

The Kampala Convention and environmentally induced displacement in Africa

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Introduction

The recently adopted African Union Convention on the Protection of and Assistance to internally displaced persons (also known as the Kampala Convention)¹ has important implications for the protection of those uprooted from their homes and livelihoods as a result of environmental factors. The Convention seeks to prevent and mitigate displacement; provides for the protection and assistance of persons displaced as a result of natural disasters and climate change; and calls on states to create condition for sustainable and lasting solution to the problem of internal displacement. It provides for the establishment of national and regional mechanisms for early warning, disaster risk reduction and for coordination of humanitarian assistance. While the Convention's primary focus is on the protection of individuals and groups displaced within the boundaries of a state, its strong focus on the prevention of displacement and the search for durable solution means that many of its provision will also have indirect but important consequences for cross border displacement.

The Kampala treaty is an outcome of a regional search for solutions for challenges including on forced migration, environmental degradation, conflicts and human rights violations. It thus brings together normative and institutional elements from regional approaches including on conflict prevention, management and resolution, human rights protection, environmental rehabilitation. In 2006 the African Union adopted a regional strategy on migration where the link between environment and migration is acknowledged. In 2009 the African Commission on Human and Peoples Rights (ACHPR) adopted an important resolution which underlined the human rights impact of climate change including those who are affected by natural disaster. The foundational instrument establishing the African Union Peace and Security Council (AUPSC) recognizes the role of the Council to coordinate humanitarian and relief action. These developments reinforce the need to examine the regional legal framework on internal displacement within the context of broader solutions for challenges of displacement situation including those which are induced by environmental factors. As the ongoing international climate change negotiations increasingly recognize the role of regional organizations, examining developments at the regional level becomes imperative.²

¹ African Union convention on the Protection of and Assistance to Internally Displaced Persons, 22 October 2009, available at: <http://www.unhcr.org/refworld/docid/4ae825fb2.html> [accessed 27 March 2011]

² Cancun Adaptation Framework invites states to take measures "to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at national, regional and international levels." (Para 14(f)).

Regional approach on forced displacement

The Kampala Convention is adopted at the first ever African Union Summit held in October 2009 in Kampala, Uganda. It represents first binding regional instrument governing the complex problem of internal displacement. It seeks to fill the legal vacuum with respect to the protecting of those displaced as a result of factors including climate change, natural disaster and environmental degradation. It is a regional solution with wider implication for the development of customary international law on a number of key areas among which lies its provisions dealing with the relationship between environmental change and climate change on the one hand and displacement of population on the other. It can also serve as a model for other regional arrangements as they seek to forge solutions in filling protection gaps with respect to IDPs. The successful elaboration of the Kampala Convention has been well recognized, among others by the General Assembly, the Human Rights Council, UNHCR and IOM.

How did a codification initiative on internal displacement that had eluded the international community for decades finally succeed in Africa? The answer is partly lies in Africa's tradition of regional solution to migration and displacement. The 1969 OAU Convention Governing the Specific Aspect of Refugee Problem in Africa was the first regional binding instrument on refugees intended to complement the 1951 Convention. It adopts an expanded definition of refugees to include those who are displaced as a result of events including those "seriously disturbing public order."³ This broad definition, it was often argued, may provide protection to persons fleeing their countries as a result of at least certain forms of natural disasters. Sub-regional mechanisms such as Intergovernmental Authority on Development were regional responses, supported by donors and development partners were established, to natural calamities and environmental degradation in the 1980s. Countries in these parts of Africa have experienced a long history of cooperation on provision of assistance to populations and communities displaced as a result of climatic stress such as drought. The unique patterns of migration and mobility of pastoralism did not respect colonial treaties and often led to a variety of transnational and informal migration regime.

The transformation of the former Organization of African Unity into the African Union has also helped the reorientation of the organization to play an active role beyond the concerns of colonialism and apartheid. The Constitutive Act of the African Union and other more recent regional legal instruments involve norms that are relevant to issues such as displacement, migration and environmental factors.⁴ The Constitutive Act provides that the Council of Ministers shall coordinate humanitarian and relief work. The Peace and Security Council of the African Union is also mandated to coordinate humanitarian action and relief; reinforcing its relevance in situations of climate change scenarios where conflicts at least partly triggered by decline in essential resources

³ Art 1(2)

⁴ See the Protocol on the Establishment of the Peace and Security Council where it is clearly stated that the AUPSC shall play a role in coordinating humanitarian action and relief.

such as water and grazing land.⁵ The African Union adopted a policy framework on migration in 2006 in which it underscores the relevance of the environment to migratory trends (where for example local populations and farmers are dislocated from their land as a result of environmental degradation and environmental disaster) and also the impact forced displacement on the environment.⁶ The policy is intended to serve as guidelines for states and thus specifically urges states to incorporate environmental consideration in the development of national and regional policy on migration management and take degradation counter measures. OAU/AU has held a series of ministerial meetings on forced displacement. These meetings resulted in important political outcomes which elevated the political profile of problem of displacement.⁷ It is important to note that ministerial declarations had a broader scope covering refugees, returnees and displaced persons. It was within the context of these ministerial processes where the idea of a regional convention on internal displacement was first conceived. As the Declaration adopted during the Kampala African Union summit underscores “large numbers of people within our Continent are displaced, either as refugees or internally displaced persons and some are even stateless as a result of conflicts, natural disasters, and increasingly climate change and other causes of forced displacement in Africa.”⁸ In the Kampala Declaration states also committed themselves “to deal with challenges of climate change, increased pressure on natural resources, issues of land management, water and sanitation, rural infrastructure in our efforts to find durable solutions to the problem of refugees and internally displaced persons.”⁹

Parallel to the regional normative development with respect to forced displacement, African human rights system was undergoing its own evolution where the human rights dimension of displacement was increasingly recognized. The African Charter on human and people’s rights enshrines most of the key human rights including the right to asylum and the environment (Art 24). Additional protocols were drafted to strengthen the Charter. Both the African Charter on the Rights and Welfare of the Child and the Protocol on the Rights of Women, for example, have explicit provision on internal displacement. An important regional milestone also emerged when in 2004 the ACHPR established a mandate on refugees, asylum seekers, migrants and displacement. This also represented an important convergence between human rights and forced displacement regimes. The Commission in 2009 adopted a resolution in 2009 on climate change and human rights in which it expressed concerns on the ongoing negotiation on climate change which in its view did not expressly take into account the human rights dimension particularly the rights of victims of natural disasters and urged member states to ensure that human rights standards such as preventive measures against forced relocation, protection from unfair dispossession of property, human rights violations and protection from loss of livelihood is guaranteed.¹⁰ It further asked the African Union

⁵ Walter Kalin, Climate Change and Population Movement, available at http://untreaty.un.org/cod/avl/pdf/l/Kalin_outline2.pdf

⁶ The Migration Policy Framework for Africa, EX.CL. 276(IX). June 2006..

⁷ The first, second and third ministerial meetings were held in Sudan(1998), Burkina Faso(2006) and Addis Ababa(2008) respectively.

⁸African Union, *Kampala Declaration on Refugees, Returnees and Internally Displaced Persons in Africa*, 23 October 2009, Ext/Assembly/AU/PA/Draft/Decl.(I) Rev.1, available at: <http://www.unhcr.org/refworld/docid/4af0623d2.html> [accessed 27 March 2011].

⁹ The Kampala Convention, para 22.

¹⁰ Resolution on Climate Change and Human Rights and the Need to Study Its Impact in Africa, *ACHPR/Res153(XLVI)09*.

to include ACHPR in the negotiation team and decided to undertake a study on the human rights impact of climate change.

Partnership and international influence

The Convention, though the brain child of the African Union, is a result of a unique collaboration between the African Union and key international partners such as the UNHCR, IOM, ICRC and the former RSG on the human rights of IDPs. These institutions were members of a consultative group which commented on and helped shape the earlier draft of the Convention. The text was then negotiated through a series of legal expert meeting held in 2007 and 2008. The final draft of the Convention was adopted by the Third African Union Ministerial Meeting on Refugees, Returnees and Displaced Persons which took place in 2008 in Addis Ababa, Ethiopia. The first ever regional summit involving the heads of state and government of the African Union held in October 2009 in Kampala, Uganda considered and adopted the text of the Convention.

The content the convention is inspired by regional and international human rights law, international humanitarian law and analogical refugee law. It reinforces the UN Guiding Principle on Internal Displacement and presents itself as a strongest legal endorsement of these principles.¹¹ It is a result of normative and institutional development on internal displacement that have emerged both at the regional and internal levels. The preamble of the Convention recognizes the Guiding Principles as important international framework for the protection of IDPs. Notwithstanding its reliance on the Guiding Principles and despite their similarities, there are some key differences. Unlike the Guiding Principles which enlists the needs and rights of IDPs, the Kampala Convention focuses on elaborating state responsibility. The Guiding Principles are soft laws whereas the Kampala Convention is a binding instrument. There are more detailed references to environmental issues in the Kampala Convention than in the Guiding Principles. The Convention also provides for an elaborate accountability and monitoring mechanism.

The framework of state responsibility and human rights

The Kampala Convention adopts the twin frameworks of state responsibility and human rights. With the view to complementing the UN Guiding Principles which describes in great detail the needs and rights of IDPs, the Convention elaborates the responsibility of states in the prevention of arbitrary displacement, protection and assistance of IDPs during displacement and in guaranteeing durable solutions. States are also urged to comply with their obligation under international law to prevent or avoid conditions which may lead to the displacement of persons (Art 4(1)). The Kampala Convention also provides a general principle of non-discrimination as overarching human rights doctrine that should underpin state measures. All measures to prevent, mitigate and mandate internal displacement is required to ensure the dignity, safety and freedom of IDPs. It is stated that states should guarantee the freedom of movement and choice of residence by IDPs and stipulates that restrictions can only be justified where they “are necessary, justified and proportionate to the requirements of ensuring security for internally displaced persons or maintaining public security,

¹¹ UN Guiding Principles on Internal Displacement, UN doc E/CN.4/1998/53/Add.2 (11 February 1998).

public order and public health. “(Art 9(2)f). The Convention also prohibits return and resentment to unsafe areas and states that IDPs may seek safety in any areas of the country. It also guarantees the rights of individuals to seek asylum outside of the country; an entitlement which is also equally enshrined under the African Charter. In all measures taken within the framework of providing assisting and protecting IDPs, states are required to allow the participation and involvement of IDPs themselves (Art 9(2)k).

The Kampala convention provides for the responsibility of states in which displacement occurs. What about the responsibility of other states including immediate neighbors, other members of the African Union and the wider international community? Within the framework of the African Union, member states have decided to take collective responsibility to take regional interventionist action in case of displacement associated with grave breaches of human rights and humanitarian law. The Kampala Convention also establishes monitoring mechanism mainly through Conference of Parties where states will oversee and monitor the implementation of the convention. It also innovatively provides for the obligation of international organizations to provide protection and assistance to IDPs (Art 6). The framework of state responsibility is also complemented with provisions concerning regional and international cooperation where it is provided that states “ shall discharge these obligations, where appropriate, with assistance from international organizations and humanitarian agencies, civil society organizations, and other relevant actors.” (Art 9(3)).

Relevant Provisions of the Kampala Convention

The Kampala Convention involves key provisions relevant to the protection of persons and communities displaced as a result of climate change and environmental degradation. The objectives of the Convention, described in detail under Article 3, include the promotion of local, national and regional measures to mitigate, prohibit and eliminate root causes; establishing a legal framework for the prevention of arbitrary displacement; create a legal framework for cooperation and solidarity among states; provide legal instrument for the protection and assistance of IDPs; and provide for the role and responsibility of states. The objectives of the Convention shall also include the provision of a legal framework for the protection of persons displaced including by natural disasters which “have a devastating impact on human life, peace, stability, security, and development.” Under Article 1(K), the definition for internally displaced persons not only covers “persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence” as a result of events including natural or manmade disasters, but also those who do so in anticipation of or in order to avoid the effect of disasters. This is intended to cover individuals who are displaced in order avoid the effect of disasters associated with environmental factors such as drought or flooding. Persons who are involuntarily displaced as a result of states’ adaptive measures may also be considered as internally displaced persons (Art 1(l) states that internal displacement shall also refer to “the involuntary or forced movement, evacuation or relocation of persons.”). The Convention even goes further by clearly defining as arbitrary any “ forced evacuation in cases of natural or human made disasters or other causes if the evacuations are not required by the safety and health of those affected.” (Art 4(4)f).

Unlike the Guiding Principles which lists the needs and rights of IDPs, the Kampala Convention underscores the framework of state responsibility in preventing arbitrary displacement, ensuring protection during displacement and facilitating a search for durable solution. Article 5(4)

states: “States Parties shall take measures to protect and assist persons who have been internally displaced due to natural or human made disasters, including climate change.” It is also provided that state parties shall take special measures to guarantee protection against environmental degradation in areas where IDPs are located. IDPs shall be treated without any discrimination (Art 9(2) and should respect the right of IDPs to seek safety in another part of the country (Art. 9(2j)). In the context of displacement triggered by projects implemented by public and private authorities, states are required to undertake the necessary environmental assessment programs. Art 10(3). Forced return and resettlement “in any place where their life, safety, liberty and/or health would be at risk” is prohibited (Art 9(2) e).

States should prevent displacement including that induced by environmental factors. They are required to adopt legislations and policies; designate a national focal point and appropriate the necessary funds to ensure the implementation of the Convention (Art 3(2)). In one of its innovative and important provisions, the Convention calls for the development of early warning systems, disaster risk reduction strategies and disaster response measures in “areas of potential displacement” (Art 4(2)). An assessment of the needs of IDPs shall be made by states including with the cooperation of international organizations (Art 5(5)). States should do so including by setting up a national registrar or data on IDPs.¹² This is particularly relevant where undertaking a full assessment of the impact of environmental changes to migration is an onerous task for African governments. It further states that these national measures need to be taken in the light of the early warning system of the African Union which is being developed under the Constitutive Act. Both the African Union and its sub-regional blocs are currently developing early warning systems. These developments should open opportunities for collaborations among states, international organizations and research institutions to fill important gaps on evidence and information regarding displacement patterns.

The Convention provides for protection of persons and groups most vulnerable to climate invariability and degradation. Much like the Guiding Principles, the Convention provides that states should endeavor to protect communities with special dependence on land (Art 4(5)). In the context of their return to place of origin, these groups or communities should be granted access by states to their land (Art 11(5)). It does provide a strong negative obligation on the part of states who are obliged not to compel the displacement of these communities unless there is an overriding public interest. The Convention also stipulates that states shall “take all appropriate measures, whenever possible, to restore the lands of communities with special dependency and attachment to such lands upon the communities’ return, reintegration, and reinsertion.”(Art 11(5)). As traditional entitlement to land for pastoralists does not respect formal state boundaries, the recognition of traditional laws and tenure promises to provide a unique opportunity to examine the role of traditional norms in cross border migratory practices and trends among pastoral communities.

In order to achieve a lasting and sustainable durable solution, states are required to seek the creation of conditions that facilitate return, local integration, relocation in a sustainable and in a manner respecting the dignity and safety of the IDPs themselves (Art 11(c)). In situations where return is not viable due to severe or irreversible environmental development, states therefore may seek local integration or relocation to other areas. The Convention also provides for effective remedies for those affected by displacement (Art 12). States are obligated to provide compensation or any other relevant repatriation including in situations where the state “refrains from protecting and assisting internally displaced persons in the event of natural disasters.”

¹² See also Art. 3 of the Great Lakes Protocol.

The Convention also provides for the role of multinational companies and their accountability in arbitrary displacement (Art. 3). It is provided that states should ensure the accountability of those “non-State actors involved in the exploration and exploitation of economic and natural resources leading to displacement.” (Art 3(1) I). This provision is relevant for situations where the role of private companies is responsible for environmental degradation which then results in displacement of individuals.

Beyond the responsibility of the state, the Convention also provides norms regulating the involvement of other states and international organizations. It specifically provides for the obligation of African Union (Art 8) and international Organizations (Art 6) in the provision of protection and assistance to IDPs. The African Union can intervene in member states within the framework of its Constitutive Act and with the objective of creating favorable conditions for durable solutions. It shall in particular strengthen its institutional framework and capacity; coordinate resource mobilization; collaborate with international organizations; and cooperate with ACHPR and its special procedures.

Implications for cross border displacement

The Kampala convention concerns internal displacement. Its relevance to cross-border displacement is thus indirect. Its strong provision on prevention of displacement, risk reduction strategies and early warning system will help prevent or mitigate the impact of internal displacement outside the boundaries of the state. As a part of their search for durable solutions, states are encouraged to look for sustainable resettlement which guarantees the dignity, humanity and freedom of IDPs. Does an effective regime on internal displacement hinder the possibility of migration as copying mechanism? The tension between internal displacement regime and the institution of asylum has been well examined. The Convention recognizes resettlement and relocation as an aspect of durable solution for situation where return is not viable. It also recognizes the right of displaced persons to seek and be granted protection including under the 1969 OAU Refugee Convention (Art 20(1)). It is provided that upon the request by the state concerned or by the Conference of Parties, states may be required to cooperate (Art. 5(1)) Regional approaches can also provide a forum for the search for pragmatic solutions for the challenge of cross-border displacement as a result of environmentally induced displacement . Both binding and non-binding norms on internal displacement may also serve as analogous normative standards for the protection of those displaced cross international boundaries.

Implementation and enforcement

States have the primary responsibility to protect and assist IDPs. States first need to ratify the Convention. So far only five Countries have ratified the Convention (Chad, Malawi, Somalia, Uganda and Zambia). The African Union has adopted an action plan which lays out different activities that are designed to promote the ratification and domestication of the Convention. When the state concerned is unable or unwilling to provide protection, the Convention allows the international community to step in and offer its services (Art 5(6)). The Convention requires states

to cooperate within the framework of this international effort. The Kampala Convention also seeks to foster regional cooperation; a concept which is incorporated as the Convention's important objective. A conference of Parties serves as a principal organ for facilitating such cooperation and dialogue among states and also for monitoring implementation of the Convention (Art 14). Reporting mechanisms under the ACHPR and the African Peer Review Mechanism are also cited as important tools to report on legislative and other measures taken by states in implementing the Convention. ACHPR's recent decisions including on the responsibility of government to take measures to prevent ecological degradation and survival of communities is important in this regard.¹³ The African Court for Human and Peoples Rights which has commenced its operation in Tanzania promises to complement the work of the ACHPR.

The effective implementation of the Convention requires a robust partnership among the states and between the African Union on the one hand and international organizations on the other. That the Convention provides a strong endorsement of the role of international organizations where it is provided that states shall respect “ the mandates of the African Union and the United Nations, as well as the roles of international humanitarian organizations in providing protection and assistance to internally displaced persons, in accordance with international law.” (Art 5(3)). It supports and recognizes the inter-agency global framework and includes provisions on the role of international organizations. Under Article 6, it provides for the obligations and roles of international organizations. UNHCR, IOM, ICRC and other organizations have now created working relationship with the African Union including through the establishment of a liaison office. These organizations and the wider international community can play an important role in providing technical and financial assistance as to “ the African Union as it addresses the challenges of forced displacement in Africa, in particular, the increasing incidence of displacement caused by environmental factors, including climate change.”¹⁴

The Cancun agreement calls for dialogue and fostering of understanding on the displacement aspect of climate change including at the regional level. The legal frameworks and institutions of the African Union and its sub-regions provide such forum. The role of sub-regional mechanisms such as the International Great Lakes Conference and sub-regional economic blocs (IGAD, ECOWAS, and SADC) are important players.¹⁵ IOM's own regional consultative forms have clear advantages and possibilities. Financing arrangements emerging from climate negotiations can be innovatively used to support programs designed through this regional framework.

Conclusion

The regional approach to forced displacement in Africa in general and the framework of the Kampala Convention in particular show the relevance of regional institutions in protecting and

¹³ The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, Comm. No. 155/96, Decision ACHPR/ COMM/A044/1 ¶ 52 (2002). For a recent communication settled in February 2010, see 276 / 2003 – Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya

¹⁴ Kampala Declaration.

¹⁵ For example ICGLR and IGAD have both sub-regional mechanism on internal displacement.

assisting environmental displacees. This role is also recognized in the Cancun Adaptation Framework where adaptation action at the regional level is incorporated as key component of response to climate change. The Convention protects persons displaced by natural disasters and environmental degradation; deepens the responsibility of the state to prevent displacement; and creates conditions for durable solutions. While endorsing the framework of state responsibility, the Convention also recognizes the fundamental human rights of IDPs and the responsibilities of international organizations. As the normative and institutional framework of the African Union further develops, the support of the international community is considerably important including in building evidence and data, strengthening early warning systems and boosting institutional mechanism both at the level of the African Union and sub-regional levels. It is important that financial tools emerging within the framework of the ongoing climate negotiation are used to provide support for regional projects and initiatives. At the national level, states, while ratifying and domesticating the Convention, may take specific measures (i.e. designation of institutional focal points, legislative enactment or amendment) with the view to providing additional and specific responses to the problems of environmental related displacement.