs in Africa unless accompanied by equally important institutional means of protection and assistance.

5.4.2. Monitoring compliance with obligations under the Convention

Finally, it is noteworthy to see the means of monitoring compliance with obligations under the Convention. According to Article 14(1), 'states parties agree to establish a Conference of States Parties to this Convention to monitor and review the implementation of the objectives of this Convention.' Hence, the 'Conference of States Parties' is the supervisory organ for ascertaining whether the rights and the obligations under the Convention are properly respected and discharged by the ratifying or acceding states. However, this provision does not give detail guidelines as to what will be the possible ways of ensuring compliance and also what measures can be taken against those states parties failing to live up to their conventional obligation. The other is that no time interval is given for the beginning of supervisory works and other future monitoring.

The only system of monitoring envisaged under the Convention, albeit inadequately, is presenting reports which will indicate the legislative and other measures that have been taken to give effect to this Convention.³⁷⁶ As to the time interval of such report, a reference is made to Article 62 of the African Charter on Human and Peoples' Rights according to which state reporting should be made every two years from the date of entry into force of the Convention. The content of the report is stated to reflect the legislative and other measures taken with a view to giving effect to the Convention.

³⁷⁶ Id., Art.14(4).

Therefore, state reporting is made the only supervisory mechanism under the AU IDPs Convention. The Convention is silent as to the use of inter-state and individual complaint mechanisms. It does not also give any clue as to whether reports can be independently submitted by NGOs. But such trend may develop through the utilization of the practice of supervisory organs as witnessed in the UN and regional human rights treaty monitoring systems.

The focus on state reporting as the only means of monitoring compliance once again reinforces the controversies regarding the creation of strong external mechanisms of supervision in the matters of IDPs. Individual victims of internal displacement have not been given an option to lodge their grievance either by themselves or through representation under the Convention. Thus, this IDPs Convention is somehow inferior to the main African Charter in its mechanisms of supervision. The latter, even if severely criticized for its inadequate and ineffective mechanisms, provides inter-state and individual complaints mechanisms. Even these long criticized mechanisms of the Charter has recently been expanded to more effective mechanisms by adopting the Protocol to ACHPR on the Establishment of the African Court on Human and Peoples' Rights (the African Court Protocol).³⁷⁷

However, the utilization of these two mechanisms, that is, the African Commission and the Court of Human and Peoples' Rights under the AU IDPs Convention is not clearly addressed. Rather the Convention states that the right of IDPs to lodge a complaint to such organs or any other competent international body shall in no way be affected.³⁷⁸ The issue here is on what basis will IDPs take their complaints to such entities? That is, will the IDPs directly invoke the violation of the AU IDPs Convention before the Commission and/or the Court?

With regard to access to the court, there is no much difficulty. This is because both under the earlier Protocol Establishing the African Court of Human and Peoples' Rights and its later

³⁷⁷ Protocol to the African Charter on Human and Peoples' Rights on the Establishment of African Court on Human and Peoples Rights, adopted on 9 June 1998 and entered into force on 25 January 2004 (hereinafter the African Court Protocol). This Court has recently been merged with African Court of Justice and form a single court known as the African Court of Justice and Human Rights.

³⁷⁸ The AU IDPs Convention, Art.20(3).

merging instrument, jurisdiction can be exercised, in addition to the listed human rights instruments, based on any other legal instrument relating to human rights, ratified by the states parties concerned.³⁷⁹ Thus, the bases of jurisdiction to human rights cases are broadly stated in order to include any subsequent legal instruments on human rights. And the AU IDPs Convention can be one of these instruments upon which the Court's jurisdiction can be assumed. This is more reinforced by its eligibility rules which entitles individuals to directly submit the case to the Court or sometimes by representation.³⁸⁰ Hence, there is no doubt that the rights and obligations under the AU IDPs Convention are amenable to judicial determination for those states that have accepted its competences. The provision authorizing individual access to the Court is another advantage. More importantly, since most IDPs may not be in a position to pursue judicial avenue, the recognition of NGO's submission will be another source of advantage.

With regard to the access to the Commission, there is no certain position. Unlike the Court, the Commission is established under the African Charter as its main supervisory organ. It has also been repeatedly stated that the Commission has in the past carefully avoided making references to the 1969 Refugee Convention. That means, cautious approach was taken not to make itself as the monitoring organ of the OAU Refugee Convention. Decisions relating to refugees have been made under the African Charter on Human and Peoples' Rights.

However, despite these past uncertainties, the Commission's recent activities in the area of refugees and IDPs are promising. One of these could be the creation of the mechanism of Special Rapporteur. One of the mandates of this office is raising awareness and promoting the implementation of legal instruments on refugees including the OAU Refugee Convention. Obviously this mandate will now extend to the recently adopted AU IDPs Convention upon its entry in to force. Moreover, the Commission has passed certain decisions, for instance, in the Sierra Leonean Refugee Case, founding the violation of rights guaranteed under the OAU Refugee Convention.³⁸¹ This particular communication alleged the violation by the government of Guinea of many rights of the Sierra Leonean refugees guaranteed under both the African

³⁷⁹ The African Court Protocol, Art.3 and Protocol on the Statute of the African Court of Justice and Human Rights July 2008 (hereinafter the Merging Court Protocol), Arts.28(1) & 34.

³⁸⁰ The Merging Court Protocol, Art.30(f).

³⁸¹ Communication 249/2002, African Institute for Human Rights and Development (on behalf of Sierra Leonean refugees in Guinea) V. Guinea (2004) AHRLR 57 (ACHPR 2004).

Charter as articles 2, 4, 5, 12(5) and 14 and article 4 of the OAU Refugee Convention.³⁸² This was stated to happen after the speech of the Republic's President, Lansana Conte, which incited the soldiers and civilians to attack and mistreat Sierra Leonean refugees living in Guinea.³⁸³ Despite the Commission's detail analysis on the admissibility and merits of the communication, my interest will only be here on its finding which will have of some help to the issue under discussion. Therefore, the Commission ultimately found that the Republic of Guinea is in violation of the above stated provisions of both the African Charter and the Refugee Convention and recommended that a joint Commission of the Sierra Leonean and the Guinean governments be established to assess the losses by various victims with a view to compensate the victims.³⁸⁴

The above communication and the manner of its disposition indicate that there has been recently certain change of attitude in the works of the Commission towards monitoring the implementation of any regional human rights instruments. This was more interesting in that it has happened by receiving and entertaining individual complaints even if there is no any legal instrument empowering the Commission to entertain complaints coming out of the reach of African Charter. Thus, the Commission is trying to expand its broader mandates under the Charter, that is, the promotion and protection of human rights. One important dimension of protective mandate will obviously be the examination of communication alleging a certain violation and recommending possible solution.

However, this being a promising development, it is not still sufficient to conclude that the Commission will certainly place itself as an organ for the promotion and protection of human rights under any regional instrument including the AU IDPs Convention. Moreover, the examination of communications and passing possible recommendations are more serious and intrusive than mere promotional works which require establishing a strong legal basis for its operation. That is why in its resolution establishing the office of Special Rapporteur, repeated mention is made to the relevance of the African Charter for the protection of the rights of refugees and IDPs.

³⁸² Id., Para.8.

³⁸³ Id., Paras.1-7.

³⁸⁴ Id., Para.74.

Chapter Summary

Institutional arrangement is another important aspect of the response for the protection and assistance of IDPs. Given the continent's ever-increasing exposure to serious crisis of internal displacement and significant number of IDPs, any outsider may expect the existence of a centrally responsible institution in charge of such affairs. However, the reality on the ground is otherwise as there is no a single organ to date regionally mandated to deal with matters of internal displacement and IDPs.

The institutions created after the formation of the OAU such as the 1964 Commission, the Bureau and the CCAR of 1968 were not given particular mandates on internal displacement and IDPs. This situation has not changed satisfactorily with the transformation of the OAU to AU. Although many organs with relevant mandates to the matters of forced population displacements are created, none of them is conferred with exclusive responsibilities in the area.

The previously existing African Commission on Human and Peoples' Rights and its special mechanisms have also no clear mandates in the matters of internal displacement and IDPs. However, following its recent shift of attention to vulnerable groups and the legal instruments protecting them, it has signaled the beginning of future enhanced involvement and contribution in the matters of IDPs.

The AU IDPs Convention, despite its full understanding of existing challenges, has not taken bold position to create a responsible institutional framework for the protection and assistance of IDPs. Its institutional focus is mainly premised on the reaffirmation of the national responsibilities and utilization of existing international humanitarian regimes. This is clearly evident from repeated references made to the UN humanitarian arrangements and particularly to the role of the UNHCR.

Finally, regarding monitoring compliance with the Convention, it has provided for the creation of 'Conference of States Parties'. The means of supervision is stated to be state reporting. Other mechanisms as complaints are not expressly mentioned. It has also a saving clause maintaining

the right of IDPs to lodge their complaints to the African Commission, the Court or any relevant bodies. But what is still not clearly indicated is the possibility and basis of access to the Commission as provided under the saving clause. One reliable guarantee remains with the recognition of the right of IDPs to pursue judicial mechanisms of enforcing their rights. This will be more beneficial given the broader bases of jurisdiction and the expanded eligibility rules of the Court.

Chapter Six: Conclusion and Recommendations

International discourse on the matters of people displaced within the territory of their national state was increasingly brought to the attention of the world community at the end of 1980s and the beginning of 1990s. There were various reasons behind such renewed interests. One was the ever-increasing number of such peoples as compared to those externally displaced, i.e. refugees. The second is related to the general decline of interest of states to receive those persons fleeing on the ground of political and other persecution from the states belonging to opposite ideological blocs. This was happened due to the decline of Cold War tensions which minimized or eliminated the ultimate political gains. The other and most hidden motive was the policy of major refugee-receiving states to contain such persons within their national borders because of the increasing refugee burden and other social and economic costs on host states. This is usually known as the refugee containment policy.

The above and other factors have led the international community especially through the strong advocacy of some NGOs and intergovernmental organizations to conduct a series of conferences and symposiums on the crisis of internal displacement and internally displaced persons. These efforts have certainly raised the awareness of the international public as to the challenges posed and risks faced by internal displacement and IDPs. Moreover, a series of recommendations were made in order to address the existing legal and institutional gaps in the protection and assistance of such groups of people.

It was after the Analytical Report of the then UN Secretary-General Boutros B. Ghali in 1992 that a concrete measure was taken at the UN level for the protection and assistance of IDPs. One of these was the appointment of the Representative of Secretary-General on IDPs, Mr. Francis M. Deng. His appointment has triple mandates as: analyze the normative framework of protection for IDPs; review the existing institutional framework

and seek means of improving coordination between various UN agencies; and conducting on-site visits. After identifying various legal and institutional gaps, possible recommendations were made to fill such gaps. With regard to the legal gaps, consensus was ultimately reached to codify those pre-existing norms under various international law rules as applying to the particular needs of IDPs. The result of this was the adoption of the Guiding Principles on Internal Displacement. The Guiding Principles thus remain to be the most important tool at the UN level for the protection and assistance of IDPs. Although it has not passed through formal treaty-making procedures and hence not binding instrument, its essence lies with international norms on which it is based on even some of which have customary international law status. It was also the basis for later attempts to codify binding rules in the area of IDPs such as the efforts in the Great Lakes Region and recently by the African Union.

Institutionally, the protection and assistance of IDPs were said to go beyond the capacity and expertise of a single agency. Initially there were strong suggestions to assign the responsibility to the UN Refugee Agency, i.e. the UNHCR. But there were also equally strong counter arguments to such proposal. While setting aside the creation of a new agency both from political and economic rationale, final decision was made to utilize the services and expertise under the existing agencies. This was finally approved under what is known as the 'collaborative approach.' That is, all the relevant UN agencies were made involved in the assistance and protection of IDPs in the process of discharging their respective mandates. After being pursued for nearly a decade, this approach was seriously criticised for lacking prompt, accountable and responsible humanitarian responses. The result of such failures was the recent introduction of new humanitarian reform known as the 'cluster approach.' The cluster approach, after identifying critical areas of gaps in humanitarian responses, assigns each important cluster areas or sectors to one or more lead agencies. Thus, this is the currently operating humanitarian reform at the UN level, of course including other non-UN agencies. As it exists now, full compilation of information and evaluation of its performance have not yet been finalized. But it can be said that it has brought certain level of certainty and accountability in the provision of the protection and materials needs of IDPs and other affected populations.

While the international community has been engaged in the continued redefinition and reformulation of the existing mechanisms of humanitarian responses, the continent of Africa has come up with its regional initiative of dealing with internal displacement and

IDPs. This mainly emanates from the fact that the continent is the most affected by the problem of internal displacement hosting nearly half of the world's IDPs population. The causes are of multiple dimension mainly including armed conflicts, human rights violations, natural disasters, developmental projects and so on. Although the phenomenon of internal displacement affects every public of African peoples, its impact is so grave on certain section of vulnerable populations such as the women and children.

The continent's recorded and formal responses to the matters of human rights in general and certain vulnerable groups such as refugees and IDPs in particular began with the formation of regional organization in 1963, i.e. the OAU. Although the establishing document of the OAU has been repeatedly criticised for lacking adequate human rights dimension, its instrumentality in the struggles against colonialism in the entire continent and racial discrimination particularly in the southern part of the continent can not be underestimated. It was also on the basis of this founding instrument that Africans attempted to lay down more elaborate and specific subject matter instruments. One of these achievements was the adoption of the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa. This Convention has brought a significant expansion in the definition of refugees by incorporating additional grounds beyond and above the UN Refugee Convention particularly relevant to the Africa such as events seriously disturbing public order. This may in turn lead to the enhanced protection of those internally displaced successfully crossing international border.

The other remarkable achievement in the area of human rights was the adoption of the continent's parent human rights instrument known the African Charter on Human and Peoples' Rights. Inspired by the African sense of rights and duties and its underlying traditions, the African Charter is a comprehensive instrument dealing with the wide array of human rights and corresponding duties of individuals and states under a single instrument. There are certain provisions of closer relevance to the rights of refugees and displaced persons. In addition to the many categories of civil, political, cultural, social and economic rights which can be invoked by IDPs as any other nationals of the states parties, such provisions on the right to freedom of movement and choice of residence, prohibition of mass expulsion, right to seek and obtain asylum carries a significant value.

More importantly, the latter special subject matter instruments in the continent such as the African Children's Charter and the African Women's Protocol clearly recognizes the

impact of internal displacement on such specially exposed categories of persons and thereby provides for basic guarantees from such risks. These instruments are also remarkable for their use of the term displacement and internally displaced children and women in a legally binding instrument.

In addition to the above binding instruments, the role of policy documents such as resolutions, declarations, reports, etc emanating from various regional conferences and symposiums on human rights and related matters formed another dimension of normative responses revealing the political commitment of the leaders of the continent. Among these, the notable ones include the 1994 Addis Ababa Recommendation, the 1999 Grand Bay Declaration and Plan of Action, the 2003 Kigali Declaration, the 2004 Solemn Declaration on Gender Equality in Africa, the 2006 Ouagadougou Declaration and the recently adopted Kampala Declaration on Refugees, Returnees and IDPs in Africa.

The other noticeable normative innovations were brought about by the transformation of OAU to AU. Repeated criticisms of the OAU Charter for lacking human rights dimension were boldly addressed under the establishing document of the African Union. That is, human rights promotion and protection are made part of the objective and principle clauses of the Constitutive Act of the Union. It has even goes to the extent of accepting the right of the Union to intervene in member states in respect of grave circumstances, namely war crimes, genocide and crimes against humanity and in order to restore peace and security in a member state. This clause has also found its way into the AU IDPs Convention.

Therefore, it is the combination of the above stated and other many ever evolving efforts of the continent's various governing organs, formerly the OAU and recently the AU, which ultimately culminated in the adoption of the recent AU Convention for the Protection and Assistance of IDPs in Africa. Before summarizing the normative and other innovations brought about by this Convention and recommending on its identified weaknesses, it deserves to mention the previous institutional arrangements of protecting and assisting IDPs in Africa.

Institutionally, once again a concrete task was begun after the formation of the OAU in 1963. The first of these was the formation of the OAU Commission of Ten in 1964. Originally established in response to the refugee problems in the Great Lakes Region (GLR), it has latter become the main policy-making body of the OAU on refugee issues.

Despite its inherent weaknesses to realize its formation mandates owing to various factors, the Commission has survived the political transition to AU and now renamed as Permanent Representatives' Subcommittee on Refugees, Returnees and Displaced Persons (PRC Subcommittee on Refugees). Next to the Commission of Ten, such new organs as the Bureau for Placement and Education of African Refugees and the Coordinating Committee on Assistance and Protection to Refugees, Returnees and IDPs (CCAR) were established in 1968.

However, until recently these entities have failed to respond effectively to the challenges of internal displacement and its victims in the continent. Thus, because of these, some institutions such as the Bureau has lost its place under the newly transformed structure and others as the CCAR has undergone continued reforms in its procedures of operation and membership so as to adapt itself to the increasing challenges of internal displacement in the continent.

The other important institution with principal human rights mandates in the continent is the African Commission on Human and Peoples' Rights and its recently added special mechanisms such as the Special Rapporteur on Refugees, Asylum-Seekers, Migrant Workers and Displaced Persons in Africa. The African Commission, created under the main human rights Charter and placed as the principal organ for the promotion and protection of human rights in Africa, has carried out a series of activities ranging from examination of state reports to entertaining inter-state and individual complaints. Despite some of its decisions carry significant bearing on the rights of refugees and displaced persons, the Commission has for long remained far away from formally supervising the implementation of the OAU Refugee Convention. However, its recent interests in the promotion and protection of the rights guaranteed under other regional instruments such as the Refugee Convention, both by passing resolutions and examining communications brought under such instruments, has signalled the end of its long inaction and inspired some hopes that this organ will play active roles in the future implementation of human rights instruments out of the main Charter.

The other far reaching institutional reforms associated with the transformation of the OAU to AU are the creation of many political, advisory and technical institutions with various mandates on the political, economic, social, cultural, peace and other many affairs of the continent. These include such supreme policy organs as the Assembly and the

Executive Council and other actively functioning organs such as the Peace and Security Council (PSC), the AU Commission (AUC), the Permanent Representatives' Committee (PRC), the Pan-African Parliament (PAP), the Economic, Social and Cultural Council (ECOSOCC), and many others. The mandates of such organs are stipulated in a comprehensive manner and human rights are made part of the objectives and operating principles of each of them. The role and mechanisms provided for under especially the PRC, AUC, and the PSC mandates are more powerful and closely related to the protection and assistance of IDPs in Africa. The PRC and the AUC have so far actively involved in the elaboration of the legal frameworks for the protection and assistance of IDPs. The outcome of such joint efforts was the adoption of the AU IDPs Convention. The PSC, on the other hand, is equipped with tremendous powers in the conflict prevention, management and resolution in the continent. One of these is the carrying out of intervention decisions under the Constitutive Act of the Union through appropriate modalities to prevent grave circumstances leading to the commission of serious crimes. However, what is still missing is the realization of such far reaching legal innovations as it can be witnessed in the continued armed conflicts resulting in instability and grave violations of the rights of Africans.

Therefore, it is now possible to conclude that the AU IDPs Convention is the sum total of the series of normative and institutional reforms carried out in the continent for long time. The drafting process was set in motion by the decision of one of the policy organ of the Union, i.e. the Executive Council, in 2004 and received continued supports from Ministerial Conferences such as the Ouagadougou Meeting on Refugees, Returnees and Internally Displaced Persons in Africa. After passing a series of both technical and political stages, the Draft Convention was adopted by the AU Ministerial Meeting in November 2008. This Draft was finally adopted as a legally binding instrument by the First Special Summit of African Heads of States and Governments on Refugees, Returnees and IDPs held in Kampala, Uganda from October 19-23,2009. This Convention becomes the first of its nature in the world specifically dealing with the problem of internal displacement and the protection and assistance needs of IDPs. Its essence lies with the bold determination made to regulate such phenomenon, i.e. internal displacement and IDPs, under an internationally obligatory treaty regime. This is a new achievement which came out without much difficulty while the international community still lacks the

required level of consensus on the propriety of dealing with IDPs in a conventional manner.

The AU IDPs Convention has become the first human rights treaty incorporating norms of international human rights and humanitarian laws in a single human rights treaty. It has become the first international legal instrument of wider application expressly recognizing and guaranteeing many rights of IDPs. For instance, the protection of persons from arbitrary displacement is one important contribution in the history of human rights treaty-making. This guarantee has been implicit in the pre-existing human rights treaties and it is for the first time that such right has acquired express legal status under a human rights treaty. The other unique contribution of the Convention is its direct imposition of human rights obligations on the members of armed groups in situations of armed conflicts. In addition, the express mention of such non-state actors (NSAs) as multinational companies and private military or security companies forms another beginning for continued debates on holding accountable such entities for their human rights violations including displacement and complicity in it. The Convention has also incorporated the right of the African Union to intervene in member states in respect of grave circumstances, namely: war crimes, genocide, and crimes against humanity and in order to restore peace and security in a member state. Thus, treaty-based right of intervention in such human rights instrument forms one key innovation in the world and it will certainly back up the efforts to intervene to prevent or stop serious human rights violations. However, the realization of such norms still remains to be seen given the ever increasing incidents of armed conflict and human rights violations leading to the grave sufferings of many Africans and still goes with impunity. Although not relatively satisfactory, the Convention has also addressed the effect of development projects and hence commits the states parties to prevent displacement caused by development projects carried out either by public or private actors.

With regard to the property rights of IDPs, the Convention provides for important guarantees starting from the broader entitlement to the effective remedies to the obligation of the state parties to protect the various property rights of IDPs left behind. The right to fair and just compensation and other reparations for damages incurred as a result of displacement is another key guarantee. This right is also made to be linked to the search for durable solutions with a view to promoting and creating satisfactory conditions

for voluntary return, local integration or relocation on a sustainable basis and in circumstance of safety and dignity. To this end, the states parties are required to ensure the participation of IDPs in finding sustainable solutions, establish appropriate and simplified procedures for resolving disputes and take appropriate measures to restore the lands of communities with special dependency and attachment upon such lands upon their return, reintegration and reinsertion. However, state liability to make reparation to the IDPs is not adequately provided. This is because express liability of the states party is only stated in relation to its failures in the event of natural disasters.

The registration and personal documentation provision doubly addresses the rights of IDPs to be issued and provided with such documents and the obligation of state parties to facilitate conditions and effect the same to the beneficiaries of such documents. This is another innovative guarantee of the Convention taking into account one of the special needs of IDPs. People uprooted from their familiar environment are usually in difficulty of keeping such documents or have already lost it. This in turn hinders their access to basic economic and social services and generally impedes the exercise of their many human rights.

Like any other treaty, the AU IDPs Convention has some provisions governing its institutional aspect. These take two forms: institutions responsible for protecting and assisting IDPs and the institution responsible to oversee the implementation of the obligations under the Convention. With regard to protecting and assisting IDPs in Africa, repeated mention is made to the primary responsibility of national governments. This responsibility is reiterated in all stages of displacement. The Convention has not established any centrally responsible organ nor assigned the task to any one or more of the existing organs. Rather the very Union is placed as an umbrella institution to support national initiatives and coordinate international efforts. Thus, the African system has preferred to continue utilizing the existing national and international arrangements. This can also be evident from repeated references to the existing international humanitarian frameworks such as the collaborative approach.

With regard to the supervision of the implementation of the Convention, a 'Conference of States Parties' is agreed to be established as a treaty body to monitor and review the implementation of the objectives of the Convention. Moreover, state reporting is

expressly mentioned as the only means of monitoring under the Convention. There is no mention for the use of other mechanisms as interstate and individual complaint procedures. However, the right of IDPs to lodge a complaint with the African Commission or the Court of Human and Peoples' Rights or any other competent international body will remain unaffected by this Convention. But the Convention does not make clear the basis of such complaints, i.e., whether such complaints can be submitted to the Commission or the Court by invoking the IDPs Convention. Regarding the Court, there is no problem as its founding Statute provides for broader list of human rights instruments the violation of which can be invoked before the Court. As to the access to the Commission, which is particularly created under the African Charter, there need to be further evidences whether the Commission's broader mandates of protecting and promoting human rights can also be extended to the IDPs Convention. Despite its long existing inaction, the Commission's recent activities such as the appointment of the Special Rapporteur and examination of some communications transpires some hopes for future improved involvement of the Commission in the implementation of the AU IDPs Convention. But as it exists today, it is still too early to conclude the exact role of the Commission under the Convention.

Therefore, on the bases of the above findings and in depth discussions under the main body of the paper, the following areas are identified for possible recommendations for future course of action and taking other concrete measures with a view to achieving the intended goals of the AU IDPs Convention:

1. On the Objective of the Convention

As institutional mechanism is one of the gaps identified in the efforts to protect and assist IDPs, this gap and possible ways of remedying it should have been clearly mentioned under the objective clause of the Convention.

2. On the definition and obligation of the non-state actors (NSAs)

The definitional articles on NSAs and other armed groups are not clearly provided and thus capable of leading to confusions. Therefore, the Convention should have employed a general definition for NSAs including armed groups while at the same time specifying clearly the distinguishing feature(s) of the latter group. The distinction made on the basis of non-existence of attributing the acts of armed groups to the states does not hold always true. Thus, state liability should be there even for acts of the armed groups when this amounts to the breach of the former's

duty to ensure respect to and protect the rights of IDPs as recognized under the AU IDPs Convention and other relevant human rights instruments.

3. On property-related rights of IDPs

Despite the existence of many important provisions in these areas, the AU IDPs Convention does not expressly provide rules on the liability of state party for causing damage to the property or its failure to protect such rights except in the event of natural disasters. Thus, the Convention should have the mechanism to hold states liable for the loss of property rights of IDPS owing to the direct act or omissions of the state machinery irrespective of the causes of displacement.

4. On development-induced displacement

One of the provisions of the Convention clearly suffering from inadequate coverage is that concerning development-induced displacement. However, given the ever-increasing pressures on land and other natural resources because of various developmental activities, the guarantees from the negative impacts of such projects should have been adequately provided. These may include the prohibition of development projects not justified by the compelling and overriding public interest as provided under the Guiding Principles and the GLR Protocol, alternative and adequate remedies for those affected by justifiable development projects and the effect of environmental impact assessment.

5. On the intervention right of the Union

This being one important achievement, at least legally speaking, concerted efforts should be made in order to translate such high sounding norms into reality and mitigate the grave suffering of Africans from protracted humanitarian crisis. To this end, the AU should consolidate genuine political determination of the member states and endeavour to create a sustainable financial basis so as to effectively respond to the crisis facing the continent and its peoples.

6. On the institutional mechanism

Although there is no objection to the assignment of primary responsibility to the national systems and the desire to utilize existing international arrangements, the Union's initiative to the matters of internal displacement and IDPs should have also adequately addressed the institutional dimension for the protection and assistance of IDPs. Even if foreseeable challenges may exist in the ways of

creating new organs, there is still a possibility to utilize the services of existing institutions.

7. On the means of monitoring compliance

When coming to the means of supervising compliance with the Convention, there is no reason to limit itself to the state reporting. Thus, the Convention should be interpreted creatively so as to expand its mechanisms to other more effective means of supervising the implementation of the Convention such as the use of complaint procedures.

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